Special Education Formal Complaint Decisions 2018-19

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 19FC01 signifies a Formal Complaint filed in the 2018 fiscal year (July 1, 2018 to June 30, 2019). The case citation of 19FC02 Appeal Review signifies the decision of the state appeal committee for case number 19FC02. All files are PDF.

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KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON NOVEMBER 9, 2018

DATE OF REPORT: DECEMBER 8, 2018

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 was sent to the Department on November 9, 2018. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on December 9, 2018.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on November 20, 2018. USD #___ made the following staff persons available as part of the investigation process:

- TK, Principal at _____ Elementary (WAW)
- A, Executive Director of Special Services
- C, School Psychologist at WAW
- K., Special Education Teacher at WAW
- H., Instructional Coach at WAW and _____ Early Childhood Center (MECC)

The Complaint Investigator interviewed the parent by telephone on November 26, 2018 as part of the investigation process.

The parent requested and granted permission for the Complaint Investigator to interview an additional person who the parent believed had information to share about the allegations. The teacher/advocate from Cradle to Career, Itzie Aparicio, was interviewed on November 27, 2018. It is noted that Ms. Aparicio had first-hand knowledge of the allegations as she has worked with the student since October 15, 2018 and attended the team meeting held for the student on October 16, 2018.

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

- Evaluation / Eligibility Report dated April 6, 2017
- Team Meeting Record dated April 6, 2017 written by school staff
- Individualized Education Program (IEP) for the student dated April 6, 2017
- Progress Reports dated February 25, 2018
- Prior Written Notice (PWN) for Evaluation or Reevaluation and Request for Consent signed by the parent on March 5, 2018
- Team Meeting Record dated March 13, 2018
- Evaluation / Eligibility Report dated March 12, 2018
- IEP for the student dated March 13, 2018
- PWN for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 13, 2018
- Email correspondence between the parent and Mr. T and W, kindergarten teacher, dated October 9, 2018
- Email correspondence between the parent, Ms. W and Ms. K dated October 9 and 10, 2018
- Team Meeting Record from the October 16, 2018 IEP Team Meeting
- IEP Amendment from the October 16, 2018 IEP Team Meeting
- PWN for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent from the October 16, 2018 IEP Team Meeting
- Email correspondence between the parent and Ms. K dated October 17, 22, and 23, 2018
- Email correspondence between Dr. A and WAW staff (Mr.T, Ms.H., Ms. K, Ms.C.) dated October 23, 2018
- Email correspondence between the parent and Ms. K dated October 29, 2018
- Team Meeting Record dated November 6, 2018
- Amended IEP for the student dated November 6, 2018
- PWN for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated November 6, 2018
- Response to Allegations written by Dr. A dated November 19, 2018
- Document written by parent titled “Avery’s IEP Meeting”
- Summary of assessments and services provided through Cradle to Career
- USD #___ calendar for the 2018-19 school year

Background Information

This investigation involves a five year-old girl enrolled in kindergarten at _____ Elementary School (WAW) during the 2018-19 school year. The student was originally evaluated and found eligible for special education services at the age of three due to Developmental Delays in the areas of communication and language arts. She received specialized instruction at _____ Early Childhood Center (MECC) through an IEP during the 2016-17 and 2017-18 school years. A reevaluation conducted at MECC on March 13, 2018 determined that the student continues to be eligible for special education services under the category of Developmental Delay due to "*an exceptionality in lowercase identification*" and to be in need of special education services.

Issues

The complainant raised four issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint includes November 9, 2017 through the present.

> **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 IEP, specifically by not providing the special education services during the 2018-19 school year.

Findings:

The parent reported an IEP team meeting was held in March 2018 to plan for the student's transition from preschool to kindergarten. At that meeting, the student's services changed from 10 minutes per day of push-in special education services to 30 minutes per day of pull-out special education services. The parent alleges that these services were not provided at the beginning of kindergarten. The parent first became aware of this problem at the parent/teacher conference held on October 9, 2018 when W, Kindergarten Teacher, stated that she was unaware that the student had an IEP.

The parent indicated K, Special Education Teacher, also attended the parent/teacher conference. She explained there was confusion over what services the student was to receive due to a coding error on the IEP. Ms. K

indicated the student was not receiving pull-out services; however the student was receiving 30 minutes per day of push-in special education services.

The parent indicated she enrolled the student in the reading readiness program at Cradle to Career at her own expense starting October 15 as a result of learning of the failure to implement the IEP as written resulting in student not receiving the required specialized instruction in literacy in the special education setting since the beginning of the school year. The advocate from Cradle to Career indicated the student has been seen for eight 30-minute sessions as of November 27, 2018.

The parent believes the student is owed compensatory services for the special education instruction that was not provided to the student as required by the IEP.

An IEP dated April 6, 2017 requires specialized instruction in language arts and communication for 10 minutes per day in the reverse mainstream setting at MECC. An IEP was developed for the student on March 13, 2018 at MECC for the transition to kindergarten at WAW. That IEP documents the special education services to be provided in kindergarten as "*30 minutes of literacy flex instruction per day of special education outside the regular education classroom beginning August 22, 2018 through November 5, 2018*." It is noted that the codes "(G)" and "(C)" are associated with this service. This IEP has one goal for the student to be able to identify and name lowercase letters which will be measured through teacher observations and progress reports by the classroom teacher and staff.

School staff at WAW reported the student did transfer from MECC at the beginning of the 2018-19 school year with an IEP. However, documentation and interviews found there was confusion as to the services that were to be provided to the student because two codes were shown for the student's special education service on the provider chart. The code "G" means pull-out services while the code "C" means push-in services.

Documentation and interview show that a parent/teacher conference was held on October 9, 2018 between the parent and Ms. W. Ms. K also attended the parent/teacher conference. Ms. K reported she explained the coding confusion to the parent during the parent/teacher conference and assured the parent the student was provided push-in paraprofessional support in literacy for 30 minutes per day in the general education kindergarten classroom.

The parent sent an email to Ms. W and copied to Mr. K that same evening stating "*I am emailing you in regards to a follow up conservation during the student's parent teacher conference. I don't think I expressed how upset I was learning that 1. You had no idea that she was on an IEP and 2. That the SPED teacher obviously had some insight but I feel there was no follow through on her part on getting the answer that she needed to start working with the student in a more timely manner. I feel the SPED teacher could have and should have done some more question seeking with _____ if she didn't understand what they sent over with her paperwork. Instead she just waited until this moment to ask me about it."*

Mr. T's email response to Ms. W and Ms. K regarding the parent's email states "*I am extremely confused and concerned. Please help me understand what may be going on so I can help rectify this matter or support it moving forward. . . I don't understand how we might've missed services on a student if we . . . had an idea in August she may need services or already have an IEP.*"

An email written by Ms. W to the parent dated October 10, 2018 states "*I am sorry we were not clear on what is being done for the student . . .She works well in the small group that she has with me . . . I have taken the time to talk with Mr. K and with Mrs. K about the situation. We as a team would like the opportunity to speak with you again to see if we can help ease your mind and let you know what is being done for the student and answer any questions you have."*

Documentation and interviews found an IEP team meeting to discuss the concerns with services was held on October 16, 2018 with both the parent and advocate in attendance. Team meeting Notes state the parent "*was under the understanding that it would be one on one services here at WAW after the last meeting (3/13/18) at_____*."

An email dated October 23, 2018 written by Dr. A to Mr.T, Ms. H, Ms. K and Ms. C states "*Since the parent and school team last year understood the services should occur in the resource room and that was the intent of the services, the services should now be delivered in the resource room."*

An email dated October 23, 2018 written by Ms. K to the parent states "*I will start pulling immediately starting tomorrow."* Mrs. K reported the student has received the pull-out of special education services in literacy for 30 minutes per day in the special education setting beginning on October 24, 2018 through the present time.

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.

In this case, it appears the student's IEP in effect at the beginning of the 2018-19 school year required 30 minutes of literacy flex instruction per day of special education outside the regular education classroom beginning August 22, 2018 through November 5, 2018. Initially, there was confusion over the coding of the special education service on the provider chart at the beginning of the school year; however, the district did not take steps to clarify the confusion until the parent/teacher conference on October 9, 2018. The plain language of the IEP makes it clear the services were to be provided in the special education setting. These services were not provided until October 24, 2018. The calendar for USD #___ shows 43 school days between the first day of school on August 21 and October 24, 2018 resulting in the student missing 21.5 hours of specialized instruction in literacy. Based upon the foregoing, noncompliance with this requirement is substantiated.

Federal regulations, at 300.342(b)(3), requires school districts to ensure that each teacher and provider be informed of his or her responsibilities related to implementing the child's IEP as well as the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

In this case, it appears the kindergarten classroom teacher was not informed of the student's IEP and her responsibilities for evaluating progress towards the IEP goal. For this reason, noncompliance with this requirement is substantiated.

ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures to amend the student's IEP during the 2018-19 school year.

Findings:

The parent believes USD #___ did not amend the IEP appropriately following the October 16, 2018 IEP Team Meeting. The parent reported she was told that the IEP needed to be amended and her consent for the changes obtained before the 30 minutes of pull-out specialized instruction could be provided to the student.

The findings in Issue One are incorporated herein by reference.

Documentation and interviews found the IEP Team met on October 16, 2018 and discussed the concerns regarding the special education services the student had been receiving. The confusion caused by the coding error was explained by Ms. K and the parent was again told the student was receiving 30 minutes per day of push-in services in the general education classroom. The Team Meeting Notes state "*If more services such as out of class supports are needed, the team would need to do a reevaluation*." The notes also document that "*Ms. K wants the IEP to be amended to have the student working in the SPED classroom on phonological awareness skills.*"

Following this IEP Team Meeting, the parent was provided with a document entitled IEP Amendment Between Annual IEP Meetings. The amendment describes the proposed action as *"It is being proposed to increase the student's special education services by adding 30 minutes of out of class services or direct services from 0 minutes . . . She will maintain the 30 minutes of in class support because that is her least restrictive environment."*

The PWN resulting from the October 16, 2018 IEP Team Meeting describes the material change of services and the substantial change of placement being proposed as "*to add out of class support in the resource room from 0 minutes to 30 minutes 5 x a week. The team felt that the student needs additional support on her Phonemic awareness skills, such as rhyming and deletion of sounds."* The options of *continuing to serve the student through in class support only was rejected because the student is showing some areas in her phonemic awareness that cannot be resolved by in class support."*

On November 22, 2018, Ms. K sent an email to the parent as a reminder that the consent for the PWN had not yet been returned. The parent responded on the same date via email indicating that she was not in agreement with the proposed changes because she believed the original IEP already included the pull-out services.

Ms. K responded on that same date and again explained the coding issue. She stated "The amendment is #1 to correct the problem, and #2 to add the new service of 30 minutes pull-out."

It is noted that an IEP Team met again on November 6, 2018 and developed a new IEP that requires the 30 minutes per day of pull-out services that were originally included in the March 13, 2018 IEP and added the 30 minutes per day of push-in services.

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. Or 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.

In this case, it appears that the IEP was reviewed and an amendment was proposed following an IEP Team Meeting held on October 16, 2018. A copy of the IEP amendment and PWN were provided to the parent following the meeting. The parent did not agree with proposed changes described in the IEP amendment and PWN and refused to provide consent for the changes. The IEP Team met again on November 6, 2018 and the IEP was reviewed and revised at that meeting.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to following appropriate procedures for amending the IEP during the 2018-19 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 appropriate prior written notice to the parent when changing goals and services on the IEP during the 2017-18 school year.

Findings:

The parent believes USD #___ did not follow proper procedures for removing the language goal from the IEP and removing services at the March 13, 2018 IEP team meeting.

The findings in Issue One are incorporated herein by reference.

Documentation found the previous IEP was dated April 6, 2017 and included two goals. The first goal was related to literacy and the second goal was related to

answering “wh” questions. The Progress Report dated February 25, 2017 showed that the student achieved both goals. The Team Meeting Record documents the parent was in attendance and participated in the March 13, 2018 IEP Team Meeting. The notes show that the student will have one goal in the area of language arts. The March 13, 2018 IEP continued the same preschool services of 10 minutes per day of specialized instruction in the general education setting through the end of the 2017-18 school year and changed the specialized instruction for the 2018-19 to 30 minutes per day in the special education setting.

A Prior Written Notice (PWN) for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 13, 2018 documents that both a material change in services and a substantial change of placement was proposed for the student as a result of the March 13, 2018 IEP team meeting. The description of the action states “*Student will continue to receive special education services in the Literacy area.*” The explanation for the proposed action states “*The option to not continue special education services was considered and rejected based on the data collected.”* The PWN shows the data used as a basis for the proposed action was “Data collected from the 5-sources.” The parent signed consent for the proposed services and placement on March 13, 2018.

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.

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. 72-988 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.

As indicated above, a PWN is required when a district proposes, or refuses a proposal, to change the provision of FAPE to a child. FAPE is defined, in part, as special education and related services in conformity with an IEP. This definition has remained unchanged since the enactment of the Education for All

Handicapped Children Act went into effect in 1974. However, the term Free Appropriate Public Education (FAPE) has been further defined in various ways through a rich history of court decisions, most notably, decisions from the United States Supreme Court.

In the 1982 case of Hendrick Hudson District Board of Education v. Rowley, the United States Supreme Court refined the definition of FAPE to be an IEP reasonably calculated to provide some educational benefit. More recently, in 2017, the United States Supreme Court clarified that a FAPE consists of an IEP reasonably calculated to enable a child with a disability to make appropriate progress in light of the students unique circumstances. The court went on to say that this also means that children with disabilities are entitled to challenging goals and objectives.

Accordingly, FAPE is no longer only special education and related services in conformance with an IEP. Rather, FAPE is the IEP in its entirety. When the IEP has challenging goals and is reasonably calculated to enable a child with a disability to make appropriate progress in light of the child's unique circumstances, only then can it be said to have offered a FAPE. The result of this history of refinement of the definition of FAPE is that any proposed change to an IEP is a proposed change to the provision of FAPE, and such proposed changes must be proposed in a PWN.

In this case, it appears that the changes included in the March 13, 2018 IEP included a deletion of a goal as well as a material change of services and a substantial change of placement. While USD #___ did provide the parent with a PWN, it only addressed the proposed changes in services and placement but did not address the change in goals. In addition, the description related to services and placement in the PWN was inadequate to inform the parent of the specific changes that were being proposed. The description of the proposed action only stated that the student would continue to receive special education services in the area of literacy and did not describe the change from 10 minutes per day of specialized instruction provided in the general education setting to 30 minutes per day of specialized instruction in the special education setting beginning on August 21, 2018.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to providing appropriate PWN to the parent during the 2017-18 school year is substantiated.

ISSUE FOUR: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to develop an IEP for the student based on the results of the most recent evaluation and the academic, developmental, and functional needs of the child during the past 12 months.

Findings:

The parent believes USD #___ did not consider language delays and evaluation results when developing the IEPs during the past 12 months.

The findings of Issue One and Three are incorporated herein by reference.

Documentation and interview found a reevaluation of the student was proposed on March 5, 2018. The evaluation only included assessment in the area of academics as all other areas were noted to fall within the average range. The parent signed consent for this reevaluation on that same date.

An eligibility determination meeting was held on March 13, 2018. The Evaluation / Eligibility Report documents the student was able to identify 10 letters and to answer "wh" questions very well. The report also states the student is able to "focus a little more" when working in a small group. The Literacy First Assessment was administered and showed the student was able to name and identify14 uppercase ad 4 lowercase letters. The report concludes the student does exhibit an exceptionality in lowercase identification and is in need of special education services in the area of literacy.

The March 13, 2018 IEP includes a goal addressing lowercase letter identification and specialized instruction in the area of literacy.

Federal regulations, at 300.324(a)(1)(iii), requires the IEP Team consider the results of the initial or most recent evaluation of the child in the development, review, and revision of the IEP.

In this case, it appears the March 13, 2018 IEP does reflect the concerns in the area of literacy which are described and documented in the Evaluation / Eligibility Report dated March 13, 2018. However, the eligibility category described as "*an exceptionality in lowercase identification"* does not appear to meet any eligibility category listed in the IDEA and defined by Kansas state law and regulations.

Federal regulations, at 300.8(a) and 300.8(b), list the 14 categories of disability included in the IDEA. These include intellectual disability, hearing impairment (including deafness), speech or language impairment, visual impairment

(including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, multiple disabilities, or, only for students age nine or younger, developmental delay.

In addition, Kansas regulation, at K.A.R. 91-40-1, defines a development delay for students age nine or younger as such a deviation from average development in one or more of the following developmental areas that special education and related services are required: Physical; Cognitive; Adaptive Behavior; Communication; or Social or Emotional Development.

In this case, the eligibility determination of "*an exceptionality in lowercase identification*" does not meet the IDEA requirements or Kansas requirements for a Developmental Delay nor any of the other 13 eligibility categories. Based on the foregoing, a violation of special education laws and regulations related to eligibility determination is substantiated.

It is noted that documentation and interviews with both the parent and USD #___ found a reevaluation of the student was discussed at the November 6, 2018 IEP team meeting. The parent has been provided with PWN proposing a reevaluation in the areas of language and academics.

Corrective Action

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

- 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.

  The findings of this investigation show USD #___ failed to provide the 30 minutes per day of specialized instruction in literacy in the special education setting required by the student's most current IEP dated March 13, 2018 for a total of 43 school days between August 21 and October 24, 2018.

- Federal regulations, at 300.342(b)(3), required each school district to ensure that each teacher and provider be informed of his or her

responsibilities related to implementing the child's IEP as well as the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

The findings of this investigation show USD #___ failed to make the general education teacher aware of the student's IEP until October 9, 2018. Documentation and interview indicated that even though push-in services with a paraprofessional were provided in the kindergarten classroom, the classroom teacher was not aware of the student's IEP or her role in its implementation.

- 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.

  The findings of this investigation show USD #___ failed to provide the parent with a PWN containing an adequate description of the proposed changes to the IEP goals and the proposed material change of services and the substantial change of placement in the March 13, 2018 IEP to inform the parent of the specific changes that were being proposed. The description of the proposed action did not reference the changes to the goals and only stated that the student would continue to receive special education services in the area of literacy. It did not describe the change from 10 minutes per day of specialized instruction provided in the general education setting to 30 minutes per day of specialized instruction in the special education setting beginning on August 21, 2018.

- Federal regulations, at 300.8(a) and 300.8(b), lists the 14 categories of disability included in the IDEA. These include intellectual disability, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, multiple disabilities, or, only for students age nine or younger, developmental delay.

Kansas regulation, at K.A.R. 91-40-1, defines a development delay for students age nine or younger as such a deviation from average development in one or more of the following developmental areas that special education and related services are required: Physical; Cognitive; Adaptive Behavior; Communication; or Social or Emotional Development.

The findings of this investigation show USD #___ failed to appropriately identify the student's eligibility in any of the categories of disability recognized in the IDEA or Kansas regulations. The eligibility determination of "*an exceptionality in lowercase identification*" does not meet the IDEA requirements or Kansas requirements for a Developmental Delay nor any of the other 13 eligibility categories.

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. 300.101 and 34 C.F.R. 300.17 by ensuring that special education and related services are provided in conformity with the IEP.

   b) Comply with 300.342(b)(3) by ensuring that each teacher and provider is informed of his or her responsibilities related to implementing a child's IEP as well as the specific accommodations, modifications, and support that must be provided for the child in accordance with the IEP.

   c) Comply with 34 C.F.R. 300.503 by ensuring that prior written notice given to parents contains a description of any action regarding an IEP that is proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action.

   d) Comply with 34 C.F.R. 300.8(a) and 300.8(b) and K.A.R. 91-40-1 by ensuring students are appropriately identified in the categories of disability recognized in the IDEA and Kansas regulations.

2. No later than February 15, 2019, USD #___ will provide training to the special education staff who served on the students IEP team during the 2017-18 and 2018-19 school year on the requirements of prior written notice, implementation of the IEP, informing teachers and providers of

their responsibilities regarding the IEP, and making eligibility determinations. 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.

3. No later than March 15, 2019, USD #___ shall conduct an eligibility determination meeting for the student at the conclusion of the reevaluation that is currently in progress. Eligibility will be based upon one of the 14 categories recognized in the IDEA and described in the Evaluation Report and PWN provided to the parent. Copies of these documents shall be provided to Special Education and Title Services.

4. USD #___ shall provide 21.5 hours of compensatory services to the student. USD #___ shall reimburse the parent for the 4 hours of specialized instruction provided by Cradle to Career and develop a plan for providing the remaining 17.5 hours of compensatory services. No later than January 15, 2019, USD #___ will hold an IEP team meeting to determine how to provide the 17.5 hours of compensatory services and provide the parent with appropriate PWN of that plan. The parent has the option of accepting all, or any part of, or none of the compensatory services presented in the plan. Copies of the payment receipt and the PWN shall be provided to Special Education and Title Services.

5. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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 COMPLAINTS
FILED AGAINST
_____ PUBLIC SCHOOLS, USD #___
ON AUGUST 21 AND 23, 2018

DATE OF REPORT: SEPTEMBER 20, 2018

This report is in response to complaints 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 _____, Mediation/Due Process Supervisor for _____ Public Schools, on August 24 and 31 and September 4, 2018. The investigator spoke by telephone with the parent on September 3, 2018.

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

- IEP for this student dated April 4, 2018
- Signature page for April 4, 2018 IEP
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated April 4, 2018
- Amended IEP for this student dated May 14, 2018
- IEP Amendment Between Annual IEP Meetings dated May 14, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated May 14, 2018
- Letter to the parent from the district dated July 30, 2018 regarding the student's school assignment for the 2018-19 school year
- IEP Amendment Between Annual IEP Meetings dated August 9, 2018
- Amended IEP dated August 9, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated August 9, 2018
- Emails dated August 9, 2018 between the parent and district staff
- Email dated August 13, 2018 from the parent to district staff
- Email dated August 15, 2018 from the parent to district staff
- Emails dated August 16, 2018 between district staff and the parent

- Email dated August 17, 2018 from the Case Manager to the Paraeducator assigned to assist the student
- Email correspondence dated August 23 and 24, 2018 between the parent and the Case Manager regarding elective classes
- Email dated August 27, 2018 from the Case Manager to the parent regarding Connexus
- Email exchange dated September 12, 2018 between the student's Case Manager and the parent
- 2018-19 Student Schedule provided by the district
- Student Schedule provided by the parent
- Receipt dated August 17, 2018 from Time4Learning

Background Information

This investigation involves a 13-year-old girl who is enrolled in the 8th grade. The student has been determined to be eligible to receive special education services under the category of Emotional Disturbance. By report of the parent, the student has been diagnosed with Autism.

During the 2017-18 school year, the student attended school on a shortened day schedule, attending classes for 6 of 10 periods during the third quarter and 8 of 10 periods during the fourth quarter. For the 2018-19 school year, the student is attending a full schedule of classes.

The student's April 2018 IEP was amended on August 9, 2018. Currently the student receives pull out service for Math, Social Studies, and Language Arts in a Positive Behavior Support (PBS) classroom – a classroom designed to meet the needs of students whose behavior interferes with their own learning or the learning of others – for 132 minutes per day, five days a week. She receives Class-Within-A-Class service for Science and is enrolled in two elective courses. Paraeducator support is provided for those electives, and the student has special education support during lunch. Additionally, the student receives 20 minutes once a week of direct counseling service.

The student does not attend her neighborhood middle school although a move to a school located 4 minutes away from her home was discussed in an IEP Team meeting on May 14, 2018. The parent was notified that the student would remain at C Middle School on July 30, 2018.

Issues

The parent filed two separate complaints. In her complaint of August 21, 2018, the parent raised two issues:

- **The district is not complying with the student's IEP and is therefore not providing the student with a free appropriate public education (FAPE).**

- **The district failed to provide the parent with a copy of an educational record (specifically, minutes of an IEP Team meeting).**

The parent submitted a second complaint on August 23, 2018. In her second complaint, the parent raised the following issues:

- **The district made a change of more than 25% to the services provided to the student without first providing prior written notice of the change to the parent and obtaining her informed written consent for the change.**
- **The education being provided to the student by the district does not coincide with her current present levels.**

During a phone call with Laura Jurgensen, Assistant Director of Special Education and Title Services for the Kansas State Department of Education, the parent gave verbal permission for the investigator to report the investigation of all these issues in this single summative document.

Issue One: The district is not complying with the student's IEP and is therefore not providing the student with a free appropriate public education (FAPE).

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 and, under 34 C.F.R. 300.17, define FAPE in part as special education and related services provided in conformity with an IEP. The IEP is intended to describe and guide services for each child on an individual basis.

The term "special education" means instruction specially designed to meet the unique needs of a child with an exceptionality.

Parent's Position

The parent states that the student's April 2018 IEP and subsequent amendments require the district to provide paraeducator supported instruction to the student in core subjects through the use of an online curriculum. According to the parent, the student used a specific online curriculum – Connexus – during the 2018-19 school year, but plans were discussed in May of 2018 to transition the student to a different online curriculum (Edgenuity) for the 2018-19 school year. The parent contends that in the May meeting she was told that staff would be trained on the new program prior to the start of the 2018-19 school year so that the program would be up and running when school started.

The parent asserts that at an IEP Team meeting on August 9, 2018 she asked whether current staff had received training on the new online program and whether the program was in place to start the year. According to the parent, the building principal stated that staff had not been trained on the use of an online curriculum with the student and that no online curriculum would be available to the student. The parent reports that the

assistant principal then cited meeting notes from the May 2018 team meeting indicating that it had been decided in May that the student would "quit" the online curriculum.

The parent asserts that after voicing her disagreement with the administrator's comments she left the meeting and subsequently sent an email to the district regarding the provision of an online curriculum for the student and asking for a copy of the meeting notes referenced by the assistant principal. According to the parent, she received an email response from the district reversing the position previously taken by the principal and assistant principal at the meeting. The parent reports that the district email stated that the district ***would*** be using an online program and that it would initially be the same online curriculum that was used by the student during the 2017-18 school year (Connexus) – while staff was getting to know the new online program that would subsequently be introduced to the student (Edgenuity).

While the parent acknowledges that the student is now using the Connexus program, she contends that the district did not as of the first day of the 2018-19 school year (August 15, 2018) have ***any*** online curricular program available for the student as specified in her IEP. According to the parent, the student reported that she slept at school on the afternoon of August 16, 2018 because she had nothing to work on.

District's Position

The district asserts that no change has been made to the student's IEP with regard to the utilization of an online curriculum for core content.

According to the District's Mediation/Due Process Supervisor, at an IEP Team meeting on May 14, 2018, the team discussed the transfer of the student to a middle school closer to her home. Over the summer, however, it was determined that the student would be better served by remaining at the school she had been attending (C). The parent was provided with formal notice of the student's school assignment for the 2018-19 school year on July 30, 2018.

Also, according to the Mediation/Due Process Supervisor, there has been discussion at a number of IEP Team meetings about transitioning the student from the Connexus curricular program utilized during the 2017-18 school year to a program used by students at the high school level (Edgenuity). The district contends that it was responsive to concerns expressed by the parent during the IEP Team meeting on August 9, 2018 (and in subsequent email correspondence) and determined that implementing a new online curriculum – on which staff would have only just been trained – might negatively impact the student.

Because it had initially been anticipated that the student would not be attending C, the district's license for use of the Connexus curricular program by the student at C was transferred to another school. The district then had to arrange to have the Connexus license transferred back to C. The district states that it asked the parent to check her login credentials for the online Connexus program and to confirm whether the student

was still able to access the program. Concurrently the school confirmed its credentials for login. It was the intent of the district that the Connexus program would be available for the student to use as of the first day of school on August 15, 2018.

The district states that while no online program was available for the student on the first day of school, the student's Case Manager purchased another online program (Time4Learning) on August 17, 2018 and began using that program with the student on that date. That curriculum provided the student with instruction in Social Studies, Language Arts, and Math.

According to the district, staff has now been trained on Connexus, and the student is using the program for her core content instruction.

Findings of Fact

The section of the student's April 4, 2018 Annual IEP (and May 14, 2018 amended IEP) entitled "Least Restrictive Environment (LRE) contains the following statement under the heading "Annual Review of Educational Placement:"

> "(The student) will be on a partial day and ***take her core classes using an online curriculum*** (emphasis added)***."***

A form entitled "Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent" signed by the parent on May 14, 2018 states that the student would "remain on the online curriculum for Math, Social Studies, and Language Arts."

The district stipulates that the preferred online curriculum (Connexus) was not in place as of the first day of school, August 15, 2018. Newly assigned staff who were to provide services to the student had not received training on the Connexus program prior to the start of the school year.

Early in the morning of August 17, 2018, the student's Case Manager purchased an online curriculum (Time4Learning) which was made available to the student on that same date.

An email from the student's Case Manager to the parent dated August 27, 2018 states, "On Friday afternoon (August 24, 2018) I trained on the Connexus platform…At this point, neither (the student) nor myself have been assigned classes or sections for her to begin. We are waiting for the company to populate them. Until then, she can continue on the Time4Learning lessons." The Connexus program was reinstated on August 28, 2018, and the student is now using that program for her core content instruction.

Summary and Conclusions

No objective record of the discussion at the IEP Team meeting was available for the investigator's review in this case. The parent represents that the positions voiced by herself and the district at the August 9, 2018 IEP Team meeting were diametrically opposed. The parent insists that she was told by the district that no online curriculum would be provided for the student until her challenge to that decision resulted in a change in services. The district on the other hand insists that there had never been any intent to remove the student's access to the online curriculum, but on-going discussion of which online program would be used as well as delays in decision-making regarding which school the student would attend for the 2018-19 school year led to a reassignment of computer program licenses and a delay in providing staff with the training needed to implement the online program used by the student last year.

Neither the student's April 2018 IEP nor any subsequent amendments require the district to use any specific curriculum for the student, only that it be an "***online*** curriculum." The district did not have ***any*** online curriculum available for use by the student on the first day of school – August 15, 2018 – and staff training on an online program had not been completed. An alternative online curriculum (Time4Learning) was made available to the student on August 17, 2018 and was used with the student until August 28, 2018 when the Connexus curriculum was reinstated.

Because the district did not have any online curriculum available for use by the student for 2 school days – and a total of 6 hours of potential core instruction – a violation of special education laws and regulations is substantiated on this issue.

Issue Two: The district has refused to provide the parent with copies of educational records she has requested.

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

Generally, the working file and anecdotal records of a teacher or other staff member would not be considered to be part of a child's record. FERPA regulation 34 C.F.R. 99.3(b) states that the term "education records" does not include "records of instructional, supervisory and administrative personnel, and educational personnel ancillary to those persons, that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record."

Parent's Position

The parent states that she has repeatedly asked for copies of the minutes of the May 14, 2018 IEP Team meeting but has not been given access to that record.

District's Position

The district states that the student's special education file does not contain a copy of any "minutes" from the IEP team meeting of May 14, 2018 and asserts that no other records of that meeting are extant. The district contends that while the Assistant Principal for C during the 2017-18 school year was observed by staff to have been using her computer during the meeting presumably for the purpose of taking personal notes, those notes were not made a part of the student's special education file and were not shared with other staff members.

Findings of Fact

The student's special education file does not contain "Minutes" from the IEP Team meeting in May 2018. While the individual employed as building Assistant Principal during the 2017-18 school year was observed to have taken notes on her personal computer during the meeting, that individual and her computer are no longer with the district and no "minutes" were shared with others by the former assistant principal prior to her departure. The current Assistant Principal provided a written statement of assurance that she does "not have any notes generated from the May meeting…"

Summary and Conclusions

The district is only required to provide the parent with access to records that are directly related to a student and ***maintained*** by the district. The investigator found no evidence of the existence of "Minutes" of a May 14, 2018 IEP Team meeting. Under these circumstances, the allegation of a violation of special education laws and regulations is not substantiated on this issue.

Issue Three: The district made a change of more than 25% to the services provided to the student without first providing prior written notice of the change to the parent and obtaining her informed written consent for the change.

As stated above under Issue One, 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 and, under 34 C.F.R. 300.17, define FAPE in part as special education and related services provided in conformity with an IEP. The IEP is intended to describe and guide services for each child on an individual basis.

The amount of special education services to be provided must be stated in the IEP so that the level of the school'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 (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP (Federal Register, August 14, 2006, p. 46667).

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

Parent's Position

The parent asserts that at the start of the 2018-19 school year the district scheduled the student for only one elective class – Technology – even though the student's August 2018 amended IEP states that she is to have ***two*** elective classes and should participate in a regular education classroom with support through a class-within-a-class model for science. The parent further asserts that the student was pulled from her Technology elective and assigned to a "language arts extension" class in a special education setting. The parent contends that this reduction in the student's participation in regular education classes represents a change of more that 25% to the services specified in the student's August 2018 IEP. The parent further states that this change was made without either her knowledge or consent.

District's Position

The district states that the student was enrolled in two elective classes at the start of the school year but it was determined that one of those electives – Technology – was not appropriate for the student. A new section of Spanish was opened and the student was enrolled in that course, reestablishing a second elective class. According to the district, the student was never enrolled in a second Language Arts class.

Findings of Fact

The student's April 2018 IEP was amended on August 9, 2018. A form entitled "IEP Amendment Between Annual IEP Meetings" signed by the parent and the Due Process Supervisor contains the following statement under the section entitled "Description of Proposed IEP Change(s) And Effective Dates:"

> "It is proposed that (the student's) minutes on her IEP be changed to accurately reflect the frequency of service that she will receive. (The student) will receive pull out service for Math, Social Studies, and Language Arts totaling 132 minutes per day, five days a week. She will receive Class-Within-A-Class service for Science, ***two electives*** (emphasis added), and supervision during lunch. She will continue to receive 20 minutes once a week of direct counseling service…"

An amended IEP for the student dated August 9, 2018 reflects the level of services specified in the above-referenced form as does a form entitled "Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent" signed by the parent on August 9, 2018.

While none of the above-mentioned documents specifically state that the student is to be enrolled in elective courses in the general education setting, comments from both the district and the parent indicate that there was consensus that the intent of the elective classes was to provide the student with opportunities to engage with general education peers.

At the start of the 2018-19 school year, the student was enrolled in and attended a Technology elective class. In an email to the parent on September 12, 2018, the student's Case Manager states that the "para realized (on the first day of class) that it was a sixth-grade class" that the student had already taken and immediately sought out the Case Manager who pulled the student from the class for the remainder of that class period. Attendance records show that the student attended the Technology class for two more days – August 16 and 17, 2018 – before being exited from the class and assigned to the Positive Behavior Support Classroom.

Email exchanges between the parent and the student's Case Manager dated August 23 and 24, 2018 show that Visual Art, Physical Education and Spanish elective options were then considered for the student. After consulting with the student, the parent notified the Case Manager via email - on August 24, 2018 that the student wanted to enroll in Spanish.

The district initially intended to have the student enroll in a 6th hour Introduction to Spanish class but then determined that class to be a one quarter only course. An email to the parent from the Case Manager indicates that an 8th hour year-long Spanish class had been "created in the master schedule on 8.21." The first day that class was available to students was August 24, 2018; the student's first day of attendance in the class was August 27, 2018.

In an email dated August 23, 2018, the student's Case Manager explained to the parent that the "Language Arts extension portion of the temporary online curriculum (Time4Learning) is intended to be a high-interest topical language arts enrichment…not an extra language arts class." In an email dated August 28, 2018, the Case Manager told the parent that "when you first raised your concern (regarding the extension activity), I deleted it from her program at your request…"

According to the district, the student's current class schedule is as follows:

1st Hour: Social Skills Adapted
2nd Hour: Online Core class (Math, Language Arts or Social Studies)
3rd Hour: CWC science
4th Hour: Online Core class
5th Hour: Online Core class
6th Hour: Study Hall
7th Hour: Garden Club (elective)
8th Hour: Spanish (elective)

A class schedule provided by the parent shows the student attending the same classes specified above.

Summary and Conclusions

The student's amended August 9, 2018 IEP as well as a prior written notice proposed changes to the student's previous IEP indicate that she is to be enrolled in two elective classes. Both the district and the parent agree that the student is now participating in two electives. However, between August 17 and August 27, 2018 the student was enrolled in only one general education elective class. Under these circumstances, the allegation of a violation of special education laws and regulations is substantiated on this issue.

Issue Four: The education being provided to the student by the district does not coincide with her current present levels.

Utilizing baseline data established in the present levels of academic achievement and functional performance (PLAAFPs), the IEP team must develop measurable annual goals, including academic and functional goals that meet the child's needs and enable the child to be involved in and make progress in the general education curriculum. The special education, related services, supplementary aids and services, program modifications, and supports for school personnel described in the IEP must reflect the child's needs in order to ensure he or she receives educational benefit.

Parent's Position

The parent asserts that the district is inappropriately devoting 2 class periods per day to language arts despite the fact that the student is able to read and comprehend at grade

level and can write a 5-paragraph paper, scoring 75% or better on punctuation, grammar, and spelling. According to the parent, the district's decision to assign the student to 2 language arts periods is depriving the student of the opportunity to enroll in an elective course with regular education peers.

Further, the parent contends that the student (per her August 2018 IEP) demonstrates grade level skills in math but is currently working at a 7th grade level in math with the decision as to when she will move up to 8th grade level to be determined by the paraeducator assigned to the student. The parent questions whether educational decisions are being made by a paraeducator rather than a teacher.

District's Position

According to the district, the student has never been placed in a second Language Arts class but was assigned a Language Arts extension activity. That assignment was described as a "high-interest topical study that extended (the student's) learning in her Language Arts component." The student is no longer being asked to complete this activity.

With regard to the student's math instruction, the district asserts that while the student was presented with some 7th grade review material to ensure the student had mastered various concepts, the primary math instruction for the student is at the 8th grade level.

The district contends that while a paraeducator does monitor the student and provides her with accommodations when the student is working on her on-line curriculum, that paraeducator works under the direction of a special education teacher who has been licensed/certified by the State of Kansas and is not making any instructional decisions regarding the student.

Investigative Findings

According to the student's current course schedule, she is enrolled in only one period of Language Arts – her fourth period class.

Neither the student's April 2018 IEP nor any subsequent amended IEPs for the student contain math-related goals for the student. With regard to the student's math instruction, an email dated August 17, 2018 from the student's Case Manager to the Paraeducator assigned to assist the student states, "I set her up with 7th grade math, so please watch to see if she needs me to bump her up to 8th grade math as well. Her test scores led me to believe that she may need some review material and then can jump into 8th grade."

According to a written statement by the Case Manager, she is "the one responsible for making…instructional decisions. I asked…the para-educator assigned to work with (the student) to simply monitor her progress in a 7th grade math curriculum, to review, take data and give me the data feedback as to her progress, so I could move her up to 8th grade curriculum. (The paraeducator) was not expected to make this decision, I was."

The paraeducator assigned to work with the student has been with the district for four years and has met all state and district requirements for training.

The student has been working exclusively on 8th grade level math since August 28, 2018 – the date the Connexus program became available to her.

Summary and Conclusions

The student has at no point during the 2018-19 school year been enrolled in two periods of Language Arts. While some 7th grade math review material was assigned to the student at the start of the school year, her primary instruction is – and has been – at the 8th grade level. The paraeducator who provides support to this student works under the supervision of the certified teacher responsible for this student's primary instruction who is making instructional decisions regarding the student.

An allegation of a violation of special education laws and regulations is not substantiated.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to 34 C.F.R. 300.101 and 34 C.F.R. 300.17 which require districts to provide FAPE to students in conformity with an IEP which describes and guides services to exceptional students on an individual basis. Specifically, the district erred by

- failing to have an online curriculum available for the student for the first two days of core instruction for the 2018-19 school year (a total of 6 class periods), and
- failing to have the student enrolled in two elective courses for a 5- day period.

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

1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with 34 C.F.R. 300.101 and 34 C.F.R. 300.17 by providing services to this student in conformity with her IEP.

2) Within 10 school days of the receipt of this report, the district shall present to the parent a plan for the provision of compensatory services.

    a. This plan should address 5 days of elective course opportunities missed between August 17 and 24, 2018. The plan should also address the 6 periods at the start of the 2018-19 school year when no online curriculum was available for the student.

b. The parent shall have the option of accepting all or part of the compensatory services that are offered or of declining any or all of these services.

3) Submit to Special Education and Title Services a copy of the plan for compensatory services (or that portion of the plan accepted by the parents) addressed above under Item 2.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
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
_____ PUBLIC SCHOOL, USD #___
ON JULY 9, 2018

DATE OF REPORT: AUGUST 7, 2018

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with H, Director of the Learning Cooperative for _____, on July 17, 26 and 31, 2018. The investigator also spoke by telephone with the parent on July 20 and 30, 2018.

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

- Multidisciplinary Team Report dated May 8, 2018
- Letter dated May 8, 2018 from the parent to the Superintendent and building principal
- Email correspondence covering the period of May 8-10, 2018 between the parent and district/Cooperative staff regarding the parent's request for an Independent Educational Evaluation (IEE)
- USD #___ Guidelines for Independent Educational Evaluation
- Listings of Kansas Association of School Psychologists from the Northeast and Central regions of the state
- Email correspondence covering the period of May 10 – May 16, 2018 regarding individuals qualified to conduct the IEE requested by the parent
- Correspondence dated May 16, 2018 from the parent to the Director of Special Education requesting that a specific individual be designated to conduct the IEE
- Email correspondence covering the period of May 16 – June 12, 2018 between the parent ad the Director of Special Education regarding the IEE
- Letter dated May 18, 2018 from the parent to the Director of Special Education
- Letter dated May 24, 2018 from the parent to the Director of Special Education
- Email dated June 4, 2018 from the parent to the Superintendent
- Curriculum Vitae for the IEE evaluator identified by the parent

Background Information

This investigation involves an 8-year-old boy who was enrolled in the 2nd grade at the time of his initial evaluation for special education. The student has a younger brother who has been evaluated and is currently receiving special education services.

According to the parent, she referred the student for evaluation to determine whether he needed any accommodations, assistive technology, or classroom supports in order to be more successful in school. By report of the parent, the student has become increasingly frustrated over his struggles to read. The parent states that the student believes that his peers are mastering reading skills at a far more rapid pace than he. The parent also states that the student has had problems with spelling, math, and writing and "is barely making (academic) benchmarks."

Issues

In her complaint, the parent raises the following issue:

The student was denied the ability to select an independent professional to perform an Independent Educational Evaluation. Instead, the LEA sent a list (of School Psychologists) from which the parent was required to choose, and established a 100-mile radius limitation on the list from which the parent was to select.

Applicable Regulations

After an initial evaluation is completed, if the parents disagree with the school's evaluation, they have the right to ask for an independent educational evaluation (IEE) at public expense. "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the district responsible for the education of the child in question. "Public expense" means that the district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

If the parent requests an independent educational evaluation, the district, "without unnecessary delay," must take one of the following actions (See K.A.R. 91-40-12):

1) Initiate a due process hearing to show that the school's evaluation was appropriate; **OR**
2) Provide information to the parent about where an independent educational evaluation can be obtained, the agency criteria (which may include qualifications of examiners and location to obtain the evaluation);

> and ensure that the evaluation is provided at public expense. However, subparagraph (B) of this regulation adds that to conform with this requirement, the district must either pay the full cost of the independent educational evaluation or otherwise ensure that the evaluation is provided at no cost to the parent; **OR *initiate a due process hearing to show that the evaluation obtained (or requested) by the parent does not meet agency criteria*** (emphasis added).

There are no other options available to school districts.

If a parent requests an independent educational evaluation, the district may ask the reason for the objection to the public evaluation. However, the explanation by the parent shall not be required, and the district shall not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

A due process hearing would determine whether the school must pay for the independent educational evaluation. If the school's evaluation is found to be appropriate and the parents still want an independent educational evaluation, the expense is the responsibility of the parents.

When an independent educational evaluation is conducted, the school must consider the results of the independent educational evaluation in decisions made with respect to a free appropriate public education for the child.

If an independent educational evaluation is provided at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the school uses when it initiates an evaluation. The State of Kansas, at K.A.R. 91-40-12, established that these criteria may include the location of the evaluation and the qualifications of the examiner but shall not impose other conditions or timelines for obtaining the evaluation. The credentials of the independent evaluator or evaluators must be comparable to the school's evaluators. The criteria for the IEE adopted by a district shall be the same as the criteria that the agency uses when it conducts an evaluation, to the extent that those criteria are consistent with the parents' right to obtain an independent educational evaluation.

The district may set reasonable limitations on the costs for which it will be responsible but may have to exceed those costs if necessary to ensure that the independent educational evaluation meets the child's unique needs.

A parent is entitled to only one independent education evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees (34 C.F.R. 300.502(b)(5)).

If the parent obtains an independent educational evaluation at public expense or

provides the district with an evaluation obtained at private expense, the school shall consider the results of the evaluation, 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.

OSEP Letters

The Office of Special Education Programs (OSEP) has provided guidance in the form of letters regarding a variety of special education issues. Three OSEP letters offer insight into the IEE process:

Letter to Petska

In Letter to Petska (35 IDELR 191, 2001), OSEP opined that a district's rule prohibiting IEE examiners from associating with private schools or advocacy groups was unrelated to the examiner's ability to conduct an educational evaluation, and may undermine the parent's ability to obtain an independent evaluation. A requirement that the examiner must have "recent and extensive experience in the public schools" was too narrow and was also unrelated to their ability to conduct an educational evaluation. OSEP noted that district policies obligating prospective IEE examiners to be licensed, or eligible for licensure, by the state Department of Public Instruction in their appropriate field might make it impossible for a public agency to assess a student in all areas of suspected disability. As an example, it observed that children suspected of a disability may require evaluations performed by clinical psychologists, who would not meet the standards of the policies because their professional licenses might be issued by an agency other than the Department of Public Instruction.

In addition, OSEP noted that the school district must ensure that under 34 C.F.R. 300.502 (b)(2), an IEE is provided at public expense unless the district demonstrates in a due process hearing that the parent's IEE did not meet the district's criteria, including criteria related to location if a district establishes criteria that restrict parents in terms of the geographic area where they may obtain an IEE.

Letter to Parker

In Letter to Parker (41 IDELR 155, 2004), OSEP explained that a parent has the final choice of the evaluator to conduct an independent educational evaluation, but a public agency may publish a list of names and addresses of evaluators meeting its criteria, including reasonable cost factors. The parent, however, is not limited to the listed evaluators. Additionally, the parent must "have the opportunity to demonstrate the unique circumstances justify the selection of an evaluator that does not meet agency criteria." If the parent uses an evaluator that does not meet the agency's criteria, the agency may seek due process to demonstrate the parent's evaluation did not meet its criteria for IEEs or there was no justification for selecting an evaluator that did not meet the criteria. OSEP

explained that a district "must set criteria under which an IEE can be obtained at public expense, including the location of the evaluation and the qualifications of the examiner, which must be the same as the criteria the public agency uses when it initiates an evaluation, ***to the extent those criteria are consistent with the parent's right to an IEE*** (emphasis added)." Other than establishing such criteria, the agency may not "impose conditions or timelines related to a parent obtaining an IEE at public expense."

Letter to Young

In Letter to Young (39 IDELR 98, 2003), OSEP was asked to clarify whether a district must pay for an IEE and if it is permissible for it to have a printed list of qualified IEE examiners from which parents must choose. OSEP explained a district is required to pay for an IEE if it is unable to show that the district's evaluation was appropriate. Additionally, it noted that there is nothing in the regulations prohibiting an LEA from providing parents with a list of qualified examiners. If, however, a district or LEA wishes to limit parents to using examiners from a list, the list must be exhaustive; that is, ***all*** qualified examiners in a geographic location must be included. In addition, a parent may use an examiner not on a list if a child's unique needs establish that no one on the list is qualified.

Specifics of the Case

The student was referred for an initial special education evaluation by the parent in the Spring of 2018 following a parent-initiated private screening of the student by staff at the Fundamental Learning Center in Wichita. According to the parent, that screening indicated that the student demonstrated characteristics often associated with students with dyslexia.

The student was assessed by a district School Psychologist using the Wechsler Intelligence Scale for Children on April 23, 2018; on May 7, 2018, the psychologist administered the Wide Range Achievement Test – 5th Edition to the student.

On May 8, 2018, the district convened a Multidisciplinary Team meeting. The building principal, School Psychologist, general education teacher, a special education teacher, and the parent were in attendance. The team developed a summative report which stated that while the results of data sources showed evidence that the student was an individual with an exceptionality, there was no evidence of a severe discrepancy between the performance of the student and that of his peers and no evidence of a severe discrepancy between the student's ability and performance in areas of concern. Therefore, the team did not consider the student to be in need of special education services. The parent signed the report but indicated she was not in agreement with the findings.

The parent sent a letter to the district superintendent and to the building principal on May 8, 2018 stating that she disagreed with aspects of the multidisciplinary team report. Specifically, she noted the following:

- Portions of the team report had been completed by the School Psychologist prior to the meeting and without discussion or input from parents or other team members.
- The team "indicated that (the student) may have some writing difficulties and yet this was not evaluated with a formal test."
- "There is a greater scatter than two standard deviations between verbal comprehension (111 SS) and processing speed (77 SS). This indicates a potential conflict with the IQ score."
- "The evidence of the test results indicate more in-depth testing should have been done by the evaluating party."
- "…phonological testing (beyond AIMSWEB) should have been completed…"
- "It appears the testing is incomplete and badly interpreted."
- "A thorough and accurate test is necessary to determine (the student's) education needs and eligibility."

In her letter, the parent requested an Independent Education Evaluation at the expense of the district.

The former director of the Cooperative sent an email to the parent on May 9, 2018 stating that "within a reasonable time frame, (the Cooperative) would provide her with a list of professionals qualified to perform the IEE." In the email, the former director also attached a copy of the "Guidelines for Independent Educational Evaluations Conducted at _____ (_____) Expense."

The parent responded to the former director via email on May 9, 2018 stating that she "would like to use Dr. Brian Stone from Wichita Ks."

The former director sent an email to the parent on May 10, 2018 stating, "If you choose to have the IEE performed by a professional outside the (Cooperative's) list of professionals qualified to perform the IEE, the criteria specified in paragraph 5 of the Guidelines for Independent Educational Evaluations Conducted at (Cooperative) Expense will apply."

On May 16, 2018, the former director sent an email to the parent which included an attached list of "professionals qualified to perform the IEE and who otherwise meet (Cooperative) criteria." According to the email, "the Independent Evaluators List is provided by the Kansas Association of School Psychologists (KASP)."

According to the former director's May 16th email, "(the 9) evaluators highlighted in yellow in the attachment live not more than 100 miles from the (Cooperative) office in _____. If you choose any of the listed professionals, the (Cooperative)

will undertake arrangements for the IEE, including contracting with the evaluator, verifying compliance with criteria, and performing payment…If you choose to have the IEE performed by a professional outside the (Cooperative) approved list, the criteria specified in paragraph 5 of the Guidelines for Independent Educational Evaluations…will apply."

Paragraph 5 of the guidelines reads as follows:

> "5. When an IEE is funded by the (Cooperative), the criteria under which the evaluation is obtained must be the same as the criteria that (the Cooperative) uses when it initiates an evaluation itself. 34.C.F.R. 300.502(e). The following criteria shall be applied to parent-requested IEEs performed at (Cooperative) expense.
>
> a) (The Cooperative) limits the travel distance to obtain an IEE to the general geographic area (not more than 100 miles from (the Cooperative) where (the Cooperative) obtains its evaluations;
>
> b) (The Cooperative) will only pay a reasonably comparable rate of IEEs (but not more than 50% above the average cost of comparable (Cooperative) initiated evaluations);
>
> c) The qualifications of the evaluators chosen to perform IEEs must comport with the qualifications required of evaluators chosen by (the Cooperative) for (Cooperative) initiated evaluations, in accordance with applicable Federal regulations, state laws, and state regulations.
>
> - A current Kansas Licensure required for a school psychologist
> - At least 3 years of experience in a school setting.
>
> d) IEE Criteria: (The Cooperative) requires that IEEs use a variety of assessment tools and strategies that are technically sound instruments to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child has a disability under the IDEA, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child to participate in appropriate activities)."

Paragraph 6 of the guidelines states, "If a parent obtains an IEE that does not comply with the above criteria, (the Cooperative) may refuse to reimburse the parent for the costs of the IEE. This result may be avoided if the parent contacts (the Cooperative) prior to obtaining an IEE, and allows (the Cooperative) to undertake the necessary arrangements to perform the IEE in accordance with these criteria."

According to Paragraph 7 of the guidelines, "(The Cooperative) will fund an IEE that does not comply with the criteria set forth above only if the parent demonstrates that extraordinary or unique circumstances are present to warrant a departure from (Cooperative) criteria. (The Cooperative) shall make a decision in such situations on a case-by-case basis, in light of the child's existing evaluation data and other relevant information."

The parent sent a letter to the former director of the Cooperative on May 16, 2018 stating the following:

> "I would like to see Dr. Brian Stone, an independent Licensed Psychologist in Wichita, Kansas. He is not affiliated with any school district, and is highly qualified, especially in evaluating students with functional reading issues like (the student). He is slightly outside of the 100-mile restriction, but I would be driving (the student) to the testing, so I am hoping that an exception can be made."

On May 18, 2018, the former director sent an email to the parent asking whether the individual identified by the parent held a current Kansas license as a School Psychologist and whether he had at least 3 years of experience in a school setting. The former director stated that the Cooperative would not fund an IEE that did not comply with criteria specified in the guidelines unless the parent could demonstrate that "extraordinary or unique circumstances are present to warrant a departure from (the Cooperative's) criteria."

The parent sent a letter to the former director on May 18, 2018 providing additional information regarding her IEE request and stating her reasons for requesting that the IEE be conducted by the licensed psychologist she had identified in previous correspondence. The parent noted the following:

- An initial evaluation should be "full and individual" and focused on the child who is being evaluated.
- The evaluation should utilize a "variety of assessment tools and strategies…including information provided by the parent."
- "All areas" of the student's functioning should be examined.
- The evaluation should be "sufficiently comprehensive to identify all of the child's special education and related services needs."
- Eligibility decisions should not be based upon the results of a single procedure.
- A variety of approaches ("observations, interviews, tests, curriculum-based assessment, and so on") and a variety of sources ("parents, teachers, specialists, child") should be utilized in the evaluation.
- Assessments "must include those that are tailored to assess specific areas of educational need…not merely those that are designed to provide a single cognitive quotient."

The parent stated that the evaluation conducted by the district's School Psychologist consisted only of the WISC-5 to assess cognitive skills and the WRAT-5 to assess functional abilities. The parent asserted that the 34-point variance between the subscales of the WISC-5 was not adequately addressed in the evaluation and that despite the significant scatter among subscales, the Full Scale score was used by the team to determine the student's eligibility for special education.

The parent further asserted the following reasons for asking for the IEE by the Wichita licensed psychologist:

- The district did not consider the results of an outside evaluation previously obtained by the parent.
- Parental input was not a part of the evaluation.
- No phonological assessment was conducted.
- No classroom data, no teacher input, no general education interventions, and no observations were included in the assessment.
- Eligibility was determined by the district prior to the team meeting.

The parent asserted that the licensed psychologist she had identified is an expert in evaluating children who display issues similar to those seen in her son and stated that she had no reason to believe that the psychologists on the list provided by the Cooperative were "any better prepared to assess (the student)" than was the School Psychologist who had conducted the district's initial evaluation.

The parent also stated in the May 16th letter that she was not asking the district to provide transportation for the IEE and therefore requested that the 100-mile limit be set aside since there were "no similarly qualified specialists within that radius."

On May 24, 2018, the former director of the Cooperative sent an email to the parent stating "the criteria under which the independent education evaluation is obtained must be the same as the criteria that the school uses when it initiates an evaluation. A current Kansas Licensure is required for a school psychologist to perform (Cooperative) initiated evaluation, in accordance with applicable Federal regulations, state laws, and state regulations. It is my understanding that (the licensed psychologist recommended by the parent) does not have current Kansas Licensure required for a school psychologist. If (the licensed psychologist) does maintain a school psychologist credential, please provide his licensure number and let me know how many IEE's he has completed using the Kansas Eligibility requirements in the past year and we will consider your request."

The parent responded with a letter to the former director on May 24, 2018, stating "a school district cannot impose different standards for professionals conducting an IEE than it uses for its own staff." The parent asserted that the licensed psychologist held a PhD in Licensed Psychology, was licensed by the Kansas

Behavioral Sciences Regulatory Board, had been practicing in the area for over 15 years, and was "more highly qualified than most school psychologists." The parent wrote that Kansas regulations stated that the criteria for IEE providers established by the Cooperative should not "impose other conditions for obtaining (an IEE)" that were not required of district staff – in this case an accounting of the number of IEEs conducted by the licensed psychologist during the previous year. The parent provided the former director a Curriculum Vitae for the licensed psychologist.

Parent's Position

The parent contends that the district has violated her right to an IEE of the student by refusing to allow reimbursement for an IEE conducted by an evaluator of her choosing and has unfairly restricted her options by mandating that the IEE be conducted by one of nine currently licensed School Psychologist identified by the district. The parent further objects to the requirements by the Cooperative that the evaluator must reside within 100 miles of the district, must have 3 years' experience in the public-school setting and must have conducted a number of IEEs using Kansas special education eligibility standards during the past year.

The parent asserts that the initial evaluation conducted by a School Psychologist employed by the district was inadequate. The parent states that she has no assurance that another similarly trained individual will be able to provide a quality assessment. Additionally, the parent feels that there is a likelihood of bias if another School Psychologist is asked to conduct an IEE that challenges the work of a colleague.

It is the position of the parent that the 100-mile limit with regard to the location of the IEE is arbitrary and is particularly onerous for a student who resides in a rural area where the number of individuals qualified to conduct an IEE is limited. The parent asserts that Wichita is just outside the 100-mile limit and further contends that the restriction is unnecessarily burdensome since the parent is not requesting reimbursement for transporting the student for the purpose of the IEE.

District's Position

It is the position of the district/Cooperative that the parent has not been denied her right to an IEE. The district/Cooperative insists that it has complied with all state requirements with regard to an IEE for this student by establishing guidelines for that IEE which include the qualifications of the evaluator and the location of the evaluation. The district/Cooperative asserts that because the initial evaluation was conducted by a School Psychologist, another School Psychologist – and only another School Psychologist – is fully qualified to conduct this IEE. The district/Cooperative contends that it is essential that the individual conducting the IEE be familiar with the requirements regarding eligibility for special education services in a public-school setting and believes that only a School Psychologist

with at least three years of experience in the school setting will have the necessary understanding of these requirements.

Findings

The parent made her original request for an IEE on May 8, 2018, immediately following the multidisciplinary team meeting held by the district on that same date. On May 9, 2018, the parent specifically requested that a licensed Psychologist of her choosing conduct the IEE. The district/Cooperative responded on May 10, 2018 by providing the parent with guidelines for the administration of an IEE, and on May 16, 2018 the former director of the Cooperative sent the parent a list of 9 School Psychologists identified as meeting the criteria established by the district for IEE evaluators. On May 16, 2018, the parent reasserted her desire to have the IEE conducted by an evaluator of her choosing.

At the time of the writing of this report, nearly 12 weeks have passed since the parent's initial request on May 8, 2018 for an IEE using an evaluator of her choosing. During that period, the district/Cooperative has failed to provide any closure on the parent's request. As indicated on page 3 of this report, the applicable regulations require that when a parent requests an independent educational evaluation, the district/Cooperative has only two options: (a) provide the independent educational evaluation at no cost; or (b) initiate a due process hearing to either show its evaluation is appropriate or to show that the requested evaluation does not meet agency requirements. Instead, the district/Cooperative has neither agreed to the parent's request nor filed for a due process hearing to assert that the evaluation requested by the parent does not meet district/Cooperative criteria or that the initial evaluation was appropriate. The district/Cooperative's failure to take one of these required specific actions on the parent's request creates an "unnecessary delay," and under these circumstances a violation of special education laws and regulations is substantiated.

Additional Comments

The investigator will defer to the decisions of a hearing officer regarding the district/Cooperative IEE criteria – should the district/Cooperative opt to request a hearing rather than moving ahead to provide an IEE at district expense using the parent's requested evaluator. However, the investigator does make the following observations regarding the district/Cooperative criteria:

Provisions in the law regarding Independent Educational Evaluations are designed to provide parents with the opportunity – within reasonable limits – to select an evaluator of their own choosing from outside the school district. In the opinion of the investigator, key aspects of the laws and regulations associated with a parent's right to an IEE are murky at best. On the one hand, districts are told that they may establish the criteria under which an IEE is obtained so long as

that criteria is the same as “the criteria that the school uses when it initiates an evaluation.” The Kansas State Board of Education regulation, at K.A.R. 91-40-12, establishes that these criteria may include the “location” of the evaluation and the “qualifications” of the examiner. However, the criteria set by the district – including any established location – must be (per Letter to Parker) “consistent with the parent's right to an IEE” and should not substantially limit the parent’s access to an IEE.

No specific guidelines are provided by special education laws and regulations regarding location. In the case at hand, the district/Cooperative established 100 miles as the maximum distance from the Cooperative that an IEE could be conducted. The office of the evaluator preferred by the parent is located about 140 miles from the Cooperative, and the parent has notified the district that she would be providing transportation for her son to that location. A hearing officer would determine whether the 100-mile limitation established by the district/Cooperative is unnecessarily restrictive.

The IEE Guidelines provided to the parent stated that the IEE must be conducted by a School Psychologist and only by a School Psychologist who holds current licensure with the State. In Letter to Petska, OSEP has stated that district policies obligating prospective IEE examiners to be licensed, or eligible for licensure, by the state Department of Public Instruction in their appropriate field might make it impossible for a public agency to assess a student in all areas of suspected disability.

The evaluator requested by the parent does not hold current licensure with Kansas as a School Psychologist but is a Kansas Doctoral Level Licensed Psychologist. He has worked as a School Psychologist in both Kansas and Utah and holds an ED Masters in School Psychology and a PhD in School Psychology. He has 4 years of experience working as a School Psychologist and has more than 10 years of experience at the university level in the areas of statistics, assessment, and School Psychology. He is currently in private practice and offices at the Fundamental Learning Center in Wichita, a company that is focused on the identification and instruction of individuals with learning disorders such as dyslexia, dysgraphia, AD/HD, dyscalculia and nonverbal learning disorder.

According to the district/Cooperative, School Psychologists are involved in every initial evaluation in the district, but other specialists (Speech/Language Pathologists, Reading Specialists, Special Education teachers, etc.) are also involved where expertise is required to assess need. In the case at hand, all testing was done by a School Psychologist, but by restricting the administrators of an IEE to only School Psychologists, the district appears to be unduly restricting the parent’s IEE options.

IEE Guidelines established by the district/Cooperative require that the evaluator chosen to perform an IEE at district expense must have at least three years of experience in a school setting. While the evaluator chosen by the parent meets this standard, OSEP, in Letter to Petska, states that any requirement that the examiners must have "recent and extensive experience in the public schools" is too narrow and unrelated to an evaluator's ability to conduct an educational evaluation. The district/Cooperative stipulates that there are no restrictions within the district prohibiting a newly-hired School Psychologist with less than 3 years of experience in the school setting from conducting an initial evaluation. Therefore, the district/Cooperative has established a higher standard for an IEE evaluator than it is requiring of its own employees.

Finally, districts are not mandated to provide a list of qualified IEE examiners, but laws and regulations state that a district ***may*** do so. According to Letter to Young, however, if a district or LEA wishes to limit parents to using examiners from a list, the list must be "exhaustive;" that is, ***all*** qualified examiners in a geographic location must be included. In this case, the parents were given a portion of a list of School Psychologists developed by the Kansas Association of School Psychologist (KASP). That list included only School Psychologists who are members of KASP ***and*** who have indicated a willingness to administer an IEE. School Psychologists who are not members of KASP are not included on the list. Additionally, KASP divides the state of Kansas into 4 regions – Western, Central, Northeast, and Southeast. The list provided to the parent by the district/Cooperative included only the Central and Northeast Regions although the Western Region lies within 100 miles of the district. Not only is the list provided by the district/Cooperative restricted to School Psychologists (contrary to Letter to Petska) and therefore not "exhaustive" as Letter to Young has indicated it must be, but the list also fails in even providing an "exhaustive" listing of School Psychologists.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Specifically, a violation has been substantiated with regard to K.A.R. 91-40-12 which requires a district to without unnecessary delay either provide a parent requested IEE at district expense OR to initiate a due process hearing to show that the evaluation requested by the parent does not meet agency criteria.

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

1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with K.A.R. 91-40-12 by either providing a parent-requested IEE at

district expense without unnecessary delay OR by requesting a Due Process hearing to contest that request.

Within 5 calendar days of the receipt of this report, provide to this parent written notice that the district is either:

a. Agreeing to provide an IEE of the student at district expense using the evaluator previously identified by the parent, OR

b. Requesting a Due Process Hearing to contest the requested IEE.

2) Within 5 calendar days of the receipt of this report, provide to Special Education and Title Services a copy of the written notice to this parent referenced above in Item 1).

Further, USD #___ and _____ 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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), 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 SEPTEMBER 14, 2018

DATE OF REPORT: OCTOBER 13, 2018

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 was sent to the Department on September 11, 2018 and received by USD #___ on September 14, 2018. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on October 14, 2018.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on October 2, 2018. USD #___ made the following staff persons available as part of the investigation process:

- J, Director of Special Education
- B, Assistant Director of Special Education
- JY, School Psychologist
- BY, High School Principal

The Complaint Investigator also interviewed the parent by telephone on October 2, 2018 as part of the investigation process. In addition, the Complaint Investigator interviewed V S, K-12 Independent Study Program Representative by telephone on October 2, 2018.

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

- Email correspondence between Mr. Y and the parent dated June 26, 27, and 28, 2017
- Email correspondence from the parent to Mr. Y dated January 25, 2018
- Email correspondence between Mr. Y and the parent dated August 27, 2018

- Email from Mr. Y to the parent dated August 28, 2018
- Email from Mr. Y to the parent dated September 4, 2018
- Meeting Notes from the September 7, 2018 meeting written by Mr. J
- Historical Grades for the student for grades for the 2015-16, 2016-17, and 2017-18 school years
- Copy of the homeschooling proposal for the student dated May 19, 2015
- Clay Center Community Center High School Graduation Credits Worksheet for the student showing credits earned and credits needed
- USD #___ School Board Policy JBA – Part-time Attendance, Policy JBC – Enrollment, and Policy IIBGB – On-line Learning Opportunities
- Letter to the parent from Mr. J dated October 5, 2018
- Individualized Education Program (IEP) for the student dated April 17, 2018
- IEP for the student dated April 27, 2017
- Copy of the K-12 Independent Study Program summary report of courses and mastery levels for 2015-16 school year
- Copy of the K-12 Independent Study Program summary report of courses and mastery levels for 2016-17 school year
- Copy of the K-12 Independent Study Program summary report of courses and mastery levels for 2017-18 school year
- Copy of K-12 Independent Study Program Attendance Record of the student for October 3, 2018
- Letter written by Mr. J to the Complaint Investigator dated September 24, 2018
- Email correspondence dated October 2, 2018 from V S, Enrollment Consultant for K-12 Independent Study Program

Background Information

This investigation involves a 17 year-old young man who is eligible for special education services under the category of intellectual disability. He is currently enrolled part-time in the 12th grade at Clay Center Community High School (CCCH) in USD #___ during the 2018-19 school year. Records indicate the student also attended CCCH as a part-time student during the 2015-16 (freshman), 2016-17 (sophomore), and 2017-18 (junior) school years. The student is homeschooled by the parent for academic course work.

Issues

The complainant raised one issue which was investigated. It is noted the Individuals with Disabilities Education Act (IDEA) allows child complaint investigations to cover a 12 month period from the date of the complaint. While information outside the 12 month timeframe was considered during the investigation, the allegation in this complaint only covers the time period beginning September 14, 2017 through the present time.

> **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 IEP by not awarding credit for the online K-12 courses completed by the student.

Findings:

The parent reports that USD #___ refuses to accept the on-line academic course work completed by the student in the homebound setting for academic credit towards graduation requirements. The parent believes the plan for recognizing the homeschool coursework for credit was originally discussed at the IEP meeting held on May 19, 2015 and the team determined that academic course work would be provided by the parent through homebound instruction using a commercial on-line program with elective credits being earned at CCCH. The parent stated this plan was discussed at every IEP meeting and included in the IEPs for the student's freshman (2015-16), sophomore (2016-17), junior (2017-18) and senior (2018-19) year in high school. The parent indicated the school is now planning to provide the student with a certificate of attendance rather than a high school diploma because they refuse to accept his academic coursework for the past three school years as was required by the student's IEPs.

Documentation and interviews found there were two IEPs in effect for the student during the past 12 months. The first IEP in effect was developed on April 27, 2017 and the second IEP was developed on April 17, 2018. The parent was in attendance at both meetings.

Both IEPs show a projected graduation date of May 2019 and included the same post-secondary transition goals for employment, education/training, and independent living. Both IEPs included transition services for instruction noting that *"The student will be taking the majority of his classes at home through Commercial K-12 online learning for his academic requirements. He is in regular ed elective classes with para support."* Both IEPs included a course of study with a Transition Note stating that "*The student's mother plans to keep him home for his core academic classes through Commercial*

K-12 on-line. So much of the courses outlined above will not apply to him. They are outlined as a possibility should he return to our school full-time." *The a*nticipated services to be provided for both IEPs state that "*Regular education classes and services will be provided primarily through Commercial K-12 on-line / home."*

The parent reported and documentation showed that a home school proposal was discussed with USD #___ staff on May 19, 2015. This proposal includes a statement that "*The student will receive full credit based on the grading standards from K-12 and feedback for qualified professionals . . . specifically . . . Sylvan Learning Center. Unified School District ___ will accept these K-12 credits to earn his diploma."*

Interviews and documentation found that USD #___ has a school board policy for transferring credits. If the credits are from an accredited school, full credit will be given; if the credits are from a non-accredited school, the principal, after consultation with parents and guidance personnel shall determine grade placement.

Interviews and documentation show the student currently has been awarded 12.5 credits toward the 25 credits required for graduation. Of the credits awarded, 12 are from successfully completing the elective credits during the 2015-16, the 2016-17, and the 2017-18 school years. The 0.5 credit is a Health credit awarded through coursework at Sylvan Learning Center.

Mr. Y sent an email on June 26, 2017 requesting the parent obtain an official transcript from K-12 so that credit for the on-line classes the student had completed could be awarded. The parent replied via email on June 27, 2017 indicating that the student was enrolled in the private K-12 program not the public K-12 program. The parent explained that the private K-12 program did not issue transcripts because the parent had done the instruction with the student.

On January 25, 2018, the parent emailed Mr. Y and indicated that she had contacted K-12 "to see if they issued any sort of diploma and they said NO. We do not do the teaching you do. So my transcripts plus the numerous boxes in my basement is what constitutes his academics." The parent again noted that the student was enrolled in the independent study of K-12 not the K-12 free tuition program.

Mr. Y sent an email to the parent on August 28, 2018 stating "You are correct in the fact that I did say we would accept K-12 credits. The state will not allow me to issue a diploma without having a licensed / certified transcript . . . Please understand that I cannot issue a diploma without licensed transcripts."

Documentation and interviews found a meeting was held on September 7, 2018 with Mr.Y, Mr.J, the parent, and a representative from Sylvan Learning in attendance. At this meeting, USD #___ staff acknowledged the district would accept K-12 credits but indicated that they had not received any official transcript or grades from the actual K-12 system. Mr. Y reiterated that proper documentation was required in order to award credit and give a CCCHS diploma.

The parent reported that she provided USD #___ with copies of the student's attendance records as well as copies of the K-12 Independent Study Program summary reports of courses and mastery levels for 2015-16, 2016-17, and 2017-18 school years per the information provided by K-12 in January 2018.

Federal regulations, at 34 C.F.R. 300.320(b), require school districts to include postsecondary goals related to training, education, employment, and, where appropriate, independent living skills in the IEP of students who are age 16 or greater. The IEP is also required to include a description of the transition services, including a course of study, needed to assist the child in reaching those goals.

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. 34 C.F.R. 300.17 defines the term "free appropriate public education," in part, as providing special education and related services in conformity with the IEP.

It is important to note that the IDEA does not include any requirements or guidance associated with the awarding of credits toward graduation requirements by local educational agencies (school districts such as USD #___) or the state education agency (state departments of education such as the Kansas Department of Education).

In this case, it appears that the IEPs developed for the student during the past 12 months did include postsecondary goals related to training, education, employment, and independent living skills. The student's IEPs for this period also included a description of the transition services, including a course of study.

Documentation and interviews found the IEPs in effect during the past 12 months both included a statement that academic instruction was being provided by the parent through a commercial K-12 on-line program. USD #___ staff acknowledged that the district would accept K-12 credits towards the student's graduation credits with appropriate documentation meeting the state and school

board requirements. In fact, documentation shows USD #___ had previously accepted the 0.5 Health credit from coursework the student completed at Sylvan Learning Center.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to noncompliance with the requirement to implementing the student's IEP by not awarding credit for the online K-12 courses completed by the student is not substantiated.

It is noted that as part of the investigation, the Complaint Investigator spoke to V S, an enrollment consultant with K-12 and learned there are two separate K-12 on-line programs. One program is taught on-line via teachers through either a public or private school setting. Credits for these types of courses can be transcribed through the K-12 program.

The other program is the Independent Study Program which is taught in a home school setting by a "learning coach" who is typically the parent. The K-12 Independent Study Program provides the curriculum, structure, and documentation of attendance and mastery levels of completed courses. The parent is responsible for homeschooling and educating their child within state and school board requirements.

Ms.S, explained and provided written documentation showing that each course in the K-12 Independent Study Program consists of approximately 180 lessons with both on-line and off-line assignments. The program tracks attendance, completion of the course, and mastery level within the system. This information combined with a portfolio of student work is used to document completion of the course.

The Complaint Investigator shared this clarifying information with both the parent and Mr.J. Subsequently, USD #___ sent a letter to the parent dated October 5, 2018 detailing the specific documentation that would be required to award credit for the K-12 Independent Study Program coursework the student had completed. Per Ms.S's clarifying information, the letter indicated that the student's attendance records, course completion / mastery level, and portfolio of off-line student work would need to be provided for each course in order for credit to be awarded. Based upon this subsequent action, it appears that USD #___ continues to make a good faith effort to award credit for the student's on-line K-12 academic coursework.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Landon State Office Building, 900 SW Jackson Street, Suite 620,, Topeka Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to 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 24, 2018

DATE OF REPORT: OCTOBER 24, 2018

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 was sent to the Department on September 24, 2018. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on October 24, 2018.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on October 16, 2018. USD #___ made the following staff persons available as part of the investigation process:

- S, Director of Special Education
- JS, School Psychologist
- TE, High School Special Education Teacher

The Complaint Investigator also interviewed the parent by telephone on October 15, 2018 as part of the investigation process. The parent requested and granted permission for the Complaint Investigator to interview two additional persons who the parent believed had information to share about the allegations. CM, family friend and advocate, was interviewed on October 20, 2018. It is noted that Ms. CM had first-hand knowledge of the allegations as she attended the IEP meetings held for the student on August 23 and September 5, 2018. MZ, family friend and special educational professional, was interviewed on October 15, 2018. It is noted that Ms. MZ did not attend any of these IEP meetings for the student and did not have any first-hand knowledge related to the allegations.

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

- Individualized Education Program (IEP) for the student dated September 27, 2017
- Individualized Education Program (IEP) for the student dated September 5, 2018
- Email correspondence between Travis Rogers, Principal at _____ High School, and the parent dated August 21, 2018, regarding a request for an IEP team meeting for the student
- Copy of Ms.CM's handwritten notes from the August 23, 2018 IEP team meeting
- Email correspondence between Mr. Rogers, Mr.TE, and the parent dated August 27, 28, and 29, 2018 regarding scheduling an IEP team meeting for the student
- Notice of Meeting dated August 29, 2018 scheduling an IEP team meeting for September 5, 2018
- Copy of the parent's handwritten notes from the September 5, 2018 IEP team meeting
- Multidisciplinary Team Staffing Summary of the September 5, 2018 IEP team meeting written by Mr. TE
- Copy of Ms.CM's handwritten notes from the September 5, 2018 IEP team meeting
- Copy of the student's current grades for 9th grade dated September 4, 2018
- Progress Report on IEP Goals dated May 22, 2018.
- Excusal From Attendance at IEP Team Meetings of Required IEP Team Members dated September 5, 2018
- Copy of parent's handwritten record regarding the Communication Book for the dates of September 26, 27, and 28, 2018
- Prior Written Notice (PWN) for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 5, 2018
- Copies of pages from the Communication Book dated September 28, and October 1, 2, 9, and 10, 2018
- Copy of narrative response to the allegations written by USD #___
- Email correspondence between Dr. S. and Mark Ward, Attorney at the Kansas Department of Education, dated September 5 and 6, 2018

Background Information

This investigation involves a 14 year-old young man who is eligible for special education services under the category of other health impairment. He is enrolled in the 9th grade at _____ High School in USD #___ for the 2018-19 school year. Records indicate the student initially began receiving special education services at age three through early childhood special education. The student has attended USD #___ since kindergarten and has received special education services throughout his entire school career. The most recent evaluation of the student was completed on August 28, 2016 and concluded the student continued to have a disability as defined in the Individuals with Disabilities Education Act (IDEA) and to be in need of special education services.

Issues

The complainant raised four issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint includes September 24, 2017 through the present.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures for changing the student's placement during the 2018-19 school year.

Findings:

The parent reports she discussed the student's services and placement with USD #___ staff at the end of the student's 8th grade school year and then again during the summer. The parent indicated the district wanted to change the student's high school services and placement to a specialized functional skills program located in a school building other than _____ High School but that she did not agree with this change. The parent also reported the student was in a special education math class during 8th grade and the IEP called for the continuation of the special education math class during 9th grade; however, the school district scheduled the student in Algebra IA, a regular education math class, for 9th grade. The parent indicated that she did not agree with this change to the IEP and requested an "emergency" IEP meeting after the school year started on August 16, 2018 to discuss both the change in math services and the possible placement at a different school for the specialized functional skills program.

Interviews with both school staff and the parent found that the IEP team did meet and discuss several options for services and placement for 9th grade at an IEP meeting held in April, 2018. However, USD #___ staff reported that the parent was not provided with a Prior Written Notice (PWN) proposing any changes in services or placement following the April IEP team meeting.

Documentation and interviews noted the first day of the 2018-19 school year at USD #___ was August 16, 2018. The IEP in place at the beginning of the 2018-19 school year was developed on September 27, 2017 and was anticipated to be reviewed/revised no later than September 26, 2018. The September 27, 2017 IEP indicated the anticipated services to be provided during the 2018/19 school were "*150 minutes of pull out time in the special education classroom daily (50 minutes math, 50 minutes English, 50 minutes seminar/study hour) along with 100 minutes of support in the general education classroom daily (50 minutes science and 50 minutes social studies)."*

Documentation showed the student was enrolled in the following classes for the 2018-19 school year: English 9 (special education), PE (general education), Biology (general education with paraprofessional support), Woods (general education), Seminar (special education), Weightlifting (general education), Algebra IA (general education with paraprofessional support), and Study Skills (special education).

Documentation shows the parent initially requested an IEP meeting on August 21, 2018. As a result of this request, USD #___ reported it held an "*informal meeting*" of the IEP team on August 23, 2018, to discuss the student's transition to high school. USD #___ stated "*Placement and services to assist the student in making education progress was discussed. _____ Special Education Cooperative does have a functional academics program at a different location in a different community. The team as a whole discussed the benefits of the program. The parent made it clear at the meeting that she was not interested in this placement. No offer was made at this time, just a conversation."*

The following persons were in attendance at this meeting: Mr. JS, School Psychologist; Dr.S, Special Services Director; TE, Special Education Teacher; EB, Special Education Teacher; AF, Art Teacher; CM, family friend/advocate; and the parents of the student.

The parent made a second request for an IEP team meeting on August 27, 2018. Documentation and interviews noted the parent and USD #___ staff corresponded on several occasions and that an IEP team meeting was scheduled for September 5, 2018 to discuss changes in services and placement, develop a transition plan, and to conduct the annual IEP review.

The following persons were in attendance at this meeting: Travis Rogers, Principal; Mr.JS, School Psychologist; Dr.S, Special Services Director; TE, Special Teacher; EK, Science Teacher; Mr.EB, Special Education Teacher; JN, Math Teacher; ML, Industrial Arts Teacher; CM, family friend/advocate; and the parents of the student.

The IEP team discussed the parent's concerns with changing the math instruction to the general education setting. School staff reported this change in services was because the Algebra IA class had only seven students on the class roster, offered a slower pace, and there was no remedial or special education math class offered at the high school. School staff also reported a 50 minute per day class of study skills in the special education classroom was added to the student's schedule to assist with assignments and re-teaching concepts from the general education academic classes. In addition, 5 minutes of transition services on a consultative basis were added every nine weeks.

Documentation shows the parent was provided with a PWN dated September 5, 2018. The PWN described the proposed change in the student's services as going from a total of 150 minutes per day of special education pull out services to 130 minutes per day of special education pull out services. This changed the student's total specialized instruction by 20 minutes per day from a more restrictive environment to a less restrictive environment. The PWN noted that these proposed changes are not considered a material change of services or a substantial change of placement and that parent consent is not required to make these changes. The PWN states that any disagreement with the actions described in the PWN may be resolved by mutual agreement, through mediation, or through due process.

It is noted that the parent returned the PWN to USD #___ on September 17, 2018 refusing to consent for the proposed changes.

The USD #___ staff acknowledged that the change of services and change of placement described in the PWN dated September 5, 2018 was implemented beginning on the August 16, the first day of the 2018-19 school year.

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.

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. 72-988 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, it appears the student's IEP in effect at the beginning of the 2018-19 school year required 150 minutes per day of specialized instruction with 50 of those minutes designated for specialized instruction in math. However, the student was assigned to the general education Algebra IA with special education paraprofessional support and a special education study skills class was added to the student's schedule. This resulted in a total of 20 minutes less time spent in the special education pull out setting. This equates to a change of approximately 5% less time spent in the more restrictive special education setting. Parent consent was not required for this proposed action to take place as the change was not a material change in services or a substantial change of placement.

School staff acknowledge that the parent was not provided with a PWN for the changes in placement and services resulting from the schedule change at the beginning of the 2018-19 school year until after the IEP meeting held on September 5, 2018. Based on the foregoing, the allegation of a violation of special education laws and regulations related to following appropriate procedures for changing the student's placement during the 2018-19 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 appropriately respond to the parent request for a change of services at the September 5, 2018 IEP team meeting.

Findings:

The parent and Ms. CM reported and documentation shows multiple requests for additional services for the student were made at the September 5, 2018 IEP team meeting. These requests included having the math class taught in the special education setting as had previously been done during 7th and 8th grades, providing remedial math class, math tutoring, or an online math class. The parent also requested paraprofessional support for the student throughout the school day.

The findings in Issue One are incorporated herein by reference.

Interviews and IEP team meeting notes from all parties reflect that the IEP team discussed and considered all of these parent requests for additional services.

At the conclusion of the IEP team meeting, the parent was provided with a PWN describing options considered and why those options had been rejected. The PWN stated *"The option to change placement and provide core instruction in a specialized program was considered but rejected in order provide the student the opportunity to be successful in his regular setting. The option to provide the student a para throughout the school day was considered but rejected as not all content requires reading and math skills. The option to provide Math instruction in the Resource Room setting was considered but rejected because the general education setting offers a slower pace and small class size for the student."*

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.

In this case, it appears the parent requested the student receive math instruction in a special education setting and have paraprofessional support throughout the school day. These requests were discussed and considered at the IEP team meeting held on September 5, 2018. The parent was provided a PWN that contained a description of the actions refused by the agency and an explanation of why these services were refused. Based on the foregoing, the allegation of a violation of special education laws and regulations related to appropriately responding to the parent request for a change of services at the September 5, 2018 IEP team meeting is not substantiated.

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures and requirements to develop the September 5, 2018 IEP related to scheduling the meeting, the meeting participants, inclusion of parent input into the IEP, review and revision of the IEP goals and services, and regular education participation.

Findings:

The parent reported multiple concerns related to the IEP meetings held on August 23 and September 5, 2018. Each of these concerns will be addressed individually in the following findings for Issue Three. Note that findings in Issue One and Two are incorporated herein by reference for each concern noted below.

First, the parent believes that USD #___ failed to respond appropriately to her request for an "emergency" IEP meeting on August 21, 2018.

Documentation and interviews show that an "informal" meeting of the IEP team was held on August 23, 2018. The parent left this meeting because the general education math teacher was not in attendance at the meeting. The parent then requested another IEP team meeting on August 27, 2018. Documentation and interviews show the IEP team meeting was conducted on September 5, 2018, with the parent in attendance.

It is noted that IDEA does not include any guidance on "emergency" or "informal" IEP team meetings. Instead, federal regulations, at 34 C.F.R. 300.324 require the IEP Team to review and, as appropriate, revise the IEP to address (1) any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; (2) the results of any reevaluation; (3) information about the child provided to or by the parents; (4) the child's anticipated needs; or, (5) other matters. While some states have regulations that define a specific timeline for responding to a parent request to conduct an IEP team meeting, Kansas does not. Accordingly, in Kansas, the school district must respond to a parent's request for an IEP meeting within a reasonable time.

In this case, it appears the parent requested an IEP meeting on August 21, 2018 and USD #___ convened a meeting of the IEP team on August 23, 2018. This meeting ended and the parent requested another IEP team meeting on August 27, 2018. USD #___ again convened an IEP team meeting for the student on

September 5, 2018. There is nothing unreasonable with these district responses to the parent's requests for a meeting. Documentation and interviews show that both meetings included discussions about the student's anticipated needs during the 2018-19 school year. Based on the foregoing, the allegation of a violation of special education laws and regulations related to failing to respond to a parent request for an IEP team meeting in a timely manner is not substantiated.

Second, the parent believes the IEP team meeting did not include the appropriate team members to develop the student's IEP. Specifically, the parent alleges that no regular education teacher of the child was in attendance at the August 23, 2018 meeting of the IEP team. The parent also alleges the special education teacher left the September 5, 2018 IEP team meeting without following proper excusal procedures.

It is noted that the regular education teacher in attendance at the August 23, 2018 meeting of the IEP team was Ms. AF, an art teacher at the high school. Documentation and interviews found the student was not enrolled in an art class and the teacher was not a regular education teacher of the student.

It is noted that Mr. EB did leave the September 5, 2018 IEP meeting prior to its conclusion due to a dental appointment. Documentation and interviews noted that both Mr. EB and Mr. TE are special education teachers of the student at the high school during the 2018-19 school year. Mr. TE was present throughout the entire IEP meeting.

Federal regulations, at 34 C.F.R. 300.321, require public agencies to ensure that the IEP Team for each child with a disability includes: the parents of the child; not less than one regular education teacher of the child (if the child is or may be participating in the regular education environment); not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child; a representative of the public agency who is qualified to provide or supervise the provisions of specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency and able to commit the resources of the agency; and an individual who can interpret the instructional implications of evaluation results.

Federal regulations, at 34 C.F.R. 300.321(e), allow for a required IEP Team member to be excused from an IEP Team meeting in two specific circumstances

following appropriate procedures. A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if the parent, in writing, and the public agency consent to the excusal, and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

In this case it appears that the meeting of the IEP team on August 23, 2018 was convened with all of the required IEP team members except a regular education teacher of the student. The IEP team meeting on September 5, 2018 was convened with all of the required team members and was not affected by the early departure of one of the two special education teachers of the child in attendance at that meeting. Therefore there was no requirement to follow excusal procedures for Mr.EB. Based on the foregoing, the allegation of a failure to include all required members of the student's IEP team, specifically a regular education teacher of the student at the August 23, 2018 IEP team meeting is substantiated.

Third, the parent believes USD #___ has failed to revise the IEP goals because the student continues to work on the same goals year after year. Lastly, the parent believes her input was not considered into the development of the IEP including the special education services and regular education participation.

Documentation found that four goals were included in the September 27, 2017 IEP for the student as noted below:

1. To use algorithms correctly to answer problems over the four operations using whole, number, decimals, integers, and fractions using a calculator with 75% accuracy

2. To read books for a variety of purposes and improve his reading comprehension scores by taking at least 12 tests over books he read in his reading range and score 70% or higher

3. To effectively write a paragraph for a variety of audiences, purposes, and contexts with a good introduction, body and conclusion and supporting

details and using complete sentences (sentence fluency), correct subject-verb agreement, organization, and conventions 4 out of 5 times.

4. To research two careers from the suggested list from Career Cruising and one career choice of his own choosing and gather the information to add to his profile

The Progress Report of the student's IEP goals dated May 22, 2018 indicated the student had met goals one and four. The student had made progress on goal three but still struggled with paragraph form and punctuation. Progress was also made towards achieving goal two with the student having read 17 books; however, his average comprehension score was 54%.

Documentation found the September 5, 2018 IEP also contained four goals as noted below:

1. To use algorithms correctly to answer problems over the four operations using whole, number, decimals, integers, and fractions; and solve problems involving proportion and algebraic equations with 75% accuracy

2. To cite strong and thorough textual evidence to support an analysis of what the text says explicitly as well as inferences drawn from the text when given grade-level literary texts with at least 75% accuracy

3. To effectively write a 1-3 paragraph essay for a variety of audiences, purposes and contexts with a good introduction, body and conclusion and supporting details and using complete sentences (sentence fluency), good word choice (vocabulary) organization, and conventions with at least 75% accuracy

4. To complete the 9th grade requirements on the Career Cruising website

Meeting notes from all parties showed that the parent attended the August 23, 2018 IEP team meeting. During that meeting, the team discussed the functional skills program located in a school building other than _____ High School and that the parent was not in agreement with this option for educating the student. The parent also requested that the regular education math teacher participate in the IEP team meeting to discuss provision of math services. Documentation found that the functional skills program was no longer considered as an option for the student following this IEP team meeting and that another IEP meeting was convened with the regular education math teacher in attendance on September 5, 2018.

Meeting notes from all parties showed the parent attended the September 5, 2018 IEP team meeting. During this meeting, the parent requested additional services and supports as well as accommodations including the use of a Communication Book and prompting the student to increase engagement in the classroom. Documentation shows that both of these accommodations were included in the September 5, 2018 IEP as program modifications. In addition, the PWN dated September 5, 2018 documents the parent requests for additional services and supports as well as the reasons why these were refused and not included in the IEP.

Federal regulations, at 34 C.F.R. 300.322, require public agencies to take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate in the IEP team meeting.

Federal regulations, at 34 C.F.R. 300.324, require school districts to review the child's IEP periodically, but at lease annually, to determine whether the annual goals for the child are being achieved. Federal regulations, at 300.320, require the IEP to include a statement of measurable annual goals, including academic and functional goals designed to 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.

In this case, it appears that the parent attended both the August 23 and September 5, 2018 IEP team meetings and provided input into the discussions related to goals, services, placement, and program modifications. The parent's input for program modifications was included into the September 5, 2018 IEP while her input related to services and supports are documented as being considered but rejected in the PWN. A review of the two IEPs in effect during the past 12 months showed IEP goals for math, reading and writing that were revised to include progressively more advanced skill development e.g. the writing goal changed from writing a paragraph to writing a three paragraph essay. Based on the foregoing, the allegation of a violation of special education laws and regulations related to providing the parent with the opportunity to provide input and to review/revise the goals of the IEP annually are 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 the accommodation for an agenda book, during the 2018-19 school year.

Findings:

The parent reported an accommodation for the student to use an agenda book or communication book was added to the list of accommodations required to be provided to the student at the September 5, 2018 IEP team meeting. However, an agenda book or communication book was not provided or used by the student until the parent inquired about its implementation on September 26, 2018.

The findings of Issues One, Two, and Three are incorporated herein by reference.

The Program Modifications on the September 5, 2018 IEP includes the following specific accommodation for the student within the regular education building in a designated instructional room: "*A Communication Book for writing assignments and Communicating with teachers and parents*." The frequency is noted as "*The teacher or para will write assignments and test dates in the book and sign it. The parent will sign the book and return it the next day.*"

Interviews noted the parent asked about the Communication Book following an IEP team meeting held for the student's brother on September 26, 2018. School staff reported that the Communication Book was not provided because the parent had refused consent for the proposed change of services and placement described in the IEP developed on September 5, 2018.

Once the parent clarified that she wanted this accommodation to be implemented, a Communication Book was provided to the student beginning on September 28, 2018. Copies of the "Daily Home Work Assignment Sheets" show assignments were written for each class period with teacher initials and parent comments and signature for the dates of September 28, October 1, 2, 9, and 10, 2018.

Federal regulations, at 34 C.F.R. 300.320(a)(4), requires the IEP to include a statement of the program modifications that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children.

Federal regulations, at 34 C.F.R. 300.42, defines a supplementary aid as any aid, service, or other support provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

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.

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. 72-988 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.

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.

In this case, it appears that the Program Modifications on the September 5, 2018 IEP included a specific accommodation to provide a Communication Book for writing assignments and communicating with teachers and parents of student. This accommodation was to be provided on a daily basis.

The addition of the Communication Book to the student's IEP would be considered as a new supplementary aid or service that was proposed by the IEP team to be provided in the regular education classroom in order for the student to be educated and participate with other children with disabilities and nondisabled children. As such, this new supplementary aid or service would constitute a 100% material change in services from the September 27, 2017 IEP which included 100 minutes of paraprofessional support in the general education setting and would require PWN and parent consent prior to implantation.

Documentation found the PWN dated September 5, 2018, did not include any mention of the Communication Book.

USD #___ acknowledged this specific accommodation was not implemented until September 28, 2018. USD #___ reported the reason for the delay in implementation was because the parent had refused consent for the proposed changes in services and placement described in the PWN dated September 5, 2018. This would be the correct action to take when a parent refuses to consent to a proposed material change of services that requires parental consent; however, in this case, the PWN dated September 5, 2017 did not include any mention of the Communication Book.

Once the parent clarified her agreement with the Communication Book being provided to the student as a program modification and supplementary aid or service, USD #___ should have provided the parent with a PWN for this material change in services. Implementation of the Communication Book should only have started after consent was obtained from the parent.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the student's IEP, specifically the accommodation for providing the student with a Communication Book during the 2018-19 school year is substantiated because USD #___ did not follow appropriate PWN and consent procedures. The parent was never provided with PWN for the Communication Book and consent was not obtained prior to the implementation of this material change of services described in the IEP developed on September 5, 2018.

Corrective Action

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

- 34 C.F.R. 300.503 requires that prior written notice must be given to parents when the responsible public agency proposes to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. 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. 72-988 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.

USD #___ acknowledged the student's services and placement were changed on August 16, 2018, the first day of the 2018-19 school year, from those described in September 27, 2017 IEP to match the student's 9th grade schedule. The IEP team met on September 5, 2018 to discuss those changes in services and placement and USD #___ staff acknowledged the parent was not provided with a prior written notice for the changes in placement and services resulting from the schedule change on August 16, 2018 until after the IEP meeting held on September 5, 2018.

In addition, USD #___ failed to follow appropriate prior written notice and consent procedures related to the provision of the Communication Book. The addition of the Communication Book was determined necessary to enable the student to be educated with nondisabled children to the maximum extent appropriate. This resulted in a 100% change of supplementary aids or services. While interviews make it clear that both the parent and school staff agree the student required a Communication Book, documentation shows prior written notice was never provided to the parent for the material change of services and consent was never obtained to start the Communication Book.

- 34 C.F.R. 300.321 requires public agencies to ensure that the IEP Team for each child with a disability includes not less than one regular education teacher of the child (if the child is or may be participating in the regular education environment.

  The documentation and interviews found that the regular education art teacher was the only regular education teacher in attendance at the August 23, 2018 meeting of the IEP team members where services and placement needs of the student were discussed. It was noted that the student was not enrolled in an art class and the art teacher was not a regular education teacher of the student.

  Subsequently, the IEP team reconvened on September 5, 2018 with three regular education teachers of the student, specifically the math, biology, and industrial arts teachers. As the identified noncompliance has been

addressed for the student, no corrective action is ordered is required in this instance.

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. 300.503 by ensuring that prior written notice is given to parents when the responsible public agency proposes to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student.

   b) Comply with K.A.R. 91-40-27(a)(3) and K.S.A. 72-988 by ensuring that parent consent is obtained before making a material change in services and/or a substantial change in placement. A material change in services is defined as an increase or decrease of 25% or more of any one service and a substantial change of placement is defined as movement to a less or a more restrictive environment for more than 25% of student's day.

   c) Comply with 34 C.F.R. 300.321 by ensuring that the IEP Team for each child with a disability includes not less than one regular education teacher of the child (if the child is or may be participating in the regular education environment.)

2. No later than January 15, 2019, USD #___ will provide training to the special education staff who served on the students IEP team during the 2018-19 school year on the requirements of prior written notice and the participants required to conduct an IEP team meeting. 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.

3. No later than November 20, 2018, USD #___ shall provide the parent with appropriate prior written notice for the Communication Book and obtain consent from the parent. Copies of these documents shall be provided to Special Education and Title Services. Because the identified noncompliance in this situation is procedural and it is apparent that both the parent and USD #___ are in agreement with the provision of the Communication Book to provide educational benefit to the student,

discontinuing the Communication Book until consent is obtained is not ordered.

4. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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: 19FC___-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on September 24, 2018, 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 (SETS) team at the Kansas State Department of Education. Following the investigation, an Initial Report, addressing the allegations, was issued on October 24, 2018. That report concluded that there were violations of special education statues and regulations. Specifically, the report indicated the district was in violation of: (1) 34 C.F.R. 300.503 for a failure to provide the parent with a Prior Written Notice (PWN) when proposing a change to the student's IEP; (2) failure to comply with K.A.R. 91-40-27(a)(3) and K.S.A. 72-988 [now K.S.A. 72-3430] for failure to obtain parent consent before making a material change in services; and (3) 34 C.F.R. 300.321 for failure to include a regular education teacher of the child at an IEP meeting on August 23, 2018.

Thereafter, on November 5, 2018, the district filed an appeal of the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the initial complaint, the Initial Report, the district's notice of appeal, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The parent did not file a response to the appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final decision.

PRELIMINARY MATTERS

The Appeal Committee will limit 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.

DISCUSSION OF ISSUES ON APPEAL

The district has appealed two conclusions made by the investigator in the Initial Report.

First: Issue 3.

The Initial Report found that the student is in regular education environments [page 4 of Initial Report], and concluded that there was not a regular education teacher "of the child" at the Aug. 23, 2018, IEP meeting. On page 9 of the Initial Report the investigator found that the regular education teacher at that meeting was Ms. F, a regular education art teacher. However, the report also states that the student was not enrolled in Art and Ms. F was not a regular education teacher of the child [Page 10 of Initial Report].

In its appeal, the district does not dispute these findings. Instead the district argues that it was not required to provide a regular education teacher because the meeting was scheduled after regular school hours. The district offers no authority for the assertion that an IEP team is exempt from including a regular education teacher of the child at an IEP meeting that is held after school hours. The Appeal Committee notes that districts are not required to conduct IEP meetings outside of school hours [See Letter to Thomas, 108 LRP 65843, 51 IDELR 224 (OSEP 2008)]. However, if a district does conduct an IEP meeting after school hours, the meeting must comply with the legal requirements for conducting IEP meetings.

The pertinent regulation is 34 C.F.R. 300.321(a)(2). That regulation requires every IEP team to include "Not less than one regular education teacher of the child…," if the child is, or may be participating in a regular education environment. As indicated previously, the Initial Report states that this student was in a regular education environment for at least a portion of the day [See Initial Report, p. 4].

The conclusions of the investigator on this issue are sustained.

Second: Issue 4,

In this issue, the parent alleged that the school failed to provide what is variably described as an Agenda Book or Communication Book, which was added to the student's IEP at the September 5, 2018 IEP meeting. The parent refused to give consent for the proposed changes at the September 5 IEP meeting. Subsequently, the report states that the parent indicated she did approve of the Communication Book and the school initiated that service on September 28, 2018. The investigator found that the district was not able to provide the services added to the IEP at the September 5 meeting, including the Communication Book, until consent for those new services was obtained. Nevertheless, the investigator concluded that the allegation of a failure to implement the IEP was substantiated because the school had not added the Communication Book to the Prior Written Notice and Request for Consent. Had the school added the Communication Book to the Prior Written Notice and Request for Consent, the parent would have had an opportunity to give consent for the Communication Book beginning on September 5, 2018.

In its appeal, the district argues that it was not required to put the Communication Book into the Prior Written Notice or to obtain prior consent because the Communication Book is an accommodation and not a service.

Before addressing the issue under appeal, the Committee wants to compliment the parties for how they were able to work together to resolve the misunderstanding regarding the addition of the Communication Book to the IEP. When the misunderstanding was revealed, the parties recognized that it was something all agreed was needed by the student, and shortly thereafter the Communication Book was provided. That collaboration moved this issue from a possible denial of a free appropriate public education (FAPE) to a procedural matter.

The Committee now addresses the procedural issue being appealed by the district in Issue 4.

In its appeal, the district asserts that a prior written notice (PWN) is "provided to parents at the conclusion of the IEP meeting to offer FAPE to a student with a disability as defined in the IDEA. The PWN is specific to services being provided to the student to allow the student to make appropriate progress in the curriculum." The Committee agrees with this statement. However, the district's appeal then goes on to assert that FAPE involves only services, and not accommodations, such as the Communication Book. It is here that the Committee disagrees.

FAPE is not limited to special education and related services. There is a rich history of case law regarding 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, and to include challenging goals and objectives in the IEP. From this lengthy history of case law, it is evident that 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.

Accordingly, the Committee agrees with the conclusion of the investigator that the addition to the IEP of the Communication Book without Prior Written Notice was a procedural violation of the Individuals with Disabilities Education Act (IDEA).

It is unclear whether the district is appealing the investigator's conclusion that it was also in violation of Kansas regulation 91-40-27(a)(3). That regulation requires school districts to obtain prior consent for a material change in services. For the sake of clarity, the Committee is also going to sustain the investigator's conclusion that the district's failure to obtain parent consent before adding the Communication Book was also a procedural violation of law. Kansas regulations, at 91-40-1(mm), define a material change in services to mean "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 services specified on the IEP of an exceptional child."

The term "Supplementary Aids and Services" is defined in Kansas regulations, at 91-40-1(ttt), to mean "supports that are provided in regular education classes, other education-related settings, and extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children." These Supplementary Aids and Services are sometimes referred to as accommodations, although the term "accommodations" is not used in either federal or state regulations regarding special education. Because an accommodation, such as the Communication Book in this case, is also a Supplementary Aid, the addition of the Communication Book to the IEP constitutes a 100% change in that Supplementary Aid, and requires parent consent under state law.

The Committee also notes that regulations regarding consent require that the parent be fully informed of all information relevant to the activity for which consent is sought [91-40-1(l)(1)]. That is another reason that the Committee concludes that a Prior Written Notice must be provided whenever a school district is requesting parent consent for a special education action. As indicated previously, the Committee agrees with the conclusion in the Initial Report that the addition of the Communication Book to the IEP required parent consent, and the failure of the district to obtain parent consent was a procedural violation of law.

The conclusions of the investigator on this issue are sustained.

CONCLUSION

All findings and conclusions in the original report are sustained.

In addition, the Committee notes the statement in the last paragraph of the _____ Special Education Cooperative's appeal, stating: "Typically, accommodations that are provided in the school setting are not included as a service on the PWN." The Committee has considered this additional information, provided by the Cooperative, and has concluded that a revision of corrective action No. 2 is necessary. Therefore, Corrective Action No. 2 is amended as follows:

2. No later than January 31, 2019, the _____ Special Education Cooperative shall provide training to all special education staff members who served on IEP teams anywhere in the Cooperative during the 2018-2019 school year on the requirements of: (a) providing prior written notice before making any change to an IEP, specifically including any change related to Supplementary Aids and Services; (b) obtaining consent before making a material change in services, specifically including material changes involving Supplementary Aids and Services [accommodations]; and (c) participants in IEP meetings. This training shall be provided by a person approved, in advance, by Special Education and Title Services (SETS). The Cooperative shall document who provided the training, the content of the training, the names of those who participated in the training, and send that documentation to SETS.

This is the final decision on this matter, there is no further appeal. This Final Report is issued this 20th day of November, 2018.

APPEAL COMMITTEE:

_____
Kerry Haag

_____
Melissa Valenza

_____
Dean Zajic

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON NOVEMBER 15, 2018

DATE OF REPORT: DECEMBER 15, 2018

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 was sent to the Department on November 15, 2018. The Kansas Department of Education allows for a 30 day time line to investigate the child complaint which ends on December 15, 2018.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on December 6, 2018. USD #___ made the following staff persons available as part of the investigation process:

- C, Special Education Director
- D., Special Education Coordinator
- AC, School Psychologist
- JH, Special Education Teacher

The Complaint Investigator also interviewed the parent by telephone on December 6, 2018 as part of the investigation process.

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

- Individualized Education Program (IEP) from USD #497 dated January 12, 2016
- Evaluation Report from USD #497 dated November 30, 2017
- IEP from USD #497 dated January 9, 2018
- Child Complaint Investigation Report #18FC497-002 dated March 6, 2018
- Online Registration Summary for USD #___ dated July 31, 2018
- Student Schedule for 2018-19 school year

- Email correspondence between the parent and Mr. AC dated August 24, 2017
- IEP Team Meeting notes dated September 6, 2018
- IEP from USD #___ dated October 18, 2018
- IEP Team Meeting notes dated October 18, 2018
- Prior Written Notice (PWN) for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated October 18, 2018
- Email correspondence between the parent, Ms. JH, and Mr. AC dated November 5, 6, 7, and 8, 2018
- Email correspondence between the parent and Ms. Dilday dated November 8 and 9, 2018
- Records Request action record from USD # ___ dated November 20, 2018
- Response to Allegations written by C. dated December 4, 2018

Background Information

This investigation involves a 16 year old young man who was enrolled in the 10th grade at S High School in USD #___ at the beginning of the 2018-19 school year.

The student was initially evaluated and found eligible for special education and related services at the end of 1st grade. He was homeschooled for 2nd and 3rd grades. He attended 4th grade in USD #___ and USD #497. The triennial evaluation conducted at the end of 4th grade by USD #497 determined the student met the eligibility criteria to be identified as Other Health Impaired (OHI). The Evaluation Report documented multiple medical diagnoses for the student including Attention Deficit Hyperactivity Disorder (ADHD), Conduct Disorder, Autism Spectrum Disorder, and Specialized Learning Disorder. He attended 5th grade in USD #497 and received specialized instruction in the elementary therapeutic classroom.

He continued to be enrolled in USD #497 at South Middle School during 6th and 7th grades where he attended one elective and one academic class in the general education setting with special education support. For the remainder of the school day, including all structured and unstructured times, he received specialized instruction, related services, and special education support. The student was placed in the Douglas County Juvenile Detention Center (DCJDC) on April 18,

2016, where he received special education services for the end of 7th grade and all of 8th grade.

In June 2017, the student was placed in state custody and, in July 2017, he was moved to Parsons State Hospital. The student enrolled in USD #503 at the Project Alternative/Parsons High School at the beginning of 9th grade. However, he was transferred to the DCJDC in USD #497 in September 2017 where he attended the remainder of the 9th grade with special education services provided at DCJDC.

In July 2018, the student was placed at Avery's Village and he was enrolled as a 10th grade student in USD #___ at the beginning of the 2018-19 school year. On November 9, 2018, the student was transferred out of USD #___ to USD #512 due to a new foster care placement.

It is noted that although the student is in state custody, the parent continues to serve as the student's educational decision maker under the definition of "*parent*" in the IDEA. Federal regulation, at C.F.R. 300.20, allows for multiple parties to serve in the role of "*parent*" for special education purposes including the natural parent of a child or a guardian (but not the State if the child is a ward of the state).

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint includes only the dates the student was enrolled in USD #___ during the 2018-19 school year.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to follow appropriate transfer procedures for the student upon his enrollment during the 2018-19 school year.

Findings:

The parent believes USD #___ failed to follow the appropriate procedures for implementing the student's IEP when he transferred into the district at the beginning of the 2018-19 school year. The parent reports that she informed the

school district staff on August 13 and again on August 24, 2018 about the student's IEP but that services were not provided until early September 2018.

Documentation shows the student was enrolled using the online enrollment process for USD #___ on July 31, 2018 by a staff person at Avery's Village. The enrollment form identifies the student as having an IEP and lists the previous school as the DCJDC in USD #497.

School staff reported the process for online enrollment is coordinated by the registrar at each school building. Once an online enrollment is received, records are requested from the previous school district. If the enrollment indicates the student has an IEP, the registrar should alert the building's special education coordinator. If records are not received in a timely manner, the registrar will enlist the assistance of the school psychologist in obtaining the records.

Documentation and interviews found school staff at S. High School were unaware the student had an IEP when school started on August 13, 2018. For this reason, the initial class schedule at S. High School shows the student was placed in all general education classes.

Mr. AC reported that the parent came to school and personally visited with him on August 13, 2018 but she did not disclose the name of the student when talking about an IEP. The parent acknowledges that she did not disclose the student's name during her discussion with Mr. AC.

The parent emailed Mr. AC on August 24, 2018 asking if the district had a copy of the student's IEP. Mr. AC emailed back that no special education records had been received. Mr. AC then made a request for special education records from USD #497. At the end of the day, the parent brought a copy of the IEP dated January 9, 2018 to the school and personally gave it to Mr. AC.

The January 9, 2018 IEP calls for 120 minutes of direct special education services for math, reading/writing, and behavior. The student will also receive paraprofessional support in the general education classes for 120 minutes per day to assist in keeping the student on task, to provide extra academic support in the classroom, and to provide accommodations and modifications. It is noted that the service delivery may change depending upon the school the student attends upon his release from juvenile detention.

The parent shared she was concerned about the student's current placement in general education and asked to be included in the IEP process. However, she did not want the student placed in an alternative school setting and suggested that the IEP from 7th grade, the most recent IEP which was implemented in the public school setting, be considered for determining special education support for the student. Mr. AC indicated the school team would review the IEP, request records, and get back to her.

On August 27, Mr. AC alerted Ms. D and Ms. JH of the student's IEP and a copy of the most recent IEP which was implemented in the public school setting was requested from USD #497. The Evaluation Report dated November 30, 2017 was received on August 28, 2018. On August 29, 2018, a copy of the January 12, 2016 IEP was received.

The January 12, 2016 IEP requires "*core instruction in the resource setting in the areas of math, reading, social studies, and science for 172 minutes per day four days every week and 140 minutes one day every week. He will also have guided studies in the resource setting for 43 minutes two days every week and 35 minutes one day every two weeks. He will have advisory in the resource setting 23 minutes a day four days per week. He receives special education support in general education PE for 43 minutes two days every week and 35 minutes one day every two weeks. He will receive special education support in an elective class for 43 minutes 4 days and 35 minutes one day a week. He will receive special education support in the general education ELA class for 86 minutes a day, four days a week and 70 minutes a day one day a week. He will receive attendant care for 45 minutes five days every week for bus, breakfast, and lunch. He will also receive special education support in the general education setting for Club Wednesday for 20 minutes for one day every two weeks. He will receive direct individual social work services 30 minutes one time a week."*

An IEP Team Meeting was held on September 5, 2018 with the parent in attendance. IEP Team Meeting notes indicate the district "*did not have his IEP paperwork or knowledge of the IEP upon his enrollment."* The team reviewed the January 12, 2016 IEP and the November 30, 2017 Evaluation Report from USD #497. The team decided to adopt the IEP from USD #497 and implement the IEP as written. The student's schedule was changed to have the special education services provided in a self-contained program for students with social, emotional, and behavioral challenges at S. High School. The IEP Team agreed to meet again in approximately four weeks to review and revise the IEP.

An IEP Team Meeting was held on October 18, 2018 to review present levels of academic achievement and functional performance, develop goals, accommodations and modifications, and determine services and placement. At the end of the IEP Team Meeting, the parent gave consent on the PWN for the student to "*continue to be served in a more restrictive setting for students with social / emotional / behavioral concerns. He will receive special education services in the special education setting for 300 minutes 2 days per week, 390 minutes 2 days per week, 270 minutes 1 day every other week, and 225 minutes 1 day every other week."*

Federal regulations, at 34 C.F.R. 300.323(e), require school districts to provide a free appropriate public education (FAPE) to children with IEPs who transfer 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 school district, until the new school district either 1) adopts the child's IEP from the previous school district or 2) develops, adopts and implements a new IEP.

In this case, the district does have a procedure in place to identify when a new student with an IEP is enrolled in the district. However, it appears the procedure was not followed for this student's enrollment. The student was enrolled using the online enrollment process for USD #___ on July 31, 2018 and was identified as a student with an IEP on the enrollment form. However, school staff at S. High School reported and documentation shows they were unaware of the student's IEP until August 24, 2018, and that no comparable services were provided to the student between August 13 and August 24, 2018.

It is noted that once the school staff were made aware of the student's IEP, special education records were requested, received, and reviewed in a timely manner. But again, comparable services were not determined in consultation with the parent and the student remained in the general education setting with no special education services even after the school staff became aware of the student's IEP on August 24, 2018.

An IEP Team Meeting was held on September 5, 2018 with the parent in attendance. The IEP Team agreed to adopt the January 12, 2016 IEP which called for a self-contained special education placement, special education support throughout the entire school day, special education support in two general education classes, and individual direct social work services. However, documentation and interviews found USD #___ only provided the self-contained

special education services in a program for students with social, emotional, and behavioral challenges at S. High School.

The IEP Team met again on October 18, 2018 to develop a new IEP for the student and provided the parent with prior written notice and obtained written consent from the parent for the proposed services and placement in order to implement the new IEP.

Based upon the foregoing, noncompliance with this requirement is substantiated.

ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures to change the eligibility category of the student from Other Health Impaired to Emotional Disturbance during the 2018-19 school year.

Findings:

The parent reports that the most recent evaluation of the student occurred on February 26, 2018 in USD #497. The determination at that meeting was that the student's exceptionality continued to be Other Health Impaired (OHI) as documented in Issue Four of the Child Complaint Investigation Report #18FC497-002. The parent believes USD #___ unilaterally changed the student's exceptionality to Emotional Disturbance (ED) when he transferred into the district at the beginning of the 2018-19 school year.

The findings of Issue One are incorporated herein by reference.

Documentation and interview found that a reevaluation was started at the beginning of the 2017-18 school year when the student enrolled in USD #503 at the Project Alternative/Parsons High School at the beginning of 9th grade. Consent was obtained and multiple tests were administered by USD #503 before the student was transferred to the DCJDC in USD #497 on September 18, 2017.

USD #497 completed the reevaluation on November 30, 2017. The USD #497 Evaluation Report dated November 30, 2017 documents the student was determined to be eligible for special education and related services under the exceptionality category of ED.

The Child Complaint Investigation Report #18FC497-002 states "*At the February 26, 2018 meeting, the team considered additional information provided by the parent and the student's therapist. That information was added to the evaluation report. The team also discussed whether or not the student should be determined eligible for special education services under the exceptionality category of Autism. The team determined that there was not a preponderance of evidence to support an Autism designation but did decide to maintain the student's current exceptionality designation of Other Health Impaired."*

Documentation and interview show USD #___ received the Evaluation Report dated November 30, 2017 from USD #497 on August 27, 2018. That Evaluation Report along with the January 12, 2016 IEP were reviewed at the IEP Team Meetings held on September 5 and October 18, 2018.

The parent sent an email to Ms. JH and Ms. D. on November 5, 2018 questioning "*how/why we're talking about ED matters moving forward when his exceptionality is OHI?"*

Mr. AC responded to the parent's question in an email dated November 6, 2018 which explained "*the student qualifies for special education under the exceptionality of an Emotional Disturbance. His eligibility was changed to ED from OHI in an evaluation that took place in Lawrence at the JDC (juvenile detention center) on 11/30/17. . . his eligibility and most recent data came from the evaluation in Lawrence."*

The parent then shared information regarding the February 26, 2018 eligibility determination made by USD #497. Mr. AC responded by email on November 7, 2018 stating "*The IEP we received from South Middle School dated 1/2/2016 states that his exceptionality was OHI. The Evaluation we received from Lawrence JDC dated 11/30/2017 stated that his exceptionality was ED. I have sent a records request to Lawrence to receive records regarding the proceedings that took place on 02/26/2018 to overturn the exceptionality label back to OHI, as we do not have any record of that."*

The parent responded in an email dated November 8, 2018 referencing the Child Complaint Investigation Report #18FC497-002 and attaching a copy of the report. The parent explained "*So here is the evidence that regardless of whether it was an I.E.P. from south of JDC (or what the eval from 11-30-18 states), when you got that I.E.P. . . . my child's exceptionality remains O.H.I, it was never changed (until he got to your school)."*

On that same date, Ms. D. responded to the parent via email. She explained that the copy of the investigation report was the first documentation received by USD #___ referencing the results of the February 26, 2018 proceedings. She indicated a review would take place and a decision made regarding the student's eligibility category once USD #497 provided copies of the records from February 26, 2018.

The parent responded via email on that same date to Ms. D. stating "So let me get this straight, now that you have the paperwork you need (complaint findings), you are going back even further to request unnecessary documentation to address my concerns?? My concerns that _____ changed by son's exceptionality under my nose and now you have your proof (complaint) . . . you are requesting even more documentation . . . There is only one word for this – unjustified . . . As this is not about what is in the best interest of my son, but the SPED agenda that is plaguing boys of my son's cultural background all over the nation."

Interviews with school staff revealed that despite two special education records requests, USD #497 did not provide any documentation or records reflecting the decisions made at the eligibility meeting held on February 26, 2018. However, based on the information contained in the Child Complaint Investigation Report #18FC497-002 provided by the parent, USD #___ changed the student's exceptionality to OHI for federal reporting in the district's student information system on November 9, 2018.

Federal regulations, at 300.303(a), require school districts to ensure a reevaluation of each child with a disability is conducted if the child's parent requests a reevaluation or if the school district determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation. Federal regulations, at 300.306(a), require that a group of qualified professionals and the parent of the child must determine whether the child is a child with a disability and the educational needs of the child at the conclusion of the reevaluation. The public agency must provide a copy of the evaluation report which documents the determination of eligibility at no cost to the parent.

In this case, there is nothing to suggest that a reevaluation of the student was conducted by USD #___. Following appropriate transfer procedures, USD #___ requested special education records from the previous school district, USD #497. The records provided to USD #___ by USD #497 included the Evaluation Report dated November 30, 2017. The information contained in the Evaluation Report, including the exceptionality category of ED, was appropriately reviewed at the

IEP Team Meeting held on September 5 and October 18, 2018. Once the parent expressed concerns regarding the ED eligibility category designation and referencing an eligibility determination made on February 26, 2018, USD #___ appropriately requested additional documentation regarding this meeting. And, once USD #___ became aware of the information contained in the Child Complaint Investigation Report #18FC497-002 regarding the February 26, 2018 meeting, the student's exceptionality was changed to OHI for federal reporting in the district's student information system on November 9, 2018.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to failing to follow appropriate procedures to change the eligibility category of the student from Other Health Impaired to Emotional Disturbance during the 2018-19 school year is not substantiated.

It appears that USD #497 did not provide USD #___ with the most recent reevaluation report upon the student's transfer. It is noted that the parent may want to contact USD #497 to obtain a copy of the Evaluation Report dated February 26, 2018 that documents the student's exceptionality as OHI for her records to avoid in future confusion.

Corrective Action

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

- Federal regulations, at 34 C.F.R. 300.323(e), require school districts to provide a free appropriate public education (FAPE) to children with IEPs who transfer 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 school district, until the new school district either 1) adopts the child's IEP from the previous school district or 2) develops, adopts and implements a new IEP.

  The findings of this investigation show USD #___ failed to provide FAPE to the student between August 13 and August 24, 2018 due to a failure to follow the district procedure to identify when a new student with an IEP is enrolled in the district. Once USD #___ became aware that the student had an IEP on August 24, 2018, it again failed to provide FAPE to the

student by not determining comparable services in consultation with the parent and implementing those services. In addition, USD #___ adopted the January 12, 2016 IEP as written but did not provide the direct individual social work services or support in the general education classes as required by that IEP.

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. 300.323(e), by ensuring that appropriate transfer procedures are followed for students who have IEPs and enroll in USD #___.

2. Please note that no compensatory services for the student are being ordered because the student is no longer a student enrolled in USD #___.

3. No later than February 15, 2019, USD #___ will provide training to the special education staff who served on the students IEP team during the 2018-19 school year on the requirements related to provision of FAPE when a student with an IEP transfers into the district focusing on the provision of comparable services and the adoption of the IEP from the previous school. 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.

4. No later than March 15, 2019, USD #___ shall convene a team of administrators, building registrars, special education coordinators, and school psychologists to review and revise, as appropriate, the district's procedures and practices related to identifying students with IEPs who transfer into the district. This team shall develop a plan to inform and train appropriate staff on these procedures prior to the beginning of the 2019-20 school year. USD #___ shall provide copies of team meeting notes, a copy of the procedures, and a copy of the plan for informing and training appropriate staff to Special Education and Title Services.

5. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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 SERVICES

REPORT OF COMPLAINT
FILED AGAINST
PIPER UNIFIED SCHOOL DISTRICT #___
ON FEBRUARY 26, 2019

DATE OF REPORT: APRIL 1, 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. Mrs. _____ has requested that the investigator include Mr. _____ as a complainant in the reporting of this investigation. Therefore, Mr. and Mrs. _____ will be referred to as "the parents" in this report.

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with MC, Director of the _____ Comprehensive Special Education Cooperative on March 5, 19, and 29, 2019. On March 11, 18, and 21, 2019, the investigator spoke by telephone with the student's mother. On March 21, 2019, the investigator spoke by telephone with the president of an agency providing substitute nursing services for the student.

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

- Revised Draft IEP for this student dated April 19, 2017
- IEP for this student dated March 30, 2018
- IEP for this student dated September 26, 2018
- Meeting Summary dated September 26, 2018
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 26, 2018
- Meeting Summary dated October 3, 2018
- Meeting Summary dated October 23, 2018
- IEP amendment for this student dated February 5, 2019
- Screenshots of Health Care Plan portions of IEPs for the student provided by the parents
- Nursing Notes dated February 6 and 7, 2019
- Written statements from classroom staff and substitutes regarding G-tube flushing on March 6, 2019
- Email dated March 8, 2019 regarding G-tube flushing

- Emails from the parent to administrators dated March 7-8, 2019
- Online district calendar

Background Information

This investigation involves an 18-year old girl who is enrolled in the 12th grade in her local high school. The student has been diagnosed with Epilepsy, Cerebral Palsy, Autism, Hydrocephalus, Failure to Thrive, Methylenetetrahydrofolate reductase (MTHFR), Dystonia, PTSD, and Gastric Reflux as well as retinopathy of prematurity, strabismus, and high myopia.

A Behavior Intervention Plan is included in the student's IEP. A Health Care Plan is also in place for the student. There is a potential for injury related to uncontrolled movements and seizure activity. The student is fed through a G-tube, and there is potential for aspiration which must be monitored closely.

Issues

The parents initially submitted three Formal Complaint Request Forms. Those forms were received by KSDE on February 26, 2019. The parents subsequently submitted an additional complaint dated March 9, 2019. With the consent of the parents and the district, the investigation of the concerns specified in all four of these complaints is summarized in this report.

In their complaint, the parents describe several incidents which they assert represent violations of laws and regulations related to IDEA (the Individuals with Disabilities Education Act) and Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination based upon disability. This investigator does not have jurisdiction to consider a potential violation of Section 504 and therefore investigated only those alleged violations associated with special education laws and regulations. If the parents wish to pursue a complaint alleging a violation of Section 504, they may contact the Kansas City Branch of the Office of Civil Rights (OCR) at 816-268-0550.

Allegations Related to the Implementation of the Student's IEP

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, and 34 C.F.R. 300.17 defines FAPE, in part, as special education and related services provided in conformity with an IEP. Eleven of the issues raised by the parents allege violations associated with the implementation of the student's IEP.

Concern #1: The student has not been provided with the level of CBI (Community Based Instruction) specified in her IEP.

Parents' Position

The parents report that CBI opportunities have been scheduled on Mondays during the 2018-19 school year. The parents assert the student has not been afforded CBI opportunities on many of the 25 Mondays between August 14, 2018 and February 4, 2019. According to the parents, the first CBI trip was not scheduled until August 27, 2018, and that first trip was cancelled.

The parents additionally contend that the student's mother was told by the school nurse that on February 4, 2019 the student did not go to Target with other students from her class for CBI instruction because the lift bus required to transport her was not available. According to the parent, she was told by the nurse that the student and her 1:1 paraeducator remained at the school while the other students traveled to Target in a school van.

District's Position

It is the position of the district that the student has been included in every scheduled CBI trip unless the parents have not given permission for her to do so.

The district asserts that neither the student nor any of her classmates went on a CBI trip on February 4, 2019. According to the district, the trip planned for that day was cancelled due to weather conditions. One of the student's classmates did leave the building that day, but the district states that student went to a job site, not a CBI trip.

Investigative Findings

According to the student's March 30, 2018 IEP, she was to be provided with 100 minutes per week of both special education and nursing services in a community setting between March 30 and May 17, 2018. From August 14 to September 25, 2018, the student was to continue to receive 100 minutes per week of both special education and nursing services in the community setting.

Review and revision of the IEP for the student dated September 26, 2018 took place over 3 meetings in September and October 2018. That IEP, when finalized, specified that the student was to receive 100 minutes of both special education and nursing services from September 26, 2018 to May 16, 2019 and from August 15 to September 25, 2019. A Prior Written Notice form dated September 26, 2018 and signed by the parent on November 16, 2018 showed that the student was to receive "Special Education services in the community based setting for 100 minutes 1 time a week." Additionally, the Prior Written Notice form states the following:

> "Nursing services everyday (sic) all day with all support providers in the special education classroom, CBI trips, field trips, and general education

classroom…Personal Paraprofessional all day everyday (sic) during the school days, CBI trips and general education classroom assigned only to (the student)."

In conversations with the investigator during the course of this investigation, the student's mother confirmed that CBI was to occur once a week.

Parents of students in the classroom typically sign an annual permission slip allowing their children to participate in CBI activities. However, the parents of this student have declined to sign a blanket permission and instead have opted – for routine Monday CBI outings to Target – to either give or decline permission verbally when dropping the student off for school on Monday mornings. For special CBI outings, such as trips to Cabela's or to parties at another school, written permission slips are sent home and these parents give written consent if they want the student to participate.

According to the district, CBI trips are typically conducted on Mondays from 9:30 to 11:00 AM (90 minutes). A 1:1 nurse and 1:1 paraeducator have accompanied the student on each trip.

Of the 25 Mondays referenced by the parents, school was not in session – either because of holidays or snow days – for 5 days. On 2 occasions CBI was not provided because of weather concerns. The student was unavailable on 2 days because of absence. On 3 days, parents declined permission for the student to participate in CBI because of recent seizure activity. The parents declined to give permission for the student to participate in the scheduled CBI activity for an additional 3 days.

The first CBI opportunity of the 2018-19 school year was provided for the student on August 21, 2018. The second CBI trip was conducted on August 28, 2018.

According to information provided by the district, no CBI opportunities were provided to the student during the following weeks:

- August 13, 2018 (School started on August 14, 2018.)
- September 3, 2018 (There was no school on Monday because of Labor Day holiday.)
- October 29, 2018 (The student was absent.)
- November 5, 2018 (Parents declined permission for the student to participate in scheduled Monday CBI because there was a substitute 1:1 nurse.)
- November 12, 2018 (Parents declined permission for the student to participate in scheduled Monday CBI due to cold weather.)
- November 26, 2018 (Monday, November 26, 2018 was a snow day for the district.)

- December 10, 2018 (Parents declined permission for the student to participate in scheduled Monday CBI because of a seizure over the weekend.)
- January 7, 2019 (Parents declined permission for the student to participate in scheduled Monday CBI because of a seizure over the weekend.)
- January 14, 2019 (Parents declined permission for the student to participate in scheduled Monday CBI.)
- January 21, 2019 (There was no school on Monday because of Martin Luther King holiday. The trip was to have been rescheduled for January 23rd but the district had a snow day on that date.)
- January 28, 2019
- February 4, 2019 (CBI was cancelled due to weather.)
- February 11, 2019 (The student was absent.)
- February 25, 2019 (CBI was cancelled due to weather; rescheduled for February 27th, but the district had a snow day on that date.)

The district is not required to provide services – including CBI – when school is not in session as was the case over Winter Break and or when school is cancelled due to weather (as was the case on November 26, 2018). Further, the district is not required to make up missed services resulting from the absence of the student (October 29, 2018 and February 11, 2019). The district is not required to make up services in situations wherein CBI opportunities were scheduled and available but the parents declined permission for the student to participate.

For 21 of the 27 weeks between August 14, 2018 and February 25, 2019 when school was in session for two or more days, the district scheduled ***one*** CBI opportunity for the student (78%). During 2 of those 27 weeks, ***two*** CBI opportunities were scheduled for the student. One scheduled CBI trip was cancelled by the district because of weather concerns although school was in session.

The student participated in only 15 of the scheduled CBI opportunities. Eight scheduled opportunities were missed either because the student was absent or because the parents did not grant permission for the student to participate.

The district failed to provide the CBI opportunities specified in the student's IEP during 6 of the 27 weeks that school was in session for two or more days per week between August 14, 2018 and February 25, 2019. Additionally, the district has provided CBI opportunities which average 90 minutes in length even though the student's March 30, 2018 and September 26, 2018 IEPs call for the student to receive 100 minutes per week of services in a community setting. Under the circumstances described above, a violation of special education laws and regulations is substantiated on this issue.

<u>Concern #2</u>: **The parents assert that on February 4, 2019, the volume on the student's iPad was turned down rendering the device ineffective as a communication tool for the student.**

<u>Parents' Position</u>

According to the parents, they routinely check to see how frequently the student uses her iPad for communication and have determined that she averages 1.5 hours of use during a school day. The parents state that on February 4, 2019 the student used the iPad for 3 hours and 22 minutes and the machine's battery capacity had dropped to 30% even though the level of use reported by school staff was lower than average. It is the position of the parents that the volume on the iPad was muted which led the student to use the iPad to make repeated efforts to communicate which were not heard by staff. The parents assert that the student would be very frustrated because her device was not working correctly to allow her to communicate.

<u>District's Position</u>

The district stipulates that the volume on the student's iPad was turned down as reported by the parent. According to the district, the volume level had not intentionally been reduced by school staff.

<u>Investigative Findings</u>

The "Modifications/Accommodations/Supplementary Aids" section of the student's September 26, 2018 IEP contains the following statement:

> "Personal IPAD for a communication device to be provided throughout her entire school day for the length of the entire school day, activity, community based instruction and field trips."

The iPad was available to the student. There is no way to know how the volume level came to be reduced. While the sound was muted, this situation was, in the opinion of this investigator, a case of "human error" not an intentional act on the part of school staff.

The investigator does not question that the student could well have been very frustrated by her inability to make the device communicate her thoughts. However, this seems to be a unique, one-time situation that did not result in a loss of FAPE (free appropriate public education) to the student. There is no record to show that the student's frustration resulted in behavioral problems on the day the volume was muted or in any overall diminution of skills. The device was fully operational on the following school day. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Concern #3: Neither the clipboard which contains the student's behavior sheet, tally sheet, and the nurse's sheet nor her communication book are consistently kept in the pocket of her wheelchair.

Parents' Position

The parents assert that on numerous occasions when the student's mother has been in the classroom, on field trips, or on CBI trips, the student's clipboard has not been in the back of her wheelchair.

District's Position

It is the position of the district that the clipboard is kept in the pocket of the student's wheelchair unless a staff member is writing on one of the sheets attached to the clipboard.

Investigative Findings

The "Modifications/Accommodations/Supplementary Aids" section of the student's September 26, 2018 IEP contains the following statements:

- "Daily tally sheet regarding iPad use for communication by teacher, 1 on 1 para, and Related Services Providers with initials by whoever is making tally mark in the backpocket (sic) of wheelchair"
- "Daily nursing notes on clipboard in the back pocket of wheelchair"
- "Daily communication book in the back pocket of wheelchair…summarizing each activity throughout the day until the activity is over and the notation is complete"
- "Behavior log on a clipboard with notations by 1 on 1 para, teacher, related service providers, nurse, with initials of who entered the information in the backpocket (sic) of wheelchair…record each incident until the incident is over"

The student's mother told the investigator that she has on several occasions observed that the clipboard was not in the back pocket of the student's wheelchair. However, the parent could not point to any specific occasion that could be targeted for investigation. The district reports that when a staff member is completing one of the forms attached to the clipboard, the clipboard will be outside of the back pocket of the wheelchair but is available within the classroom setting.

The parents did not provide any objective evidence to support their allegation. Under these circumstance, a violation of special education laws and regulations is not substantiated with regard to this issue.

<u>Concern #4:</u> The parent was not contacted by telephone to retrieve the student's soiled clothing on January 18, 2019 as required by the student's September 26, 2018 IEP. Instead, a text message was sent to the mother's cell phone.

<u>Parents' Position</u>

The parents assert that they have specifically requested that they be contacted by telephone rather than text if the student soils her clothing because they fear they might not hear a text come in. The student's mother acknowledges that she received the text and went to the school to pick up the soiled clothing.

<u>District's Position</u>

The district stipulates that on January 18, 2019 a paraeducator sent a text to the student's mother regarding the student's soiled clothing rather than placing a telephone call.

<u>Investigative Findings</u>

The "Modifications/Accommodations/Supplementary Aids" section of the student's September 26, 2018 IEP contains the following statement:

> "(The student's) parents ***will be called*** (emphasis added) whenever (the student) soils her clothes such that her clothes need to be changed."

Since this incident, a sign has been posted on the student's clipboard and on the wall of the bathroom reminding staff of the protocol to be followed if the student's clothing becomes soiled.

Because the district failed to follow protocol specified in the student's September 26, 2018 IEP with regard to the method of contacting the parent (via telephone, not via text) in the event that the student's clothing needed to be changed, a violation of special education laws and regulations is substantiated.

<u>Concern #5:</u> On January 18, 2019, when the parent went to the student's classroom, she observed that instead of having the student listen to one of 3 parent-approved radio stations, a CD – which the district had agreed to dispose of – was being used.

<u>Parents' Position</u>

The parents assert that in August of 2018 they requested that the district destroy a CD that in their opinion had been overused as a reinforcer for the student. According to the parents, the building principal had indicated the CD would be destroyed.

District's Position

The district agrees that the parents had made a request at the beginning of the 2018-19 school year that staff not play a particular Vivaldi CD as a reinforcer for the student. This request was communicated to the teacher at that time along with a directive to discard the CD, but the district stipulates that the CD was as of January 18, 2019 still extant.

Investigative Findings

The Behavior Intervention Plan contained in the student's September 26, 2018 IEP includes a section labeled "Reinforcement Procedures." The Plan notes the following:

> "Music (on Radio stations 101, 102.1, 102.5, and Big Mac when walking)…"

Since becoming aware that the CD was still being used, the building principal has taken action to see that it has been destroyed.

Because the district used a re-enforcer other than those specified by the student's September 26, 2018 IEP, a violation of special education laws and regulations is substantiated.

Concern #6: On October 9, 2018, the district failed to telephone the parent to notify her that the student had soiled clothing.

Parents' Positon

According to the parents, when the student's mother picked the student up from school on October 9, 2018, she was handed a bag of soiled clothing. When she asked staff why she had not been notified by telephone about the clothing, staff told her that the Special Education Coordinator had told them she would notify the parent via email.

District's Position

The district concurs that notice of the soiled clothing was provided to the parent via email rather than by telephone.

Investigative Findings

As stated above under Concern #4, the "Modifications/Accommodations/ Supplementary Aids" section of the student's September 26, 2018 IEP contains the following statement:

> "(The student's) parents ***will be called*** (emphasis added) whenever (the student) soils her clothes such that her clothes need to be changed."

Because the district failed to follow protocol specified in the student's September 26, 2018 IEP with regard to the method of contacting the parent in the event that the student's clothing needed to be changed (via telephone, not via email), a violation of special education laws and regulations is substantiated.

Concern #7: The district is only using an adaptive tricycle with the student when the Adaptive Physical Education (APE) teacher is in the building.

Parents' Position

The parents assert that on September 25, 2018 classroom staff told the student's mother that they were not using the adaptive tricycle with the student because they did not feel comfortable putting the student on the equipment. The parents contend that – despite the fact that the Adaptive PE teacher had shown staff how to put the student on the tricycle – the only time the student gets to use the tricycle is one day per week when the Adaptive PE teacher is in the building.

District's Position

According to the district, the student receives Adaptive Physical Education (APE) only when the APE teacher is in the building and confirms that the adaptive tricycle is used with the student only when the APE teacher is present. The district states that classroom staff feels they are not able to use the tricycle safely in the absence of the APE teacher.

Investigative Findings

The "Modifications/Accommodations/Supplementary Aids" sections of the March 30 and September 26, 2018 IEPs for the student contain the following statement:

> "When (the student) is not able to swim for adaptive PE, she participates in other gross motor activities and will walk using the walker or ride the adaptive tricycle on the swimming days (the student) cannot swim for the length of adaptive PE times."

The student's IEP does not require the district to provide the student with access to the adaptive tricycle at any time other than those occasions when she is unable to swim for adaptive PE. APE is provided only when the Adaptive Physical Education Teacher is present in the building. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Concern #8: The district has failed to consistently make the iPad available to the student.

Parents' Position

According to the parents, in an email on September 13, 2018, the Special Education Coordinator stated, "PHS staff knows that it (the iPad) was not used today as much as it should have been used…Today was not a good day for the adults in the classroom today with all of the changes that are occurring with the loss of an instructional leader (due to the resignation of the teacher) …" The parents contend that the iPad should be available to the student at all times unless she is swimming.

District's Position

The district asserts that the iPad is available to the student throughout her school day.

Investigative Findings

The "Modifications/Accommodations/Supplementary Aids" sections of the student's March 30 and September 26, 2018 IEP contain the following statement:

> "Personal iPad for a communication device to be used by (the student) with assistance from teacher, 1 on 1 personal paraprofessional, Related Service Providers, and personal nurse…during the school day whenever the iPad is present."

Among the data collected on a daily basis is a tally of iPad use. As noted above under Concern #2, the parents have been able to determine that the student uses the iPad for an average of an hour and a half every day. The student's March and September 2018 IEPs require only that an iPad be "used." On September 13, 2018, the student did "use" the iPad. The parents did not provide the investigator with any other specific instances when the iPad was not used. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Concern #9: The parents assert that because Prepare House, a community based district site, is not handicapped accessible, the student was not able to participate in a field trip which was to have been conducted at the site.

Parents' Position

According to the parents, the student was scheduled to go to Prepare House on May 3, 2018 in order to assist with preparations for a district-sponsored flower sale. The parents report that when the student's mother dropped the student off

for school on the morning of May 3rd, the student's teacher told the student's mother that the student would not be going to Prepare House that day because the ramp was too muddy and staff did not want the wheels on the student's chair to get dirty.

The student's mother reports that she went to Prepare House to view the ramp on May 3, 2018. When she arrived at the house, she observed that no ramps were visible at either entrance to the facility. According to the parent, the entrance to the building is located on a hill with steps leading up to the door**.** The parents question how the student was able to enter the house on previous occasions. The parents also contend that space is limited in the interior of Prepare House and question whether the student would have been able to move around the facility in her wheelchair.

District's Position

The district asserts that the field trip proposed for May 3, 2018 was cancelled so that students could be available in the building for a visit by a television celebrity not because the Prepare House site was inaccessible to the student.

Investigative Findings

According to the district, Prepare House is a duplex which was donated to the district by the Housing Authority. The site is used to teach life skills to students who will be employed independently once they have exited the district. The structure is two stories with only the first story being used for students. Once a year, the site has been used for one day to prepare for a flower sale which is then conducted the following day at the district's Education Center.

According to the district, while the entrance at the front of the building is too steep for wheelchairs, there is room at the back of the structure for a bus to park, a low curbing at a sidewalk leading to the back door and a threshold at that entrance, all of which can be crossed by a wheelchair with assistance.

The student was not denied access to CBI services on May 3, 2018 because of accessibility issues regarding Prepare House. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Concern #10: The 1:1 paraeducator assigned to the student is not coming out when the student is dropped off for school in the morning and when she is picked up at the end of the day.

Parents' Position

The parents assert that the 1:1 paraeducator assigned to the student is not coming to the car to assist in transitioning the student when she arrives and leaves each day. As a result, the parents have no one to ask about the student's day, and – because she is nonverbal – they cannot get that information from the student herself.

The parents contend that they cannot rely on the information provided in the student's communication book to help them know what has gone on while the student is at school because the information included therein is often incomplete and does not provide the level of detail they feel is necessary. As an example, they cite February 13, 2019 when the student's mother was told by a substitute teacher that the student went to art and choir but the communication book did not include that information. The parents state that on that same date the student's 1:1 nurse told the student's mother that the student "slept 15 minutes this morning," but the next day the student's 1:1 paraeducator offered a different report regarding the student's sleep.

District's Positon

The district asserts that the student's IEPs are being followed. While the staff members who have provided assistance at arrival and departure times have not always been staff from the student's classroom, the student's IEPs have not specified that they must be.

Investigative Findings

The "Modifications/Accommodations/Supplementary Aids" section of the student's September 26, 2018 IEP amended on February 5, 2019 contains the following statements regarding who is to assist the parent in transitioning the student into and out of the vehicle when arriving at or leaving the school:

- "Two staff members will be in office at 8:00 waiting for (the student's) arrival. When the vehicle (the student) is riding in arrives, the parent will take out the wheelchair. Once wheelchair is out of van and on sidewalk, staff will move the wheelchair so that (the student) can be safely seated/positioned in the wheelchair by the parent."
- "Two staff members will take (the student) to the van. The brakes on the wheelchair will be locked by 1 on 1 para, nurse, or teacher and 1 on 1 para, nurse, or teacher's hands will be on the handles of the wheelchair."

The student's September 26, 2018 IEP and her February 5, 2019 amended IEP require that "***two staff members***" assist the parent in transitioning the student to and from the vehicle at the beginning and end of each school day. The IEP does not specify who those staff members must be. Under these circumstances, a

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

Concern #11: The district has failed to follow the Health Care Plan included in the student's IEP.

Parents' Position

The parents assert that from March 5 through March 7, 2019, the nurse regularly assigned to the student was absent and substitutes were provided. According to the parents, the substitute nurse failed on March 6 and 7, 2019 to flush the student's G-tube with the required amount of water (using 50 cc's rather than the 5 ounces specified in the Health Care Plan).

The parents contend that since no Nursing Notes were provided for March 5, 2019, they have no way to determine whether the student was given the proper amount of fluid in her flush on that date. It is the position of the parents that assurances by the 1:1 paraeducator assigned to the student that 5 oz. were used to flush the student's G-tube that day are of little value since that paraeducator was also absent on the date in question.

The parents report that staff from the agency who provided the substitute nurse affirmed to them that the substitute nurse was told by classroom staff that flushing was typically done with 5 cc's. The parents are concerned that the student may not be routinely getting the amount of fluid she needs to avoid dehydration.

District's Position

The district asserts that the correct amount of fluid was used for the G-tube flush on March 5 - 7, 2019 although Nursing Notes from March 6 and 7, 2019 indicate that the student did not receive the 5 oz. G-tube flush called for in her Health Care Plan.

Investigative Findings

The IEP for the student dated September 26, 2018 contains a section entitled "Health Care Plan for Students in a School Setting." A portion of that plan provides guidance related to "G-tube/feeding." According to the IEP, after the student has been fed "Peptamin w/prebio," there should be "adequate flushing with **5 oz.** (emphasis added) of warm water. The IEP further states that "in the event (the student) does not finish her drink, the remaining liquid will be put into the syringe and through the feeding tube followed by the **5 oz.** (emphasis added) of warm water" to flush the feeding tube.

The “Nursing Notes” form used by the district includes the statement “flushing with 5 oz. of warm water after feeding of the Peptamin…w/probio.”

The 1:1 nurse who regularly serves the student provided the investigator with a description of the procedures she uses to flush the student’s G-tube. According to that description, the 1:1 nurse flushes the student’s G-tube with 5 oz. of fluid.

The 1:1 nurse typically assigned to provide services to the student was absent March 5-7, 2019. Two substitute nurses were employed to provide services to the student during this period, one for March 5th and a second for March 6th and 7th.

No Nursing Notes were available for March 5, 2019. In an email dated March 8, 2019, the paraeducator who routinely provides 1:1 assistance to the student wrote, “On 3/5 I flushed and simply forgot to check it on nursing note.”

Nursing Notes dated March 6, 2019 indicate that the student finished her drink and “tolerated flush with 50 cc.” According to Nursing Notes dated March 7, 2019, the student again finished her drink. It was noted that the student’s abdomen was distended. She “laid down after flushing with 50 cc. water.” (Note: 50 cc. =1.69 fluid oz. It would take 147.9 cc’s to equal 5 oz.).

In a telephone call with the investigator on March 21, 2019, the president of the agency that provided the substitute nurse for March 6 and 7, 2018 stated that the substitute nurse had confirmed in a written statement to the agency president that she flushed the student’s G-tube with 50 cc’s of fluid – not 5 oz. According to the agency president, the substitute nurse reported that classroom staff told her flushing was usually done with “5 oz.”

In a written statement, a classroom paraeducator who assisted the substitute nurse with the flush on March 5, 2019 provided the following information:

> “At noon, it was time to flush the G tube on (the student). To help out, I filled the usual measuring cup with the 5 ounces of the required water amount and placed it in the bathroom on the shelf. (Another paraeducator who was acting as 1:1 paraeducator for the student for the day) came out of the bathroom and asked if I would assist the sub nurse because she was having difficulties with the flushing and I have several years of experience with the flushing and care of (the student). The sub had a small amount of water in the tube and there was nothing flowing down the tubing. I asked her about the amount of water and when she was going to pour the rest of the water in the tube and she said, ‘This is 50 cc’s, which is the amount of water used to do a flush.’ I explained to her that that is

> not the amount the parents want used to flush and please pour the water out. I then filled the tube with the 5 ounces of measured water and I managed to get the water to flow down the tube. When she was filling out the nurse's notes at 2:15 she made an error in the amount of water probably due to her training, but I know for a fact that 5 ounces of water was used to flush that day."

Regarding the G-tube flush of March 7, 2019, the paraeducator who typically provides 1:1 services to the student wrote in an email dated March 8, 2019, "…5 oz. is not marked. All staff is on the same page, we all know she flushed with 5 ounces of water, everyday." The 1:1 paraeducator wrote the following in a separate statement:

> "I was introduced to sub nurse first thing Thursday morning (March 7, 2019). She gave me a recap of Wednesday. I got my copy of IEP out and we went over nursing section. She referred to it periodically throughout the day."

First-hand anecdotal information submitted by two classroom paraeducators provides specific information regarding their own actions related to the administration of 5 oz. flushes of the student's G-tube on March 5 and 6, 2019. This investigator is persuaded that the required 5 oz. flushes were administered on those days. The investigator also believes based upon the statements made by the paraeducators themselves and by the president of the agency that provided contract nursing services on March 6th and 7th that classroom staff understands that 5 oz. of fluid is to be used to flush the student's G-tube.

However, while classroom staff asserts that the substitute nurse used 5 oz. of fluid to flush the tube on March 7, 2019, it does not appear that any staff member actively assisted the substitute nurse with the flush on that date, and the substitute nurse – both in the Nursing Notes she completed on that date and in comments made to her supervisor - indicates she administered the flush with 50 cc's of fluid, not 5 oz. Under these circumstances, a violation of special education laws and regulations is substantiated.

Parental Consent for Changes to the IEP

Concern #12: The parents have never consented to changes made to the student's IEPs associated with "fatigue" which in the opinion of the parents represent a material change in services or substantial change in placement.

Districts must obtain the written consent of the parents before making a substantial change in placement (more than 25% of the child's school day) for the student or a material change in the services provided to the student (25% or more of the frequency or duration of any one service). (See K.A.R. 91-40-27(a)(3).)

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

Parents' Position

The parents assert that the district has provided them with copies of IEPs for the student printed on a number of different dates throughout the 2017-18 and 2018-19 school years. According to the parents, statements under the "Nursing Assessment" section of the Health Care Plan have been changed several times without any prior notice from the district and without the written consent of the parents.

District's Position

It is the position of the district that the changes to the Health Care Plan portions of the student's IEPs have not represented a substantial change in placement or a material change in services to the student. The district asserts that parental consent for changes to the wording of the Health Care Plan that have been made over the period of March 30, 2018 through February 28, 2019 did not require the written consent of the parents.

Investigative Findings

The district and the parents have provided the investigator with several versions of the IEPs developed for the student over the course of the last 12 months. Both the district and the parents acknowledge that there have been numerous IEP meetings over that same period, and frequent changes to the documents.

To support their contention, the parents provided the investigator with copies of the referenced section of the student's IEP printed on the following dates:

- March 1, 2018: "Student will achieve and maintain optimal activity level during the school day."
- April 26, 2018: "Inability to participate in routine activity – Difficulty staying awake."
- June 6, 2018: "Student will achieve and maintain optimal activity level during the school day

- June 7, 2018: “Inability to participate in routine activity – Difficulty staying awake.”
- June 15, 2018: “Student will achieve and maintain optimal activity level during the school day.”
- November 13, 2018: “When (the student) is tired she is unable to participate in routine activities.”
- February 5, 2019: “When (the student) is tired she is unable to participate in routine activities.” According to the parents, this statement was to have been deleted. Additionally, mention of “labored breathing” was to have been added but was not present in the printed copy.
- February 28, 2019: “When (the student) is tired she is unable to participate in routine activities. Student will achieve & maintain optimal activity level during the school day.” The parents assert that the initial portion of this statement should have been removed from the student’s IEP.

The district provided the investigator with three finalized IEPs for the student covering the same period referenced by the parent. In examining these documents, the investigator found that “Fatigue” was addressed in three sections of the Health Care Plan – “Nursing Assessment,” “Nursing Interventions,” and “Outcomes.”

In the student’s March 30, 2018 IEP, fatigue was addressed as follows:

- Nursing Assessment: “Inability to participate in routine activity – Difficulty staying awake.”
- Nursing Interventions: “Obtain reports from parents if ample amount of sleep was not acquired the night before with possible reasons for insomnia such as: pain, medications, activity or changes in routine/schedule. Assess student for signs of fatigue (slow to respond, nodding, lethargic, yawning, lack of interest in activity, irritable). Allow student to rest/nap until obvious signs of alertness are observed. Monitor student while resting/napping closely watching for pre-seizure activity. Report to parent any concerns or abnormal behavior.”
- Outcomes: “Student will achieve and maintain optimal activity level during the school day.”

The student’s September 26, 2018 IEP addressed fatigue as follows:

- Nursing Assessment: “When (the student) is tired she is unable to participate in routine activities.”
- Nursing Interventions: “Obtain reports from parents if ample amount of sleep was not acquired the night before with possible reasons for insomnia such as: pain, medications, activity or changes in routine/schedule. Assess student for signs of fatigue (slow to respond, nodding, lethargic, yawning, lack of interest in activity, irritable). Allow student to rest/nap until obvious signs of alertness are observed. Monitor student while resting/napping closely watching for pre-seizure activity. Report to parent any concerns or abnormal behavior.”

- Outcomes: “Student will achieve and maintain optimal activity level during the school day.”

In the student’s February 5, 2019 IEP, fatigue was addressed as follows:

- Nursing Assessment: “When (the student) is tired she is unable to participate in routine activities.”
- Nursing Interventions: “Obtain reports from parents if ample amount of sleep was not acquired the night before with possible reasons for insomnia such as: pain, medications, activity or changes in routine/schedule. Assess student for signs of fatigue (slow to respond, nodding, lethargic, yawning, lack of interest in activity, irritable). Allow student to rest/nap until obvious signs of alertness are observed. Monitor student while resting/napping closely watching for pre-seizure activity. Report to parent any concerns or abnormal behavior.”
- Outcomes: “Student will achieve and maintain optimal activity level during the school day.”

The documents presented by the parents which were printed March 1 and June 6, 2018 were sections of an IEP from September 2017. The documents printed on June 15, 2018 were portions of IEPs written in August 2016, January 2017, March 2017, August 2017, and December 2017. None of these IEPs fall within the 12-month period covered by this investigation.

The documents presented by the parents as printed on April 26, 2018 and June 7, 2018 are copies of the March 30, 2018 IEP. Both contain the statement “Inability to participate in routine activity – Difficulty staying awake.” These statements align with the content of the Nursing Assessment portion of the Health Care Plan in the student’s March 30, 2018 IEP.

The document presented by the parents as having been printed on November 13, 2018 is a copy of the Nursing Assessment portion of the Health Care Plan from the student’s IEP of September 26, 2018. Again, the statement identified by the parent matches the corresponding statement contained in the student’s IEP.

The documents presented by the parents as having been printed on February 5 and 27, 2019 contain statements identical to those presented by the district from the February 5, 2019 IEP.

The parents assert that in February 2019 they requested changes to comments about the student’s fatigue. The meeting at which those changes were discussed was held on February 28, 2019 – two days after the complaint containing this issue was received by Special Education and Title Services. The district provided the parents with Prior Written Notice of the proposed change to the IEP at that time.

This investigator found no evidence of multiple changes to the student's IEP over the period of March 1, 2018 to February 5, 2019. Since March 30, 2018, wording in one portion of the Health Care Plan contained in the student's IEPs was changed once. The September 26, 2018 IEP language in the "Nursing Assessment" section was changed from "Inability to participate in routine activity – Difficulty staying awake" (as written in the March 30, 2018 IEP) to "When (the student) is tired she is unable to participate in routine activities." This change does not represent a substantial change in placement for the student or a material change in services. Parental consent for the change was not required. However, federal regulations, at 34 C.F.R. 300.503, require that prior written notice be given to parents before making ***any*** change regarding the provision of a Free Appropriate Public Education (FAPE) to a child with a disability. The United States Supreme Court recently ruled that FAPE means an IEP reasonably calculated to enable a child to make appropriate progress in light of the student's unique circumstances. Accordingly, ***any*** change to an IEP is a change related to FAPE and requires a prior written notice. These parents should have been provided prior notice that these changes were being made. The district provided no evidence to suggest that notice was given to the parents. Therefore, a violation of special education laws and regulations is substantiated on this issue.

Additional Comments

Changes to the Health Care Plan portion of the student's IEP were discussed at an IEP Team meeting on February 28, 2019. The Meeting Summary from that date shows that the parents requested that a statement regarding labored breathing be added to the Nursing Assessment section. The parents also requested that statements regarding rest be removed and asked for the addition of another statement. The district agreed to the changes requested by the parents and on February 28, 2019 provided prior written notice to the parents regarding those changes.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to 34 C.F.R. 300.101 and 34 C.F.R. 300.17 which require districts to provide FAPE to students in conformity with an IEP which describes services to exceptional students on an individual basis. Specifically, the district erred by

- Failing to provide the level of CBI opportunities specified in the student's IEPs;
- Either failing to contact the student's mother or contacting her via text rather than telephone to notify her that the student had soiled her clothing;
- Using a non-approved reinforcer for student behavior; and
- Failing to ensure that a substitute nurse properly followed the student's Health Care Plan when flushing the student's G-tube. Reinforce

Additionally, a violation was substantiated with regard to 34 C.F.R. 300.503 and K.A.R. 91-40-27(a)(3) which requires districts to provide prior written notice of changes to the delivery of FAPE to a student that are considered neither substantial changes in placement nor material changes in services.

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

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

    a. 34 C.F.R. 300.101 and 34 C.F.R. 300.17 by providing services to this student in conformity with her IEP, and
    b. 34 C.F.R. 300.503 and K.A.R. 91-40-27(a)(3) by providing prior written notice to parents of changes that are neither a substantial change in placement nor a material change in services.

2) Within 10 school days of the receipt of this report, the district shall submit to the parent a written plan for the delivery of not less than 400 minutes of compensatory CBI (special education and nursing) services. A total of 6 weeks of service at 100 minutes per week were missed between August 14, 2018 and February 26, 2019. That total has, however, been mitigated by 2 weeks – or 200 minutes – because CBI opportunities were available twice in one week on two occasions.

    a. The parents shall have the option of accepting all or part of the compensatory services that are offered, or of declining any or all of these services.

3) Within 5 school days of submitting the plan referenced above under Item 2 and receiving the parent's response, submit to Special Education and Title Services a copy of the plan for compensatory services (or that portion of the plan accepted by the parents).

4) Within 30 school days of the receipt of this report, review the IEPs of all students in this student's classroom and determine whether the district has provided the level of CBI opportunities to all students in the manner specified in each student's IEP and submit to Special Education and Title Services a summative report of this review.

    a. If the IEP review determines that the district has failed to provide required CBI services to any other student, the district will, within 60 school days of the receipt of this report, schedule an IEP team meeting for that student for the purpose of determining appropriate compensatory CBI services.

5) Within 10 school days of the receipt of this report, the district shall submit to Special Education and Title Services a plan ensuring that any future substitute nurse has a clear understanding of the procedures established in the student's Health Care Plan and can follow the plan with fidelity.

(Note: The district has already put in place methods to make sure that staff know the correct procedure to use when contacting the student's mother in the event the student soils her clothes. The district has destroyed the CD that was inappropriately used as a reinforce for the student. Therefore, no additional corrective actions will be required with regard to these violations.)

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to the State Commissioner of Education within 10 calendar days from the date of the 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
_____, USD #___
ON MAY 6, 2019

DATE OF REPORT: JUNE 05, 2019

This report is in response to a complaint filed with our office by _____ on behalf of her child, _____. _____ prefers to go by the name "_____" and will be referred to as "he" or "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 _____, on May 13, 2019. The investigator spoke by telephone with the parent on May 24, 2019.

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

- Email dated March 20, 2019 regarding the student's use of a cell phone or other electronic device
- IEP for the student dated February 1, 2019
- Portions of the IEP for the student dated April 16, 2019 provided as an attachment to the parent's formal complaint
- (The student's) Coping Skills chart
- Safety/Crisis Prevention Plan for the student

Background Information

This investigation involves a 15-year-old student who was enrolled in the 9th grade in the Growth, Education and Reflection (GEAR) program in his local school district on September 10, 2018. The student had started the 2018-19 school year in a high school in the district, but a physical altercation with a teacher resulted in a change of placement. The GEAR program is designed to serve students who exhibit behaviors that interfere with learning. Students are included in general education activities whenever possible with accommodations and/or modifications to meet their unique needs.

According to the student's IEP, he has multiple psychiatric diagnoses including Major Depressive Disorder, Generalized Anxiety Disorder, Obsessive Compulsive Disorder,

Gender Identity Disorder, Disassociation Disorder, and Post Traumatic Stress Disorder. He is currently under the care of a physician, a psychiatrist, and a therapist.

The student has been confined to a bed or a wheelchair following surgery to repair a broken pelvis, the result of a suicide attempt approximately a year ago. Since April 2, 2019 the district has provided the student with special education services in a homebound setting.

Issues

In a letter to the Assistant Superintendent of Special Education for the district dated May 6, 2019 on which the parent was copied, Tiffany Hester, Legal Consultant with the Special Education and Title Services team at the Kansas State Department of Education (KSDE), stated that KSDE has authority to investigate only complaints alleging a violation of special education laws and regulations. Any issue in a complaint that does not relate to special education requirements will not be investigated. The letter from Ms. Hester indicated that the investigator could determine that one or more of the parent's allegations did not related to special education requirements and are beyond the jurisdiction of a state complaint.

The letter also noted that the removal of school personnel is a local school district issue addressed by school district administration and board of education, not KSDE.

In her complaint, the parent raised the following broad concern:

The principal of the GEAR program has violated the student's IEP on many different occasions.

The parent asserts that on multiple occasions during the 2018-19 school year, when the principal was alone with the student with doors closed and no other staff present, the principal spoke derogatorily to the student and put the student down in an effort to undermine the student's mental health and safety. The parent further contends that when the student self-harmed following one of these occasions, the principal stated to the parent that it was the student's "choice to self-harm." It is the position of the parent that the principal has refused to work "as a team" to provide a safe emotional and physical environment for the student based upon the student's IEP.

Allegations regarding the actions of the principal when in closed-door sessions with the student were not investigated since the only individuals who could attest to what was said in those sessions are the principal and the student. No other parties were present who could provide additional information regarding this allegation, and the parent provided no additional evidence to substantiate that a violation of special education laws and regulations had occurred.

The parent attached a copy of portions of the student's April 16, 2019 IEP to her written complaint and indicated that the principal of the student's school had violated various

highlighted aspects of the IEP during the 2018-19 school year. Those highlighted statements include:

From the "Current Academic Achievement and Functional Performance" portion of the "Summary of Present Levels of Academic Achievement and Functional Performance section of the IEP:

- "While (the student) is working, specific praise and words of encouragement (should be given)."
- "(The student) can refuse to attend to the academic task demand."
- "(It is recommended to) have (the student) work through those times with an adult to encourage participation."
- "(The student) benefits from the use of positivity (reinforcing what he is doing right versus punishing negative behaviors)."
- "When (the student) become unregulated, it can be beneficial for an adult to talk with him in a separate quieter space offering direct instructions on preferred coping skills to use."
- "…modeling how to appropriately ask for a break."
- "…follow his behavior plan…"
- "…keeping open communication with the team."

From the "Relevant Medical Information" portion of the "Special Considerations" section of the IEP:

- "Major Depressive Disorder, Generalized Anxiety Disorder, Obsessive Compulsive Disorder, Gender Identity Disorder, Disassociation Disorder, Post Traumatic Stress Disorder"

From the "Other Considerations" portion of the "Special Considerations" section of the IEP:

- "…team discussion…"
- "…trauma-informed care approach…"

From the "Prevention Procedures" portion of the "Behavior Intervention Plan" (BIP) included in the student's IEP:

- "Four to one ratio of positive attention to negative attention (praise to correction)"
- "Use of specific praise"

The majority of the elements of the student's IEP which were highlighted by the parent in her complaint were included under the Current Academic Achievement and Functional Performance sections of the document, which is intended to describe the student's current performance including how the child's disability affects involvement and progress in the general education curriculum (see 34 C.F.R. 300.320(a)(1)). This

section also provides the foundation upon which other decisions in the IEP will be made. This portion of the student's IEP is not intended to describe the district's commitment regarding placement and services but rather to inform the development of goals, accommodations/modifications, interventions, and other elements of the IEP.

In a telephone call with the investigator on May 24, 2019, the parent additionally pointed to the section of the student's BIP which states "[The student] will have access to noise reduction headphones when appropriate." The parent asserted that the student should therefore have been allowed to use his cell phone and earbuds to reduce noise when on a field trip. The parent contended that the principal originally gave permission for the student to take his cell phone on the field trip but subsequently withdrew that permission. It is the parent's contention that the district's refusal to allow the student to use his cellphone and attached headphones represents a failure of the district to follow the student's IEP.

The parent also specifically alleged that staff have not been provided with the training on Crisis Prevention Intervention (CPI) and trauma-informed care called for in the student's IEP.

It is the position of the parent that when dealing with the student, the principal used a punitive approach rather than encouraging the student and behaved in a manner that triggered adverse behaviors on the part of the student.

Investigative Findings

Federal regulations, at 34 C.F.R. 300.101, require public schools to make a FAPE (free appropriate public education) available to children with disabilities. 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.

Cell Phone Use

On March 20, 2019, the principal sent an email to the parent stating that the student would "no longer be allowed to bring a cell phone or electronic device to school…for the remainder of the spring 2019 semester." On March 24, 2019, the parent presented the principal with a note from the student's psychiatrist, who is also the parent's employer, indicating that the student "needed the cell phone as a calming device." The principal sent an email to the parent on March 25, 2019 requesting a copy of the doctor's note on official letterhead, as the student's use of a cell phone was counter to the district's previous understanding of the doctor's position. On April 2, 2019, the psychiatrist contacted the principal by telephone, stating that he had not written the note that the parent had provided. Also, on April 2, 2019, the student's neurotherapist participated in a meeting with the GEAR team and verbally agreed that the cell phone should not be used as a coping tool.

It is the position of the district that a cell phone is not a part of the noise cancelling headphone accommodation. The district asserts that had there been an intent to include the cell phone as a part of the BIP in the IEP, it would have been explicitly included. The noise reducing headphones are housed in the student's classroom. He was allowed to plug the headphones into the computer for sound if desired, but the headphones were, by themselves, capable of muffling sound. On the day of the field trip, the student could have taken the headphones with him to address noise issues. His use of his cell phone had been restricted since March 20, 2019.

The student's February 1, 2019 IEP and associated BIP calls for the use of noise reduction headphones, not his cell phone and earbuds. The district notified the parent on March 20, 2019 that the student could no longer bring his cell phone or other electronic devices to school. Neither the student's psychiatrist nor his neurotherapist disputed the district's decision to restrict the student's cell phone use. Noise cancelling headphones were available to the student for his use in coping with anticipated noise issues while on a scheduled field trip. Under these circumstances, a violation of special education laws and regulations is not substantiated.

CPI and Trauma-Informed Care Training

The "Special Considerations portion of the student's February 1, 2019 IEP includes a section entitled "Other Considerations." One of the questions asked under that section is the following:

> "Is special training required for a student's teachers and/or other staff member(s) that is directly targeted on assisting the teacher and/or staff to meet a unique and specific need of the student related to 1) the student's progress toward attaining the measurable annual goals and 2) involvement and progress in the general curriculum and participation in extracurricular and other non-academic activities?"

According to the IEP, "CPI training and trauma-informed care approach to best serve (the student) and his emotional needs."

The district office, rather than individual school buildings, plan and facilitate CPI training. The training is required to be repeated biennially. Information provided by the district shows that all individuals who work directly with the student are current in their training, including the building principal.

With regard to Trauma-Informed Care Training, the district contracted with Kaw Valley to provide training over multiple sessions held from August through October in 2017. No additional training was delivered during the 2018-19 school year, but a Masters level social worker was assigned to each class to provide mental health support for all students. Adverse Childhood Experiences (ACE) and the impact of trauma are cornerstones of academic preparation for social workers.

While the building principal was not employed by the district at the time the Kaw Valley training was delivered, his previous experience with Trauma-Informed Care while working as education director at Cornerstones of Care Marillac Residential Facility for 5 years afforded him the opportunity to develop his skills in that area. Specifically, the principal was trained in the Safety Crisis Management Module which is created from a team of trauma-informed instructors, teaching de-escalation, and the understanding of the impact of trauma. At Cornerstones of Care, each department participated in fidelity checks 3 times a year to ensure the trauma-informed model was implemented effectively. In addition, the principal participated in training on the Safety, Emotional Regulation, Loss, and Future (SELF) Model. He has participated in multiple trauma-related training sessions including the following:

- "Rage to Reason" by Dr. Amy Buie, an in-depth look at behavior and trauma in 2016
- "Safe and Civil Schools" by Dr. Randy Sprick, based on positive and proactive approaches to classroom and school-wide discipline. The plan involves providing 5 positive prompts for every negative prompt. This training was completed in 2014, 2016, and 2017.

All GEAR staff members who work with the student are current with regard to CPI training and all have been trained on Trauma-Informed Care. The building principal has had additional extensive training in the trauma-informed model. Under these circumstances, a violation of special education laws and regulations is not substantiated.

Use of Positive Supports

The student's February 1, 2019 IEP includes a Behavior Intervention Plan (BIP) which was originally developed December 11, 2018. Section V of the BIP is entitled "Prevention Procedures." Item A.8. of that section states "Four to one ratio of positive attention to negative attention (praise to correction). Item A.9. states "Use of specific praise." The parent alleges that the principal has not followed this portion of the IEP when dealing with the student.

While the district does not keep a formal record of positive and negative prompts, the principal asserts that when dealing with the students in his building he is guided by the recommendations of the "Safe and Civil Schools" program which recommends 5 positive statements to every one negative prompt. Other staff at GEAR have been trained to follow a 4:1 ratio of positives to negatives. This approach is consistently emphasized in team meetings, behavior implementation meetings, and in meetings regarding individual students.

The student's BIP allows him to go to the Sensory Room if he makes an appropriate request. If the student's behavior escalated while he was in the sensory room, staff were to avoid giving either positive or negative reinforcement. Instead, the student

would be provided with “neutral prompts” such as “tell us what you need. Do you need a fidget?”

While no specific record of positive to negative prompts is maintained by the district, the use of multiple positive to negative prompts is a skill that is continually reinforced for all GEAR staff members who work with the student including the building principal. The parent has asserted that the principal’s failure to maintain an appropriate ratio of positives to negatives has occurred behind closed doors. The investigator, therefore, has no objective evidence to either confirm or dispute the parent’s allegations and the investigator must make a determination based on the best available evidence. Under these circumstances, a violation of special education laws and regulations is not substantiated.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education laws 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, 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), which is attached to this report.

_____
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 FEBRUARY 12, 2019

DATE OF REPORT: MARCH 12, 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 was sent to the Department on February 12, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on March 13, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on March 8, 2019. USD #___ made the following staff persons available as part of the investigation process:

- TL, Director of Special Education
- CG, Interim Director of Special Education (2-19-10 school year)
- TS, Assistant Principal of _____ High School
- KS, Special Education Teacher
- BW, Assistant Superintendent
- Dr. WB, Superintendent

The Complaint Investigator interviewed the parent by telephone on March 7, 2019 as part of the investigation process.

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

- Notice of Meeting dated October 23, 2018
- Individualized Education Program (IEP) dated November 5, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 5, 2018

- Team Meeting Notes dated November 5, 2018
- Email from KS to the parent dated November 7, 2018
- Email from KS to the parent dated November 19, 2018
- Email from the parent to KS dated January 8, 2019
- Email correspondence between KS and the parent dated January 9, 2019
- Email from the parent to KS dated January 25, 2019
- Emails from KS to the parent dated January 27, 2019
- Email correspondence between KS and the parent dated February 1, 2019
- Written Response to Formal Child Complaint written by BW

Background Information

This investigation involves a 15 year old young man who is enrolled in the 10th grade at _____ High School in USD #___ during the 2018-19 school year. The student was initially evaluated for special education in second grade at the Belton 124 School District in Missouri. At that time, the student was found eligible for special education services under the exceptionality category of Other Health Impaired due to a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and began receiving special education services. The parent obtained an outside evaluation at Children's Mercy Hospital in Kansas City and on September 12, 2014, the student was diagnosed with Dyslexia. The student enrolled in USD #___ at the beginning of 9th grade and continues to receive special education services under the exceptionality category of Other Health Impaired due to medical diagnoses of ADHD and Dyslexia.

Issues

The complainant raised one issue which was investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint begins on February 12, 2018.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the parent's request for specialized instruction in reading based on the Orton-Gillingham approach at the November 5, 2018 IEP Team Meeting.

Findings:

The parent indicated that a request was first made for the student to receive his special education instruction in reading through an Orton-Gillingham approach at the November 5, 2018 IEP meeting. The parent reports being told that the USD #___ staff would look into changing the student's reading curriculum but they would need to consult with administration before any curriculum changes could be made. Subsequently, the parent has contacted school staff on multiple occasions to see when the requested change would be made.

The parent reports the student previously was taught reading though the Orton-Gillingham approach while in Missouri and progressed from a kindergarten reading level to a 4th grade reading level. Since his enrollment in USD #___ in 9th grade, the student's reading instruction has been provided through the Read 180 program and the student has not made any reading progress. The parent gave consent for USD #___ staff to contact the reading tutor who worked with the student to obtain specific information about the student's progress. The parent indicated she is frustrated that almost another entire year of reading instruction for the student has been wasted while the district continues to research reading programs for the district.

USD #___ staff report the IEP team did discuss the Orton-Gillingham approach to reading and agreed to the services, accommodations, and modifications listed in the IEP dated November 5, 2018. Following the IEP team meeting, the parent was provided with a Prior Written Notice for Identification, Initial Services, Placement, Changes in Services, Change of Placement, and Request for Consent (PWN) for the services and accommodations agreed to at the IEP team meeting.

USD #___ reported that at the request of the parent, KS, Special Education Teacher, and AF, School Psychologist, agreed to look into getting an Orton-Gillingham approach reading curriculum for the student. Subsequently, USD #___ has provided training on Dyslexia to Ms. S, and researched a variety of reading programs based on the Orton-Gillingham approach. The District plans to make a recommendation at the April 2019 School Board Meeting for the

purchase of a reading program and to provide training to all staff so the approved program can be implemented for all students diagnosed with Dyslexia as well as struggling readers during the 2019-20 school year. USD #___ staff also noted they are have been waiting on the recommendations from the Legislative Task Force on Dyslexia to make any final decisions regarding reading instruction and curriculum.

Interviews and documentation found an IEP team meeting was held for the student on November 5, 2018. The purpose of the meeting was to review evaluation information, to review the IEP, and to revise the IEP if necessary. It is noted that the student's step-father was in attendance at the IEP team meeting; however, the parent did not attend or participate in the IEP meeting herself.

In the Concerns of the Parents/Educational Decision Maker section of the November 5, 2018 IEP, it states "*Stepdad is concerned that the Read 180 program is not meeting the student's needs. He would like a reading program implemented that is designed for individuals with dyslexia."*

The IEP includes one goal addressing reading comprehension which will be measured by progress made in the Read 180 program.

Team meeting notes state "*Parents are requesting the student's reading curriculum be Orton-Gillingham. Mrs. S and Mrs. F will look into getting the requested curriculum or a similar reading program in replace of Read 180. Mrs. S will also look into the possibility of replacing the spelling portion of the Read 180 program while a new reading program for dyslexia is being researched."*

A Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent (PWN) was provided to the parent on November 5, 2018. This PWN proposes continued eligibility for special education services, a change in services, and a change of placement. The section of the PWN refusing to initiate or change the identification, educational placement, or provision of special education and related services is not marked or completed.

Emails written by Ms. S to the parent dated November 7 and November 19, 2018 report on the progress of contacting administration regarding the change in reading curriculum.

The parent sent an email to Mrs. S on January 8, 2019 stating "*Can you discuss the plan for the student's accommodations regarding the reading program? I understand Dr. L____ is on medical leave. However, we would like an update on providing an instructor trained in the Orton-Gillingham curriculum. Time is of the essence, it is imperative he continues the reading program suggested by Children's Mercy Hospital.*"

An email response written by Ms. S to the parent on January 9, 2019 stated "*I will be meeting with the interim sped director Friday to discuss our options for Nathan. I will provide her with the information from our IEP meeting along with what I learned from my discussion with Carolyn at Lexibility. Hopefully we will have a plan in place soon*."

On January 25, 2019, the parent emailed Mrs. S regarding an update on the reading program. Mrs. S responded via two emails on January 27, 2019 indicating that she had not yet had the opportunity to meet with CG, Interim Special Education Director. Mrs. S also noted that "*I know she was waiting for some information from the state regarding new procedures and programs for working with students with dyslexia. A committee recently met to discuss this at the state level and we are supposed to be hearing their findings and rulings any time now."*

On February 1, 2019, Mrs. S emailed the parent with an update. She shared information about the recent recommendations regarding dyslexia education and training of staff. Mrs. S indicated USD #___ would "*be looking into the best way to go about doing both of these things."*

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 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, documentation and interviews found the parent made a request at the November 5, 2018 IEP team meeting for USD #___ to provide the student with reading instruction using an Orton-Gillingham approach. This request is

documented in the IEP and the Team Meeting Notes, but no PWN documents the team's response to this request. It is clear, however, that USD #___ refused the parent's request for the Orton-Gillingham approach to reading instruction by including a reading comprehension goal that uses the Read 180 program for IEP goal progress monitoring. The PWN provided to the parent does not include an explanation of why the parent's request for reading instruction to be provided using an Orton-Gillingham approach was refused.

USD #___ mistakenly believed the parent was in agreement with the reading instruction for the reading goal using the Read 180 program for progress monitoring described in the November 5, 2018 IEP. This miscommunication was compounded by USD #___'s belief that merely researching a reading program using an Orton-Gillingham approach was satisfactory with the parent. However, the subsequent emails between Mrs. S and the parent beginning on November 7, 2018 through February 1, 2019 clearly show the parent's continued dissatisfaction with the Read 180 program and their desire for reading instruction for the student using an Orton-Gillingham approach.

The IDEA requires a public agency to provide written notice to a parent who makes a request for a change in the provision of a free appropriate public education of the student. The purpose of the provision of the PWN is to clearly respond to parent requests so as to avoid miscommunication and to inform parents of their procedural safeguard rights if they disagree with the public agency's action.. USD #___ did not provide a PWN to the parent following the request for reading instruction based on an Orton-Gillingham approach instead of the Read 180 curriculum following the November 5, 2018 IEP team meeting. Based on the foregoing, the allegation of a violation of special education laws and regulations related to appropriately responding to a parent request is substantiated.

Note: Although not the focus of this investigation, interviews and documentation suggest that the IEP team was under the impression that the parent's request for a change in the provision of FAPE by changing the reading curriculum could not be decided at the IEP team meeting but would need to be approved by higher level administration. Federal regulations, at 34 C.F.R. 300.321(a)(4), require a representative of the public agency who is knowledgeable about the availability of resources be a member of the IEP team so that the decisions made in the IEP team meeting do not have be "approved" at a higher level by public agency staff who were not members of the IEP team.

In addition, rather than treating the parent request as an individualized request for the student, it appears USD #___ staff treated the parent's request as a district-wide request for a change in reading instruction for all students with Dyslexia. Federal regulations, at 34 C.F.R. 300.320, require public agencies to develop the IEP based on the unique needs of the child.

Corrective Action

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

A. 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 #___ did not provide PWN to the parent refusing her request for reading instruction based on an Orton-Gillingham approach rather than the Read 180 program at the November 5, 2018 IEP team meeting and therefore failed to respond appropriately to the parent request.

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. 300.503 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 when a request is made.

2. No later than May 15, 2019, USD #___ will provide training to the special education teachers and administrators who work with the student regarding when 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. In addition, the training will emphasize the individualized nature of the IEP process as well as the role of the LEA representative at the IEP team meeting. USD #___ will document who provided the training and the content of the training and send that documentation to Special Education and Title Services.

3. No later than April 1, 2019, USD #___ shall provide the parent with appropriate prior written notice regarding the parent's request for reading instruction based on an Orton-Gillingham approach rather than the Read 180 program. 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).

4. Further, USD # ___ shall, within 14 calendar days of receipt 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 620,, Topeka Kansas 66612-1212, within 10 calendar days from the date of the final report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to 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 #___
_____ PUBLIC SCHOOLS
ON APRIL 4, 2019

DATE OF REPORT: APRIL 26, 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 "the parent" in this report.

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with RS, School Psychologist and former Special Education Coordinator for USD #___ on April 8, 2019. The investigator spoke with NT, Assistant Superintendent and Director of Special Education for the district on April 9, 2019. On April 12, 2019, the investigator spoke via conference call with the following individuals:

- NT
- ST, Principal of F High School
- AT, Assistant Principal at the high school
- NR, Special Education Teacher for the student
- RS, School Psychologist
- JR, Activities Director at the high school

On April 18 and 19, 2019, the investigator spoke by telephone with the parent.

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

- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated April 26, 2018
- Notice of Meeting dated August 28, 2018
- Initial Evaluation and Eligibility Team Report dated August 29, 2018
- Certification of Eligibility for Special Education dated August 29, 2018
- Simple Functional Behavior Assessment dated August 27, 2018
- Revised Draft IEP for this student dated April 19, 2017

- Prior Written Notice for Identification, Initial Services, Placement Changes in Services, Change of Placement, and Request for Consent dated August 29, 2018
- Notice of Meeting dated February 22, 2019
- IEP Amendment Between Annual IEP Meetings dated February 22, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated February 22, 2019
- Email correspondence between the parents and school staff during the period of March 15, 2018 through April 9, 2019
- Log entries regarding absence and discipline covering the period of August 29, 2018 through February 19, 2019
- 2018-19 Activity Handbook for F High School

Background Information

This investigation involves a 17-year old boy who is enrolled in the 11th grade in his local high school.

In the Spring of 2018, after deciding to stop playing baseball following conflicts with coaching staff, the student's grades dropped and his school attendance decreased. It was determined that the student should be evaluated to determine whether he was eligible for and in need of special education services.

Written consent for an initial evaluation was given by the student's mother on April 26, 2018, and an evaluation was conducted by district staff. The report of a parent-initiated outside evaluation which had been completed by a Licensed Psychologist in 2017 when the student was 15 years, 10 months of age was also included in the summative evaluation report. That report included the "Diagnostic Impression" of "Oppositional Defiant Disorder" with recommendations for individual and family therapy.

The student was determined to be eligible for special education services on August 29, 2018 under the category of Specific Learning Disability. An IEP was developed and special education services were initiated.

The student's attendance and grades improved during the Fall semester of the 2018-19 school year. According to the district, there were some displays of inappropriate behavior, but the student was allowed to report to his special education teacher as a "safe room" intervention. That intervention resolved most problems. The student also played football during the Fall season.

Once football ended, the student's behavioral issues increased. He began skipping classes, and grades began to drop. A change in the student's schedule was made in order to address these issues.

In January 2019, a situation arose regarding the student's refusal to serve an in-school suspension. That refusal resulted in the student being given a 3-day out-of-school suspension. Another change to the student's schedule was made.

In mid-February 2019 – shortly before the start of the baseball season – the student was arrested. Charges were brought against the student which resulted in a court-ordered no-contact order. That order restricted the student's ability to move freely about the high school and constrained his participation in extracurricular activities.

Because of the student's legal situation, the district made a determination on March 8, 2019 that he was no longer in "good standing" and was therefore no longer eligible to participate in extracurricular activities.

Issue

The parent was contacted by Mark Ward of Special Education and Title Services following receipt of this complaint. The concerns of the parent were clarified as follows:

Concern #1: The school district has failed to develop an IEP to adequately meet the behavior needs of my child.

In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior. (See K.S.A. 72-3429(4).) The focus of positive behavioral interventions and supports in the IEP should beis prevention of the behavior, not just provision for consequences subsequent to the behavior. This means that the team must attempt to identify the function of the behavior, usually through a functional behavioral assessment, and develop strategies to prevent the behavior from occurring again in the future. The positive behavioral interventions and supports could be implemented through the IEP annual goals, program modifications, ***or*** a behavioral intervention plan (BIP).

Parent's Position

The parent reports that the student has been diagnosed with Oppositional Defiant Disorder (ODD) and alleges that the student's behavior difficulties have interfered with his ability to make appropriate educational progress and to participate in extra-curricular activities, such as baseball. The parent asserts that the student needs a behavior intervention plan (BIP) that includes positive behavioral interventions and supports. According to the parent, he has asked the district to include such a plan in the student's IEP, but to date that has not happened.

District's Position

The district asserts that a behavior intervention plan has been a part of the student's IEP since services to the student began on August 29, 2018 and contends that plan includes positive behavioral interventions and supports.

Investigative Findings

On April 26, 2018, the student's mother gave written consent for the district to conduct an initial evaluation for special education services. The evaluation was – according to the "Initial Evaluation and Eligibility Team Report" dated August 29, 2018 – requested by the parents because the student had "been struggling in the academic setting." As noted on the report, the parents requested the evaluation to determine if the student had an exceptionality and needed specialized instruction.

Assessments completed by district staff showed the student to fall within the average range of intellectual functioning with overall academic skills within the average range. Skills related to reading comprehension and reading recall were, however, noted to fall within the "borderline deficient" range for the student's age.

Included in the evaluation report was an evaluation which had been conducted when the student was 15 years, 10 months of age by a Licensed Psychologist who diagnosed the student as having Oppositional Defiant Disorder. At the time of the evaluation, the Psychologist had recommended family therapy as well as individual therapy for the student to address "anger and self-harmful behaviors, defiance and compliance, substance abuse, and the identification of and appropriate expression of thoughts and feelings."

On August 27, 2018, the special education teacher for the student completed a Simple Functional Behavior Assessment which was "based on records from (the) 2017-18 school year." The assessment established the following "problem behavior:"

> "(The student) leaves the building on a regular basis according to 2017-18 attendance logs."

On August 29, 2018, an initial IEP was developed for the student. The "Teacher Information Page" notes that the student's primary disability was determined to be "Specific Learning Disability." It was determined that the student needed 52 minutes per day of special education services five days a week in a special education setting and 104 minutes per day, five days per week, of special education services in a general education setting throughout the remainder of the 2018-19 school year.

Under the “Social/Emotional” section of the August 29, 2018 IEP, it was noted that the student needed to learn “positive behavior interventions in order to decrease his negative behaviors that result when he can not handle his emotions. (The student) tends to live in the ‘fight vs. flight’ mode when he is going through one of his emotional periods. (The student) needs to learn to remove himself and relocate to a safe spot to cool down before reaching the point where he chooses to fight or flight…At this time, (the student) chooses to leave the school premises when he is feeling agitated or overwhelmed which results in missing class time and instruction. This is a concern, especially when he fails to get permission to leave.”

According to the August 2018 IEP, needs in the social/emotional area were to be addressed through the following:

- a goal,
- accommodations/modifications/supplementary aids, and
- supports for school personnel.

The following goal was developed by the IEP team:

> “By the end of the IEP year, (the student) will learn positive behavior interventions to reduce outbursts and leaving school premises by 50% by using his safe spot to cool down when needed, as measured by behavior tracking by the special education teacher.”

Under the “Accommodations/Modifications/Supplementary Aids” section of the August 2018 IEP, it was noted that

- “(The student) will be provided a separate, quiet setting for all testing situations…whenever given a test in any class,” and
- (The student) will be allowed to exit the classroom to report to his ‘safe spot’ as needed throughout the school day…whenever behavior arises that he feels the need to remove himself.”

With regard to the “supports for school personnel,” the district reports that the special education teacher for the student met with each of the student’s teachers at the start of the school year to review an “IEP at a Glance” as well as to review the student’s behavior plan and to provide them with information regarding Oppositional Defiant Disorder.

The August 2018 IEP contains a section entitled “Positive Behavioral Intervention Plan.” Four “Prevention” strategies were included in that plan:

1) The student would be provided with a “safe place” within the building to report to when he felt the emotional need.

2) The student was to be given “space and time to recollect himself if he should become angry, sad, etc.”
3) The student was to be allowed to leave the classroom in order to cool down as needed.
4) The student was to be allowed to stay in the resource room or safe spot for as long as he felt the need to do so.

The behavior plan was to be reviewed weekly, and the special education teacher was to communicate with the parents and staff regarding the effectiveness of the plan as well as any changes to the plan that were needed. According to the special education teacher, she used district maintained attendance data to determine whether or not the student left school and determined that the student was making good progress toward attaining his behavior goal.

The district conducted an initial evaluation of the student to determine whether he was eligible for and in need of special education services. As a part of that evaluation, the team considered an earlier outside evaluation of the student which included a diagnosis of ODD. Additionally, the district conducted a Functional Behavior Assessment which focused on the student’s leaving school when he felt agitated or overwhelmed. The student was identified as exceptional, and special education services were recommended. An IEP was developed which contained a Behavior Intervention Plan which included positive behavioral interventions and supports to address the targeted behavior. After the plan was implemented, the student has made progress toward attaining his behavior goal. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Additional Issues

In telephone conversations with the investigator, the parent raised two additional issues which were not specifically addressed under the original complaint:

<u>Concern Two:</u> The district failed in the Spring of 2018 to implement appropriate positive behavioral intervention and supports which could have prevented conflicts that arose during baseball season.

According to the parent, in March of 2018, following an incident between the student and his baseball coaches, the student decided to quit playing baseball. After a meeting between the student’s father and district staff, the student was allowed to resume playing baseball under specified conditions. Another incident ensued in late March 2018, and the student once again decided to drop out of baseball. It is the position of the parent that these incidents were the result of the district’s failure to properly address needs of the student which were related to his diagnosis of ODD.

A formal complaint must allege a violation of federal or state statutes or regulations which occurred during a one year period prior to the date the complaint is received by KSDE (see 34 C.F.R. § 300.153(c)). The incidents described by the parent in this instance occurred outside of that one-year window and were therefore not investigated.

Concern Three: The district acted inappropriately when reducing the level of special education services to the student in February 2019.

Once the IEP Team has made the decision on the initial placement of a child with an exceptionality, the parents must be provided Prior Written Notice about the placement decision and must be requested to provide consent before initial provision of special education and related services in the proposed placement. Within the notice requirements, parents must be informed about the placement options that were considered and the reasons why those options were rejected. Additionally, for subsequent changes to the IEP, parents must provide consent for any substantial change in placement (more than 25% of the child's school day) or material change in services (increase or decrease of 25% or more of the duration or frequency of a special education service, a related service, or a supplementary aid or service) (K.S.A. 72-3430(b)(6)).

On February 22, 2019 – after the student's arrest and the execution of a court order of no-contact with specified other students – an IEP Team meeting was held. Present were the student and his mother, the student's special education teacher, the building principal, and a general education teacher for the student. The decision was made to reduce special education services from 52 minutes 5 times per week in the resource setting to 120 minutes twice a week (a reduction of 20 minutes – or approximately 8% – in direct special education services in a special education setting). Because the student could no longer participate in his general education classes due to the no-contact order, paraeducator support in the general education setting was no longer needed, and those services were removed from the student's IEP. The student's mother gave written consent for the proposed changes on February 22, 2019. On that same date, the student's mother also signed a form entitled "IEP Amendment Between Annual IEP Meetings" which spelled out the changes proposed by the district. By signing the form, the student's mother indicated that she agreed to "amend the student's IEP."

On April 9, 2019, the building principal sent an email to the student's mother regarding, among other things, the student's "current schedule here at school." The principal asked the student's mother whether that was "something that you guys are looking at making adjustments to…If so, we need to get an IEP meeting set up to discuss what that would look like."

The student's mother responded on April 9, 2019 stating, "I don't think so. I am not sure why (the student's father) thinks there needs to be any changes, but he

has not really discussed that with me. With only a few weeks left in this year I think it would be best to leave things the same. We will need to make changes for next year, but probably best to do that after the summer and we get all the court stuff behind us. I would come to (the Assistant Superintendent and Director of Special Education) first if I was wanting changes."

The student and his mother participated in an IEP Team meeting wherein the proposal was made to reduce the level of special education services provided to the student. The district provided prior written notice for the proposed changes to the student's IEP, and the student's mother gave her written consent for the proposed changes. 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 statute and regulations on the issues presented in this complaint. Therefore, no corrective action is required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to the State Commissioner of Education within 10 calendar days from the date of the 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 FEBRUARY 4, 2019

DATE OF REPORT: MARCH 6, 2019

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 Susan ____ will be referred to as "the parent." The complaint was sent to the Department on February 4, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on March 6, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on February 25, 2019. USD #___ made the following staff persons available as part of the investigation process:

- LG, Director of Special Education
- DP, English Language Arts Teacher
- DW, Assistant High School Principal
- SR, High School Principal
- CM, Superintendent
- AH, Special Education Teacher and Case Manager
- JC, Special Education Teacher
- SM, School Psychologist
- CH, Administrative Assistant

The Complaint Investigator interviewed the parent by telephone on February 25, 2019 as part of the investigation process. In addition, at parent request and with parent written consent, the Complaint Investigator also interviewed two persons the parent believed had pertinent information. Angie Schreiber, Executive Director, Cradle to Career Literacy Center, was interviewed by telephone on February 27, 2019. Chris Niileksela, Licensed School Psychologist, was interviewed on March 1, 2019.

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

- Psychoeducational Assessment dated October 24, 2017 written by Avner Stern, Licensed Clinical Psychologist
- Psychoeducational Assessment Report dated November 21, 2018 written by Chris Niileksela, Licensed School Psychologist, which was shared with USD #___ in November 2018
- Psychoeducational Assessment Report dated November 21, 2018 written by Chris Niileksela, Licensed School Psychologist, which was shared with USD #___ in January 2019
- Individual Education Program (IEP) for the student dated September 11, 2018 and amended on November 28, 2018
- IEP for the student dated September 12, 2017
- Team Meeting Notes dated November 28, 2018 written by USD #___ staff
- Team Meeting Notes dated November 28, 2018 written by the parent
- Email dated November 26, 2018 written by the parent to LG
- Email dated March 4, 2019 written by Dr. Niileksela to the Complaint Investigator
- Team Meeting Notes dated September 11, 2018 written by USD #___ staff
- Team Meeting Notes dated September 11, 2018 written by the parent
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated September 13, 2018
- Results of the February 19, 2019 AccuPlacer Test for Flint Hills Technical School
- Meeting Notes written by the parent regarding a meeting held with USD #___ staff on September 18, 2018
- Cradle to Career Memorandum of Agreement
- Aimsweb Data Chart dated December 2017 through May 2018
- Rite Flight Data Sheet dated February 15, 2018 through April 19, 2018
- IEP Progress Report for the September 11, 2018 IEP
- Copies of the student's class schedule for the 2018-19 school year

- Email correspondence between JC and Jackie Bell dated January 31, 2019
- Response to the Allegations dated February 19, 2019 written by LG

Background Information

This investigation involves a 16 year old girl who is enrolled in the 11th grade at Burlington High School in USD #___ during the 2018-19 school year. The student began her educational career in USD #230 and originally had a Section 504 Plan due to a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) in second grade. The student was initially evaluated for special education in third grade and found eligible for special education services under the exceptionality category of Specific Learning Disability. The student received special education services to address the student's specific learning disability until the sixth grade when the she enrolled in USD #___. Since her enrollment, USD #___ has continued to provide special education services.

Issues

The complainant raised four issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint begins on February 4, 2018.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to appropriately consider the results of the outside assessment conducted as part of the triennial reevaluation at the November 28, 2018 IEP meeting.

Findings:

Interviews and documentation found the student's triennial reevaluation is required to be completed prior to April 26, 2019. This reevaluation was discussed at the September 11, 2018 IEP Team meeting and the parent requested that school staff not conduct the assessments for the reevaluation. USD #___ staff understood this to be a request for an independent educational evaluation (IEE) and granted the request. An IEE was conducted by Chris Niileksela, Licensed School Psychologist, resulting in a Psychoeducational Assessment Report dated November 21, 2018. An unsigned copy of this report was provided to USD #___ by the parent on November 26, 2018, prior to the

November 28, 2018 IEP Team Meeting. The parent subsequently provided USD #___ with a signed copy of the report in January 2019.

The parent reported USD #___ did not appropriately consider the results of the independent educational evaluation (IEE) conducted in November 2018. The parent indicated the school district refuses to provide the explicit, structured reading instruction recommended to address the student's dyslexia as a result of the evaluation. The parent believes USD #___ has historically not provided this type of instruction and therefore should be providing this instruction through the program offered through the Cradle to Career Literacy Center. The parent reported that a previous IEE in October 2017 also included this same diagnosis of dyslexia and a recommendation for reading to be taught using an explicit, structured reading program. The parent expressed frustration that USD #___ continues to ignore these recommendations to address the student's diagnosis of dyslexia.

Interviews and documentation found the parent requested an IEE for the student at the beginning of 10th grade. This IEE request was granted and a psychoeducational assessment was provided by Dr. Arven Stern, Licensed Clinical Psychologist. The report based on this assessment is dated October 24, 2017 and included the following recommendations related to reading instruction and accommodations:

- *Student will also need work with phonological processing and LIPS from Lindamood Bell, or incorporating the sound pictures from Take Flight to increase her grapheme- phoneme knowledge.*
- *To compensate for Student's Specific Learning Disorder, the following accommodations are recommended: Allow time-and-a half for all exams requiring reading in a quiet testing environment free from distractions; Provide audiobooks for textbooks; To not count spelling errors as part of her class grade.*

A Psychoeducational Assessment Report dated November 21, 2018 written by by Dr. Niileksela was provided to USD #___ by the parent on November 26, 2018. That version of the report included 23 recommendations. The report also states "*The following recommendations describe some programs and approaches that can be used may help her improve her reading and spelling skills*." Nine programs and approaches are listed including Multisensory approach; Audiobooks; High Frequency Words; Cover, Copy, Compare; Fenald Method; Neurological Impress; Word Processing; Reading for Fun; and Explicit, Structured Reading Instruction described as follows:

- *It would be beneficial for the student to be part of a structured, specific program for reading that focuses on the development of phonological and phonemic awareness, orthographic processing, and reading fluency. Programs that are based on Orton-Gilingham, Lindamood-Bell, or a specific program like Take Flight may be appropriate for her.*

It is noted that this copy of the report was not signed by Dr. Niileksela.

Another copy of the Psychoeducational Assessment Report dated November 21, 2018 written by by Dr. Niileksela was provided to USD #___ by the parent in January 2019. That version of the report included 24 recommendations. The report also states "*The following recommendations describe some programs and approaches that can be used at home that may help her improve her reading and spelling skills*." The same nine programs and approaches are listed and added an additional recommendation as follows:

- *Tutoring: Information from parents indicate that the student has been working with Cradle to Career in Emporia, Kansas to help improve reading and spelling skills. It is recommended that this be continued to ensure she is able to continue to develop skills and strategies for basic reading and spelling skills.*

It is noted that this copy of the report is signed by Dr. Niileksela and dated November 19, 2018.

An interview with and documentation from Dr. Niileksela revealed the original report was provided to the parent via email on November 24, 2018. Dr. Niileksela indicated the parent requested some wording changes to report on November 25, 2018 and the final report was changed to reflect the suggestions. A copy of the final edited version of the report was then emailed to the parent on November 26, 2018. Dr. Niileksela stated that a final signed copy of the report was provided to the parent on or about December 11, 2018. The final version of the report should read "*The following recommendations describe some programs and approaches that can be used may help her improve her reading and spelling skills*." The final version of the report should not include the Cradle to Career recommendation for tutoring.

Based upon Dr. Niileksela's description of events surrounding the Psychoeducational Assessment Report, it appears the parent confused the original version and the final version of the report when providing a copy to the school. Regardless, the IEE considered at the November 28, 2018 IEP meeting appears to be the correct version of the report.

Notes kept by the parent of the IEP Team Meeting held on November 28, 2018 indicate the reading teacher had not read the IEE prior to the meeting. The notes reflect discussion of staff training to provide instruction in Wilson Reading [Note: The Wilson Reading System (WRS) is based on the Orton-Gillingham approach] and adding the accommodation of notes being provided to the student. The notes also show much discussion regarding the parent request that USD #___ contract with the Cradle to Career Literacy Center to provide the student's literacy program based on explicit, structured reading instruction.

Notes kept by USD #___ staff of the IEP Team Meeting held on November 28, 2018 indicate the purpose of the meeting was to review the IEE completed by Dr. Niileksela. The notes also reflect that the report had not been read by all IEP Team members as it had only been provided to USD #___ on November 26, 2018. The notes show there was discussion at the meeting related to appropriate teacher training for the Wilson Reading program and the parent's request for the Cradle to Career program to be paid for by USD #___. The notes also show an IEP amendment was made to add an accommodation to provide the student notes of classroom lectures.

USD #___ staff report the current IEP dated September 11, 2018 and amended on November 28, 2018 as well as current IEP implementation already includes the following services and accommodations recommended in the IEE conducted by Dr. Niileksela:

- Instruction
    - Explicit, Structured Reading Instruction and Multisensory Approach provided through use of Sonday System [Note: the Sonday System is based on the Orton-Gillingham approach]
    - High Frequency Words using the Sitton Spelling List
    - Reviewing and Editing incorporated into Goal #3
    - Daily Study Skills class in the special education setting
- Accommodations
    - Use of diagrams
    - Paraphrase Instructions
    - Extended Time
    - Separate Quiet Environment
    - Use of audiobooks
    - Provided a laptop for word processing

Federal regulations, at 34 C.F.R. 300.502(c) require public agencies to consider the results of an independent educational evaluation in any decision made with

respect to the provision of a free appropriate public education of the student. There is no requirement that the public agency accept the results of independent evaluations, only that the results of the independent evaluation are considered when making decisions with regard to FAPE.

In this case, interviews and documentation show the parent requested an IEE on September 11, 2018. This IEE was conducted by Dr. Niileksela and the results reported in the Psychoeducational Assessment Report dated November 21, 2018. The parent provided a copy of the unsigned version of this report to USD #___ on November 26, 2018. This version of the report was discussed and considered at the IEP Team Meeting held on November 28, 2018. The September 11, 2018 IEP was reviewed in light of the recommendations and amended based on the discussion. Documentation and interview found the unsigned version provided to USD #___ is the final version of the report and as such was considered by USD #___ at the November 28, 2018 IEP Team Meeting in decisions related to the provision of FAPE. Based on the foregoing, the allegation of a violation of special education laws and regulations related to this issue is not substantiated.

> **ISSUE TWO:** 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 enable the student to make progress appropriate in light of the child's circumstances during the past 12 months.

Findings:

The parent alleges USD #___ has failed to use appropriate interventions as evidenced by the minimal progress in reading skills. The parent believes USD #___ has not provided the research based interventions to address the student's dyslexia with fidelity. The parent reports paying for services through the Cradle to Career Literacy Center during the summer of 2018 and that the student made more progress during those three months than USD #___ has provided in five years. The parent notes that multiple requests have been made for the student's special education services to be provided through the Cradle to Career Literacy Center but these have always been denied resulting in the student's lack of meaningful progress in reading skills.

Interview and documentation provided by Angie Schreiber, Executive Director of Cradle to Career Literacy Center, found the student was provided 60 hours of

instruction in reading, writing, math, and computer applications during summer 2018. Ms. Schreiber explained that while the student has made some progress in USD #___'s program, that progress was not sufficient as evidenced by a .0.80 trend line for oral reading fluency as measured by Aimsweb. At the beginning of the summer, the Quick Phonic Screener (QPS) showed the student had mastered 6 of 13 phonic skills tested and at the end of the summer, the student had mastered 13 of 13 phonic skills tested.

Ms. Schreiber reported four school districts in the state of Kansas currently contract with Cradle to Career Literacy Center to provide special education services through a Memorandum of Agreement.

The findings of Issue One are incorporated herein by reference.

LG, Director of Special Education for USD #___ reported that the student's IEP team has used the information gained through the two psychoeducational assessments which were completed in October 2017 and November 2018 to develop IEPs which are designed to enable the student to make progress in light of her unique circumstances. Ms. G noted *"It is important to note that the team is aware of all of student's diagnoses including dyslexia and ADHD. In addition, the student's formal testing confirms consistently that she has low working memory. The 2017 IEE indicated a working memory in the 1st percentile, and the 2018 IEE showed a working memory in the 5th percentile. The student's working memory will impact the rate at which the student can acquire and retain concepts."*

In the area of reading, the Present Level of Academic Achievement and Functional Performance (PLAAFP) in the September 11, 2018 IEP shows an overall reading composite in the 48th percentile. Vocabulary was measured at 37th percentile. Silent reading fluency was measured at 28th percentile. Reading comprehension was 89th percentile. Oral reading fluency was at 21st percentile. The August 28, 2018 results of Aimsweb were listed as follows:

4th grade level text: 154 words per minute (wpm), 83rd percentile
7th grade level text: 137 wpm, 40th percentile
8th grade level text: 97 wpm, 8th percentile
High school level text; 99 wpm, 8th percentile

The impact of her exceptionality is described as "*Due to the student's visual perception disorder and dyslexia diagnosis, it will be difficult for her to perform at grade level. She will benefit from more exposure to text, ad read aloud during tests and large reading assignments. The student will have to be exposed to text in multiple formats so she would benefit from audio books but will also need to*

read and re-read text silently and aloud in order to benefit from multiple exposures due to her low reading and low working memory." A goal was written to increase her reading fluency to 135 words per minute on 8th grade level text. To achieve this goal, the IEP requires 50 minutes per day of special education services outside of the regular education setting.

Interview and documentation found the student is currently receiving the 50 minutes per week of specialized instruction in reading skills in a one-to-one setting with JC, Special Education Teacher. Ms. C is certificated in Kansas to teach Secondary English grades 7-12 and Learning Disabilities grades 7-12. The Sonday System is used to provide explicit, structured reading instruction to the student.

Ms. C was trained in the Sonday system during the 2017-18 school year with her most recent one-day refresher training being conducted on January 28, 2019. Documentation shows Ms. C consulted via email on January 31, 2019 with Jackie Bell, the educational consultant who provided the Sonday training regarding correct implementation of the programming. Ms. Bell responded to that "*You're being diagnostic and prescriptive! That's how good teachers respond to their learners. And the fact that you are recognizing the need to reteach concepts shows that you are definitely making wise instructional decisions!!"*

The IEP Goal Progress Report dated December 19, 2019 shows the student read 114 wpm when presented with 8th grade level text as measured by Aimsweb progress monitoring. This is a gain of 17 wpm and the student is rated as on track to meet the annual goal of reading 135 wpm when presented with 8th grade material by September 10, 2019.

Federal regulations, at 34 C.F.R. 300.320, require school districts to develop an IEP describing the special education and related services needed to address the unique needs of students with disabilities to enable the child to 1) advance appropriately toward attaining the annual goals; 2) be involved in and make progress in the general education curriculum; 3) participate in extracurricular and other nonacademic activities; and, 4) be educated and participate with other children with disabilities and nondisabled children.

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."*

In this case, it appears that the IEP team of the student, including the parent, met on September 11, 2018 and again on November 28, 2018 to review and revise the student's IEP. The results of the most recent IEE as well as current progress monitoring data were considered by the IEP Team in the development of a reading goal and special education services to address the student's reading fluency which data suggested was the weakest area of reading skills. USD #___ is providing explicit, structured reading instruction using the Sonday System by an appropriately certificated and trained special education teacher. IEP goal progress reports show the student is making progress towards meeting the annual goal.

It is clear that the parent would prefer the special education instruction be provided through the Cradle to Career Literacy Center. However, documentation and interviews show USD #___ appears to have developed an IEP designed to allow the student to advance appropriately towards her annual reading goal. The September 11, 2018 IEP which was amended on November 28, 2018 appears to be based on the student's present levels of achievement and takes into account her disability, and potential for growth as described for the student in the two recent IEEs.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to this issue is not substantiated.

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act

(IDEA), failed to include appropriate transition services in the Individualized Education Program (IEP) to enable the student to meet her post-secondary goals during the past 12 months.

Findings:

The parent alleges the transition services included in the student's IEPs during the past 12 months are not adequate to appropriately enable the student to meet her post-secondary goals. The parent reported the student wants to attend college or technical school after graduation. The parent wants the student to attend Flint Hills Technical School Instead of taking multiple elective classes during her senior year. However, the parent reported the student did not earn a high enough score on the English portion of the AccuPlacer Test administered in February 2019 to be enrolled. The parent also reported the student took the AccuPlacer Test in 2018 for Allen County Community College (AAC) and scored a 34 in writing and a 31 in reading. The student needs a score of 35 in both areas to be enrolled in the pre-English composition class. At present her scores place her into the Integrated Reading and Writing class. The parent indicated the student will have to take a full year of pre-English courses at personal expense prior to being able to enroll in Freshman Composition 1 at AAC. The parent states the student's poor test scores in English are the direct result of USD #___ not providing the student with appropriate literacy instruction.

The findings in Issue One and Issue Two are incorporated herein by reference.

Documentation found two IEPs in effect for the student during the past 12 months. The first IEP was dated September 12, 2017 and the student turned age 16 during the IEP cycle. The second IEP was dated September 11, 2018 and the student will turn 17 during this IEP cycle. Both IEPs include post-secondary goals and transition services.

The September 12, 2017 IEP states the student's post-secondary goals are to go to school and obtain training to become a licensed daycare provider resulting in employment as a daycare provider. The anticipated Course of Study included high school courses that would allow the student to obtain a high school diploma which is a requirement for admission into higher education. The transition services consisted of the accommodations/modifications to the general education curriculum which included paraprofessional support in general education classes in addition to special education services for reading and study skills.

The September 11, 2018 IEP states the student's post-secondary goals were to obtain training and a degree in human services in order to be employed as a child advocate. The anticipated Course of Study includes high school courses that would allow the student to obtain a high school diploma which is a requirement for admission into higher education. The transition services include the accommodations/modifications to the general education curriculum which included paraprofessional support in general education classes as well as special education services for reading and study skills. In addition, the student will participate in career exploration to learn about her field of interest and how they match with her strengths. Finally, to increase self-advocacy skills, the student will work on addressing teachers in regards to grades, assignments, and tests.

USD #___ staff report the current post-secondary goals are based on an informal student interview conducted on August 30, 2018 and the results from the interest inventory completed on September 6, 2018 through MyNextMove.org. The September 11, 2018 IEP notes the student's choice of a future career as a child advocate lines up with her highest interest inventory score which was in the social area. The student is currently enrolled in courses that will lead to graduation with a high school diploma as well as dual credit classes that will allow the student to graduate with college credit toward her goal of a college degree in human services.

USD #___ staff noted the student completed the following classes at Allen County Community College (AAC) in Fall 2018 and earned nine hours of college credit as follows:

BIO115 – Basic Nutrition (online) – earned an A
PSY101 – General Psychology (night class) – earned an A
SOC102 – Sociology (dual credit class) – earned a B

It was noted the student withdrew from a dual credit history class during this timeframe due to the risk of failing the class. The parent reported the class was switched to include only the high school credit responsibilities and a "W" for withdrawal is now recorded on the student's AAC transcript.

The student is currently enrolled in the following classes to earn an additional four hours of college credit:

ANT111 – Cultural Anthropology (duel credit)
GEO104 – Principles of Geography (night class)

Federal regulations, at 34 C.F.R. 300.320(b), requires that beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include (1) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the child in reaching those goals.

Federal regulations, at 34 C.F.R.300.43(a)(2), requires that post-secondary goals and transition services be based on the individual child's needs, taking into account the child's strengths, preferences, and interests.

In this case, it appears that the student's current post-secondary goal in the area of education/training is to attend college and earn a degree in Human Services. The student's current post-secondary goal in the area of employment is to be employed as a child advocate. Documentation and interview show these goals are based upon age appropriate transition assessments including an informal student interview and an interest inventory. The Course of Study is designed to lead to graduation with a high school diploma as well as to allow the student to earn college credit towards her college degree. The transition services appear to be designed to support academic success, build skills in self-advocacy, and increase reading skills. Based on the foregoing, the allegation of a violation of special education laws and regulations related to this issue is not substantiated.

> **ISSUE FOUR:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the parent request for access to SKYPE or a similar web program to allow the student to receive intensive instruction in appropriate programs designed to provide educational benefit at the November 28, 2018 IEP team meeting.

Findings:

The parent believes USD #___ has not provided appropriate literacy instruction to the student during the past two school years. For this reason the parent requested that the Cradle to Career Literacy Center provide the literacy instruction to the student in lieu of USD #___ special education staff. A number of services and placement options were discussed to accomplish this request. Although this request has been made several times, the most recent request was made at the November 28, 2018 IEP Team Meeting.

The findings in Issue One are incorporated herein by reference.

Interviews and documentation found the parent request for the Cradle to Career Literacy Center to provide the literacy instruction to the student in lieu of USD #___ special education staff was initially made at the September 11, 2018 IEP Team Meeting. A Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated September 13, 2018 was provided to the parent rejecting the parent's request for a change in services and placement. Under the Options Considered and Why the Options Were Rejected section of the PWN it states "*Request was made by parents for the district to provide the student with Cradle to Career programming during the school day, paid for by the district and delivered by the Cradle to Career Staff. This has been rejected as the team will continue to provide other research based programming to meet the student's needs. The services are being provided by staff that is highly qualified in Secondary English grades 7-12, Learning Disabilities grades 7-12 for the intensive 1-1 instruction for reading.*

The parent made another request for USD #___ to contract with the Cradle to Career Literacy Center to provide the literacy instruction to the student in lieu of USD #___ special education staff at the November 28, 2018 IEP Team Meeting. USD #___ staff indicated that this request had already been rejected following the September 11, 2018 IEP Team Meeting and acknowledged that another PWN was not provided to the parent following the November 28, 2018 IEP Team Meeting.

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 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.

In this case, documentation and interviews found the parent made a request for USD #___ to contract with the Cradle to Career Literacy Center to provide the literacy instruction to the student in lieu of USD #___ special education staff at

the November 28, 2018 IEP Team Meeting. The IDEA requires a public agency to provide written notice each time a parent makes a request for a change in services or placement. USD #___ acknowledged a PWN was not provided to the parent following this request erroneously believing they had previously responded to the same request on September 13, 2018. Based on the foregoing, the allegation of a violation of special education laws and regulations related to appropriately responding to a parent request is substantiated.

Corrective Action

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

A. 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 request at the November 28, 2018 IEP Team Meeting for USD #___ to contract with the Cradle to Career Literacy Center to provide the literacy instruction to the student in lieu of USD #___ special education staff.

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. 300.503 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 May 15, 2019, USD #___ will provide training to the special education teachers who work with the student regarding when 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.

3. No later than April 1, 2019, USD #___ shall provide the parent with appropriate prior written notice regarding the parent's requests related to services being provided by Cradle to Career Literacy Center. 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).

4. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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: 19FC___-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on February 4, 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 March 6, 2019. That Initial Report concluded that there was a violation of special education laws and regulations

Thereafter, the parent, through her attorney, 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, the district's written response, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The appeal committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

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: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." This appeal consisted of fourteen numbered statements each alleging error. However, there was no reference in any of these statements regarding which of the complaint issues were being appealed in these statements. The notice of appeal did not even identify which issues were being appealed. This lack of clarity made it difficult for the appeal committee to assess which issues were being appealed, and how the alleged errors affected the outcome of any of the issues in the Initial Report. The appeal committee assumes that the parent is appealing all of the conclusions in the Initial Report, and will address each of the issues specified in that Initial Report.

The first numbered statement in the appeal alleged that the investigator reframed issues "to focus on procedural versus substantive educational issues." There was no explanation in this statement as to how the investigator focused on procedural issues versus substantive issues. However, the investigator clearly did reframe the issues. The appeal committee believes it was necessary for the investigator to reframe the issues presented because the issues presented were stated in an extraordinarily broad manner. The first issue in the initial complaint, for example, was presented in three paragraphs, the second issue was presented in one, eight-sentence paragraph, and the fourth in two extended paragraphs. It is the duty of an investigator to narrow broadly stated allegations into specific allegations, to the extent that is possible. The appeal committee believes this investigator properly framed each issue.

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.

DISCUSSION OF ISSUES ON APPEAL

ISSUE 1: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately consider the results of the outside assessment conducted as part of the triennial reevaluation at the November 28, 2018 IEP meeting.

The applicable regulation is 34 C.F.R. 300.502(c)(1). That regulation says that when a parent obtains an independent educational evaluation (IEE), whether privately or at public expense, the IEE must "be considered" in any decision with respect to the provision of a free appropriate public education (FAPE). Courts have consistently held that, although IEP teams must consider the results of an IEE, they have no obligation to adopt the evaluator's recommendations or conclusions [See, for example: R.Z.C. v. North Shore School District 73 IDELR 139, 17-35933 (9th Cir. 2018)]. The issue presented in the complaint was whether the IEE conducted by Dr. Niileksela in November of 2018 was given due consideration. Further, the notice of appeal alleges that the investigator made an incorrect legal conclusion regarding 34 C.F.R. 300.502(c), claiming that the IEE was the triennial evaluation and therefore the IEE cannot be discarded by the team.

The committee found no evidence to support the claim that the IEE was the triennial evaluation rather than an IEE. In addition, the district's written response to the appeal indicated that the triennial reevaluation is due by April 26, 2019, and the district will contact the parents to obtain consent for conducting the reevaluation. The duty of the IEP team, pursuant to 34 C.F.R. 300.502(c)(1), was to consider the results of the IEE. On page 5 of the Initial Report, the investigator notes that there was a second version of the IEE which added this recommendation:

> Tutoring: Information from parents indicate that the student has been working with Cradle to Career in Emporia, Kansas to help improve reading and spelling skills. It is recommended that this be continued to ensure she is able to continue to develop skills and strategies for basic reading and spelling skills.

On the same page, the investigator described an interview she had with Dr. Niileksela, in which Dr. Niileksela indicated that his original report was changed to reflect the suggestions of the parent. A final, edited version of the report was completed and mailed on November 26, 2018. That final version read "The following recommendations describe some programs and approaches that can be used may (sic) help her improve her reading and spelling skills." This final version did not include the Cradle to Career recommendation for tutoring.

On page 6 of the Initial Report, the investigator stated that the notes of the November 28, 2018, IEP meeting, kept by the parent, show "much discussion" regarding the parent's request that the district contract with Cradle to Career Literacy Center to provide reading instruction. The notes of this meeting that were kept by the district also indicate much discussion of this issue.

Page 6 of the Initial Report lists ten separate instructional methods and accommodations in this students IEP which were recommended in Dr. Niileksela's IEE. Further, evidence indicates that the IEP team adopted 19 of the recommendations listed in the IEE.

The appeal committee finds ample evidence that the student's IEP team gave more than adequate consideration to Dr. Niileksela's IEE, and that it adopted several recommendations from the IEE. 34 C.F.R 300.502(c)(1) requires the district to "consider" the IEE; the IEP team went beyond that requirement. The Appeal Committed concludes that the Initial Report should be, and is, sustained on this issue.

ISSUE TWO: 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 enable the student to make progress appropriate in light of the child's circumstances during the past 12 months.

The notice of appeal states that the Initial Report drew an incorrect legal conclusion from Endrew F. v. Douglas County School District because it ignored this portion of the decision: "For a child fully integrated in the regular classroom, an IEP typically should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." The notice of appeal further states that because the student is fully integrated, the expectation is that she should "catchup with grade level peers."

The investigator cited the Endrew F. case on pages 9 and 10 of her Initial Report. There the investigator quoted a short segment from guidance by the United States Department of Education regarding the Endrew F. decision. The investigator emphasized the part of this guidance which stated that the IEP team must give "careful consideration to the child's present levels of achievement, disability, and potential for growth." The parent is correct that the court, in the Endrew F. decision said that a child who is fully integrated in the regular education classroom "typically should" receive passing marks and advance from grade to grade. Neither the statute nor the Endrew F. decision requires, or guarantees, that children who are fully integrated into regular education classrooms will receive passing marks, advance from grade to grade, or "catch up" with grade level peers. It is still an individualized process. The Court said there is no "bright-line rule" regarding the adequacy of a given IEP. According to the Court, the required level of progress is progress that is appropriate in light of the child's circumstances. The Endrew F. decision went on to say that when there is disagreement between the parties as to the appropriateness of an IEP, deference is given to school officials, based on the application of expertise and the exercise of judgment.

The Court added that a reviewing court "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Aside from the

fact that the student has received passing grades in all classes, there was evidence that the reading goal for the student was appropriate for this particular student and that the student was making sufficient progress toward the achievement of her reading goal. The investigator likely did give some deference to the judgment of school personnel, but, in doing so, cited what the investigator considered to be a cogent and responsive explanation for the decisions that were made with regard to the student's IEP. On page 10 of the Initial Report, the investigator said:

> It is clear that the parent would prefer the special education instruction be provided through the Cradle to Career Literacy Center. However, documentation and interviews show USD #___ appears to have developed an IEP designed to allow the student to advance appropriately towards her annual reading goal. The September 11, 2018 IEP which was amended on November 28, 2018 appears to be based on the student's present levels of achievement and takes into account her disability, and potential for growth as described for the student in the two recent IEEs.

The appeal committee agrees. There is nothing in Endrew F. which requires that a child who is behind her peers catch up to those peers. The progress to be made is progress that is appropriate in light of the child's circumstances. This student has attention deficit hyperactivity disorder, Dyslexia, a low working memory, and slow processing speed. These circumstances are relevant in determining appropriate progress. A review of all three of the student's IEEs show a root cause of the student's reading difficulties as phonological memory, which refers to her coding information phonologically for temporary storage in working or short-term memory, and rapid symbolic naming, which is the ability to efficiently retrieve phonological information from long-term or permanent memory and quick and repeated execution of sequence of operations. The school is providing direct, explicit instruction in reading to address these issues. The teacher has received ongoing professional development and has worked with the curriculum trainer to assist her in making appropriate instructional decisions for the student. The progress monitoring evidence provided by the school shows steady growth in the areas of reading fluency. The student's low working memory, dyslexia, and slow processing speed would directly impact her reading fluency. Slow reading fluency would directly impact her reading comprehension. Aside from curriculum based measures, additional evidence presented demonstrates that the student is receiving more than just passing grades. She is receiving above average grades, and is advancing from grade to grade. Moreover, the student is also successfully completing college level coursework at Allen County Community College. For all these reasons, the appeal committee finds that the student is being provided with a FAPE and concludes that the Initial Report is sustained with regard to Issue 2.

ISSUE 3: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to include appropriate transition services in the Individualized Education Program (IEP) to enable the student to meet her post-secondary goals during the past 12 months.

The notice of appeal alleges that the investigator failed to correctly apply 34 C.F.R. 300.43(a)(2), claiming that this regulation “would require consideration of this student’s need to catch up in her reading skills.” Nothing in this regulation requires transition services to catch the student up

with her peers. Further, 34 C.F.R. 300.320(b)(2), cited by the investigator on page 13 of the Initial Report, states "The IEP must include the transition services (including courses of study) needed to *assist* the child in reaching postsecondary goals" (emphasis added). This regulation does not require the transition services to guarantee achievement of goals or to enable the student to catch up with peers. The U.S. Supreme Court has stated that "the IDEA cannot and does not promise any particular educational outcome." (Endrew F. citing Rowley 458 U.S. at 192). As stated in the discussion of issue 2 above, Endrew F. requires that the IEP is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

This student is in the 11th grade (page 3 of Initial Report). On the AccuPlacer Test (2018), the student scored a 34 in writing and a 31 in reading. The student needs a score of 35 in both areas to be enrolled in the pre-English composition class (page 11 of Initial Report). This student is close to attaining her post-secondary education goal of going to school to obtain training and a degree in human services. She has another year of secondary education in which to make appropriate progress toward her post-secondary goals. It is too early to determine that her progress toward post-secondary goals is inadequate.

In addition, the student has successfully earned nine hours of college credit at Allen County Community College, where she has earned an A in Basic Nutrition [an on-line class] and General Psychology [a night class], and a B in Sociology [a duel credit class]. Currently, the student is enrolled in an additional four hours where she can earn college credit.

On page 13, the investigator concluded:

> Documentation and interview show these goals are based upon age appropriate transition assessments including an informal student interview and an interest inventory. The Course of Study is designed to lead to graduation with a high school diploma as well as to allow the student to earn college credit towards her college degree.

The appeal committee agrees with the investigator's findings and conclusions. The Initial Report is sustained on this issue.

ISSUE 4: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the parent request for access to SKYPE or a similar web program to allow the student to receive intensive instruction in appropriate programs designed to provide educational benefit at the November 28, 2018, IEP team meeting.

The notice of appeal refers to a reframing of "issues" to focus on procedural versus substantive educational issues. In the "Preliminary Matters" portion of this decision, the appeal committee concluded that issues were reframed out of necessity, and that the investigator did so appropriately. It appears that the notice of appeal may be referring to Issue 4 when the parent alleges that the reframing concentrated on procedural requirements at the expense of substantive requirements.

A close reading of the Initial Report demonstrates that both the substantive and procedural side of this issue were directly addressed by the investigator. The substantive portion was addressed in Issue 2, which this committee has already sustained. Issue 4 in the Initial Report addressed a procedural violation found in the course of investigating the parent's complaint. In Issue 4, the investigator found that the district correctly provided the parent with a prior written notice (PWN) on September 13, 2018 when it refused the parent's request for the district to pay for services from Cradle to Career, but failed to provide a PWN when it again refused a subsequent request for Cradle to Career services to be paid by the district that was made at the November 28, 2018 IEP meeting. The appeal committee agrees with this analysis and sustains the Initial Report on this issue.

CONCLUSION

The complaint report is sustained on all issues.

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

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Melissa Valenza

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ PUBLIC SCHOOLS, USD #___
ON DECEMBER 12, 2018

DATE OF REPORT: JANUARY 10, 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 AG, Mediation/Due Process Supervisor for _____ Public Schools, on December 17, 2018 and January 7, 2019. The investigator spoke by telephone with the parent on January 4, 2019.

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

- IEP for this student dated February 24, 2016 from Missouri
- IEP for this student dated February 24, 2016 adopted by the current school district
- IEP for this student dated February 2, 2017
- IEP for this student dated January 24, 2018
- Email dated September 7, 2018 regarding Homebound services
- Email dated September 19, 2018 regarding Homebound services
- Timesheet for Homebound services covering the period of October 10-31, 2018
- Email dated November 19, 2018 from the Homebound instructor
- Timesheet for Homebound services covering the period of November 28 through December 19, 2018
- Email dated December 17, 2018 regarding provision of Homebound Services
- Homebound Attendance Log covering the months of October through December 2018
- Email dated December 19, 2018 from the Homebound instructor

Background Information

This investigation involves a 15-year-old girl who is enrolled in the 10th grade. The student has been determined to be eligible to receive special education services under

the category of Multiple Disabilities. By report of the parent, the student has numerous diagnoses including (but not limited to) the following: Chronic Lung Disease, moderate to severe hearing loss, a blood clotting disorder, end-stage renal failure, and immunodeficiency, in addition to delays in speech/language and motor development.

The student is non-verbal and uses "total communication" – sign language, gestures, and an assistive technology device to communicate. Because of her motor limitations, the student uses a wheelchair and stander but is mobile in her home environment.

By report of the parent, the student has spent 8 of her 15 years in a hospital setting but has had no hospitalizations during the past 6 months. She has been enrolled in her current school district for all but 7 months of her education. She has at times attended classes in the public-school setting, but since the beginning of the 2018-19 school year, all of her educational services have been provided in her home.

Issues

In her complaint, the parent raised two issues:

Issue One: The district failed to provide the Homebound services called for in the student's IEP.

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 and, under 34 C.F.R. 300.17, define FAPE in part as special education and related services provided in conformity with an IEP. The IEP is intended to describe and guide services for each child on an individual basis.

The term "special education" means instruction specially designed to meet the unique needs of a child with an exceptionality.

Parent's Position

It is the position of the parent that between the time of her enrollment on August 24, 2018 and October 3, 2018, the student received no Homebound services. Additionally, the parent contends that one of the two Homebound instructors assigned to provide services to the student after October 3rd was ill during the month of November and was therefore unable to provide services due to the student's compromised immune system.

District's Position

The district stipulates that no Homebound services were provided to the student prior to October 4, 2018 and acknowledges that services have been missed after that date due to the illness of the service provider.

Investigative Findings

The section of the student's January 24, 2018 IEP entitled "Statement of Special Education/Related Services" states that the student was to be provided with 300 minutes per week of Special Education Services from a Homebound Instructor between January 24, 2018 and January 23, 2019.

According to documents provided by the district, two individuals were assigned to provide services during the months of August and September of 2018. One of these individuals, who was to begin providing Homebound instruction sometime after September 5, 2018, declined the assignment, and the second individual simply failed to follow through on providing services.

Since October 4, 2018, two Homebound instructors – one male and one female – have been assigned to provide services to the student. One of those instructors comes to the home one day per week; the second instructor has come to the home two to four days per week since initiating services. Each of the instructors has provided 60 minutes of service on each visit to the home.

A Homebound Attendance Log completed by the male teacher shows that he cancelled a total of 4 instructional sessions between October 4 and December 18, 2018 due to his own illness and missed another session with the student for unknown reasons. In an email dated December 19, 2018, the instructor states that he "didn't go and see (the student) as planned."

Two "USD ___ Homebound Certified Timesheet & Documentation of Instruction" forms completed by the female instructor show that she provided services on October 10, 17, 24, and 31, 2018 and on November 28th and December 5, 12, and 19, 2018. In an email dated November 19, 2018, the instructor stated "I didn't get to work with my student this month as I've been sick and Mom asked that if we were sick, we didn't come in."

Summary and Conclusions

The district failed to provide 300 minutes per week of Homebound instruction to this student between the time of her enrollment on August 24, 2018 and October 4, 2018. Service providers missed an additional 480 minutes of Homebound services in November and December 2018 because of the illness of both instructors. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

Additional Comments

In her complaint, the parent has raised the issue of the district's failure to provide the student with the 300 minutes per week of Homebound services outlined in her IEP. It is

the opinion of this investigator that the statement of Special Education and Related Services outlined in the student's January 2018 IEP is confusing.

It appears that the district developed an IEP intended to cover two contingencies: services to the student if she was able to attend school and services to the student in the Homebound setting. In the opinion of the investigator, the district, the student, and the parent might be better served by having an IEP that clearly reflects services to the student in the setting where services have been provided since August of 2018 and recommends that the IEP team review this part of the student's IEP.

Issue Two: The district has failed to consistently provide the student with opportunities for peer interaction through technology.

A student's IEP is defined as a written statement for each student with an exceptionality, which describes that child's educational program and is developed, reviewed, and revised in accordance with special education laws and regulations. A public school district is required to implement the educational program specified in that written document. Public school districts, however, are not required provide opportunities or services which are not specified in an IEP, even though those services and opportunities might arguably be beneficial to the student.

While a student's IEP is not intended to reflect every activity or opportunity afforded to the student as a part of his or her educational experience, the document must by law address a number of key elements including all of the special education and related service needs of the child. There are several special factors that the IEP team must consider in the development of the IEP (K.S.A. 72-3429(d)). These considerations must be documented but there is no requirement on where they are documented. Some districts choose to include documentation of these considerations within the IEP while others choose to keep documentation separately and maintain it in the student's file.

Among the factors that must be considered are the concerns of the parents for enhancing the education of their child. Parents must have the opportunity to express these concerns during the IEP meeting. This provides the parents an opportunity to share with the team what they see as most important in meeting the needs of their child. The concerns of the parents *must be considered* by the IEP team, but the IEP team makes the final decision regarding the content of the IEP.

Parent's Position

According to the parent, the student was enrolled in a Missouri school district for a few months during the second semester of the 2015-16 school year. The parent asserts that at that time the Missouri district suggested and implemented a strategy that allowed the student to interact with an age peer via Skype. According to the parent, the student benefitted significantly from that opportunity.

The parent contends that upon the student's reenrollment in her current district at the beginning of the 2016-17 school year, the parent requested an opportunity for peer interaction for the student similar to the one provided in Missouri. The parent states that after an initial delay, a willing peer was identified, and the student and that peer began interactions through "Zoom" – a video conferencing application – that continued until the peer graduated from high school and left the district at the end of the 2017-18 school year.

It is the position of the parent that the district has failed in its obligation to the student to identify another peer to interact with the student during the 2018-19 school year. The parent believes that the district has not made a concerted effort to identify a peer and feels that her daughter should continue to have the opportunity to interact with someone near her own age in addition to the 5 adults she sees on a weekly basis.

District's Position

It is the position of the district that while it has during the 2018-19 school year attempted to find a willing age peer to interact with the student, no peer has yet been identified. The district states that there is no guarantee that such a peer will be found. The district further contends that it is not required by the student's IEP to provide this type of peer interaction.

Investigative Findings

Neither the student's 2016 Missouri IEP nor the IEP developed by the district in the Fall of 2016 obligated the districts to provide the technology- based peer interactions described by the parent.

The section of the student's February 2, 2017 IEP entitled "Describe the Parent/ Guardian concerns regarding the student's academic/behavioral performance" contains the following statement:

> "Mom has requested that (the student) is able to video conference into /school for social and communications skills. She wants Ryleigh to have more peer-to-peer interaction. She isn't as concerned about the class content as she is with the social rewards."

The "Other" section of the "Needs as They Affect Learning" portion of the student's January 24, 2018 IEP contains the following statement:

> "Idea of using the advocacy class time as a time to have interaction with peers in the D/HH classroom using Zoom."

An age peer was found and communication between the student and the peer occurred until the end of the 2017-18 school year.

The section of the student's January 24, 2018 IEP entitled "Describe the Parent/ Guardian concerns regarding the student's academic/behavioral performance" contains the following statement:

> "Mom wants (the student) is (sic) have exposure to her peers (FaceTime, Skype,...). She wants (the student) to have a better quality of life due to exclusion from her peers. Mom wants her to be a teenager."

The portion of the "Summary of Present Levels of Academic Achievement and Functional Performance" section of the student's January 24, 2018 IEP entitled "Social / Emotional" states, "(The student) prefers to use yes/no or "thumbs up/thumbs down" gestures to response to questions. She needs encouragement to use her Dynavox or more signs to communicate." There is no indication in "Needs as They Affect Learning" section of the January 2018 IEP that the IEP team had determined that the student required technology-supported peer communication experiences in order to achieve her goals and objectives. There are no Social/Emotional goals in the student's January 2018 IEP.

No technology-based peer interaction has to date been established for the student during the 2018-19 school year.

Summary and Conclusions

While opportunities for peer interaction were by report of the parent provided to the student when she was enrolled in a Missouri school district in 2016, the student's February 24, 2016 Missouri IEP does not specify that these interactions were to be made available as a part of the student's special education services. Both the student's February 2017 IEP and her January 2018 IEP developed in her current district reflect that the parent's desire to enhance the student's opportunity to interact with peers through the use of technology was considered, but neither of these IEPs contains any specific commitment on the part of the district to provide such interaction in order for the student to achieve her IEP goals and objectives.

The district was able to identify a peer who was willing to communicate with the student during the 2017-18 school year, but that student is no longer enrolled in the district. To date, the district has not been able to find another student willing to engage in a similar peer communication activity.

The district was required to consider the parent's concerns regarding technology-based peer interaction for the student. This student's IEP indicates the team both noted and considered these concerns, but the team was not obligated to adopt proposals of the parent to address those concerns in the student's IEP – unless there was consensus among team members that such interactions were necessary in order for the student to achieve her goals and objectives. There is no evidence to indicate there was such a consensus among the members of this team. Neither the student's February 2017 IEP nor her January 2018 IEP specify a need for technology-based peer interaction, nor

does the IEP require such interactions. While nothing prohibits the district from continuing to seek out a peer contact for the student, the district's failure to date to find such a peer does not represent a failure to comply with the student's IEP. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to 34 C.F.R. 300.101 and 34 C.F.R. 300.17 which require districts to provide FAPE to students in conformity with an IEP which describes services to exceptional students on an individual basis. Specifically, the district erred by

- failing to provide the student with 300 minutes per week of Homebound service between August 24 and October 3, 2018, and
- failing to provide an additional 480 minutes of Homebound instruction to the student in the months of October, November, and December 2018 due to the illness or absence of the Homebound instructors.

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

1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with 34 C.F.R. 300.101 and 34 C.F.R. 300.17 by providing services to this student in conformity with her IEP.

2) Within 10 school days of the receipt of this report, the district shall schedule an IEP Team meeting at a mutually agreed upon time, for the purpose of discussing with the parent a plan for the delivery of compensatory Homebound services.

3) Within 5 school days of the conclusion of the IEP team meeting outlined above under Item 2, the district shall present to the parent a plan for the provision of compensatory services.

    a. Any plan proposed by the district shall include a minimum of 1980 minutes of compensatory Homebound services, and take into consideration the student's limitation of 60 minutes of instructional service per day recognized by both the parent and the district.

    b. The parent shall have the option of accepting all or part of the compensatory services that are offered, or of declining any or all of these services.

3) Submit to Special Education and Title Services a copy of the plan for compensatory services (or that portion of the plan accepted by the parents) addressed above under Item 2.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
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 19, 2018

DATE OF REPORT: JANUARY 17, 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 was sent to the Department on December 19, 2018. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on January 18, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on January 9, 2019. USD #___ made the following staff persons available as part of the investigation process:

- G, Mediation/Due Process Supervisor
- H, Principal
- T, Paraprofessional
- M, Special Education Teacher / Case Manager

The Complaint Investigator also interviewed the parent by telephone on January 7, 2019 as part of the investigation process.

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

- Individualized Education Program (IEP) dated October 23, 2018
- Mediation Agreement dated May 10, 2018
- My Day note dated December 5, 2018
- Target Goals Behavior Log dated December 5, 2015
- Email from K to M and H dated December 5, 2018 at 1:41 p.m.
- Email from H to M and K dated December 5, 2018 at 2:13 p.m.

- Email from H to M and T dated January 2, 2019 at 4:55 p.m.

Background Information

This investigation involves a 9 year old boy who is enrolled in the third grade at _____ Elementary School in USD #___ during the 2018-19 school year. The student has medical diagnoses of Autism and Attention Deficit Hyperactivity Disorder ADHD). He was initially evaluated in kindergarten during the 2014-15 school year but was not eligible for special education and related services at that time. He was evaluated again during the second semester of first grade in 2017 and was found eligible for special education and related services under the exceptionality category of Other Health Impaired (OHI). The student has had an IEP since that time. It is noted that the student is currently repeating third grade during the current school year.

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint begins on December 19, 2017.

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 IEP, specifically by not providing the paraprofessional support services on December 5, 2018.

Findings:

The parent reported the student's IEP was not followed on December 5, 2018 between 1:30 and 3:00 p.m. when paraprofessional support was not provided in the general education classroom. The parent alleges the paraprofessional used her "gift of time" and left the building for a doctor's appointment and no substitute or replacement was found thus leaving the student unattended. The parent first became aware of this problem after school when the student reported that his paraprofessional, had not been with him at the end of the day in his third grade classroom. The next day, the parent went to school and asked the student's third grade general education classroom teacher, K, about the situation. The parent reported that Ms. K apologized to her and indicated that she had notified the

principal and the IEP case manager at the beginning of class but no one ever came to support the student in the classroom.

An IEP dated October 23, 2018 requires 390 minutes per day of “Attendant Care” by a para educator in the regular education classroom. A description of these services state “The one-on-one para will provide academic and behavior support. The IEP will provide CWC services from the one-on-one para.”

Based upon documentation and interviews with the parent and school staff, the student is scheduled for class with Doreen Springer, reading teacher, from 1:30 – 2:00 p.m., at recess with Ms. K from 2:00 – 2:30 p.m., and back in class with Ms. K from 2:30 – 3:00 p.m.

The My Day note for December 5, 2018 shows the student’s behavior was rated as “Awesome” for all classes as well as both the morning and afternoon recess periods. The Target Goals sheet dated December 5, 2018 shows the student was on task with no redirection between 1:30 and 3:00 p.m. It also shows the student had appropriate interactions with peers and expressed frustration and feelings appropriately during this same time frame.

T, paraprofessional, reported that she used her “gift of time” from 1:30 – 3:00 p.m. on December 5, 2018 for a doctor appointment. H, principal, reported that all staff in the building were given a “gift of time” during the holidays. This gift was a 90 minute block of time the staff member could take at any time during the school day so long as coverage for their duties was arranged.

Ms. T stated that she told both Ms. Springer and M, special education teacher, on the morning of December 5, 2018 that she planned to take her “gift of time” that afternoon from 1:30 – 3:00 p.m. Ms. T indicated that Mr. M had arranged to cover for her in the past and that Ms. Springer was the teacher in the classroom at 1:30 p.m. Ms. T reported that she left as planned at 1:30 p.m. for her doctor appointment assuming that Mr. M was just running late and would eventually show up. Ms. T acknowledged that no one was in the classroom to cover her position when she left at 1:30 p.m.

An email dated December 5, 2018 at 1:41 p.m. from Ms. K to Ms. H, and Mr. M states “Mrs. Patti left to have her gift of time and the student doesn’t have any coverage. Just wanted to let you know.” An email from Ms. H to Mr. M at 2:13 asked if he can go to Ms. K ’s classroom.

Mr. M reported that he does not remember Ms. T informing him on the morning of December 5, 2018 that she planned to use her gift of time that afternoon. He indicated that he did not read the two emails until after school so was he unaware there was a problem.

After the holiday break, Ms. H was informed of the child complaint allegations from the parent. Ms. H then met with Ms. T and Mr. M on January 2. 2019 to discuss the December 5, 2018 situation. Ms. H summarized the meeting in an email dated January 2, 2019 at 4:55 p.m. written to Mr. M and Ms.T. The email emphasizes that the student must have coverage at all times and included a new procedure for Ms. T to let the office know if she needs to leave in the future so that coverage can be arranged.

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 special education and related services that are provided in conformity with the IEP.

School staff acknowledge that the student did not receive the paraprofessional services required by the IEP on December 5, 2018 between 1:30 and 3:00 p.m. Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the IEP as written on December 5, 2018 is substantiated.

> **ISSUE TWO:** 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 following the parent contact procedures on December 5, 2018.
>
> Findings:

The parent indicated and a Mediation Agreement dated May 10, 2018 shows that the student's IEP is to include "a clear description of a plan to provide support in the event that the designated para is unavailable" and "if the situation occurs when back-up support is not available, the parent will be notified." The parent reported that she has never been contacted by any school staff regarding the lack of paraprofessional support that occurred on the afternoon of December 5, 2018.

The findings in Issue One are incorporated herein by reference.

An IEP dated October 23, 2018 states “The student will be supported during classroom instruction, specials, and recess by a paraprofessional. In the event that the designated para is unavailable, staff members such as another para, a child study team member, or another certified staff member will provide that support. If such support cannot be provided due to unforeseen events, the parent will be notified that day.”

School staff reported the parent was not called or emailed regarding the lack of paraprofessional support on December 5, 2018. It was noted that the My Day note is one way they keep in contact with the parent; however, the December 5, 2018 My Day note does not include any mention to the lack of paraprofessional support that occurred that day.

G, Mediation/Due Process Supervisor for USD #___, acknowledged the parent was not notified as required by the student’s IEP and stated that “the team is not keenly aware of what is required in the IEP.”

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 special education and related services that are provided in conformity with the IEP.

In this case, the IEP requires the parent to be contacted if paraprofessional support cannot be provided due to unforeseen events. USD #___ acknowledged this was not done regarding the lack of paraprofessional support on December 5, 2018. Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the IEP as written on December 5, 2018 is substantiated.

Corrective Action

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

- 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 special education and related services that are provided in conformity with the IEP.

The findings of this investigation show USD #___ failed to provide the paraprofessional support between 1:30 and 3:00 p.m. on December 5, 2018. In addition, USD #___ failed to notify the parent of the lack of providing these support services as required by the student's IEP.

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. 300.101 and 34 C.F.R. 300.17 by ensuring that special education and related services are provided in conformity with the IEP.

2. No later than March 15, 2019, USD #___ will provide training to the special education teachers and paraprofessionals at _____ Elementary School on the requirements for implementing the IEP as written and procedures for monitoring IEP implementation. 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.

3. It is noted that no compensatory services are required to be provided to the student for the failure to implement the IEP on December 5, 2019. Documentation and interviews found the student was successful during the 90 minutes of missed paraprofessional support.

4. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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, 2019

DATE OF REPORT: FEBRUARY 12, 2019

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with AG, Mediation/Due Process Supervisor for _____ Public Schools, on January 28 and February 8, 2019. The investigator spoke by telephone with the parent on January 28, 2019. Also on January 28, 2019, the investigator spoke by telephone with Lola Loredo, Bilingual Support Specialist with Families Together.

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

- Form dated October 2, 2018 and signed acknowledging the district's receipt of a request from the parent for a comprehensive evaluation and the parent's desire to withdraw that request to allow the team to start general education interventions
- Form dated November 17, 2018 and signed acknowledging the district's receipt of a request from the parent for a comprehensive evaluation and the parent's desire to withdraw that request to allow the team to start general education interventions
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated January 4, 2019
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated January 17, 2019
- Kindergarten Progress Report
- Daily Attendance Profile for period of October 23, 2018 through January 29, 2019
- Individual Benchmark Report: Early Math covering Fall and Winter 2018-19
- Individual Benchmark Report: Early Reading English covering Fall and Winter 2018-19
- Student Discipline Profile 2018-19

- Problem Solving form for the student
- Data sheets covering the period of October 29, 2018 through January 9, 2019
- USD ___ online school calendar for the 2018-19 school year
- Forms for the Vanderbilt Assessment Scale – Parent Informant and Teacher Informant

Background Information

This investigation involves a 5-year-old boy who is enrolled in Kindergarten. The student entered the district at the start of the 2018-19 school year at Washington Elementary School. On October 17, 2018, the student was transferred to B Elementary School.

The district has recommended that the student be transferred to G Alternative Elementary School which serves students from Kindergarten through 5th grade who have been suspended or expelled from other schools or who have emotional disturbances. While most students attending G qualify for special education services, the school provides services to some students who have not been determined to need such services. The student's "therapeutic intervention placement" at G was made because it was believed by the district that the student's behaviors were likely to result in "harm to self or others." The transfer was intended to facilitate completion by an unbiased team of an initial evaluation to determine the student's eligibility to receive special education services. The district determined that the student's attendance at G would not extend beyond 60 school days from the date the parent consented to the evaluation on January 7, 2019.

Issues

In her complaint, the parent raised four issues:

<u>Issue One:</u> By suspending the student on 12 occasions during the second quarter of the 2018-19 school year, the district has failed to provide the student with a free appropriate public education (FAPE).

The law has special provisions which sometimes require schools to treat children with disabilities differently than other children when it comes to disciplinary action. Schools must provide FAPE to all children with disabilities, including those who are suspended or expelled from school. School officials may use in-school or out-of-school suspension as a consequence for disciplinary infractions by an identified special education student so long as the imposition of these consequences does not constitute a "change of placement." The law does not set an absolute limit on the number of cumulative school days needed to constitute a change of placement, but requires a case-by-case examination of specific factors and mandates that special education services be provided to students determined to be eligible for special education after the 10th school day of suspension in a school year.

The school is not required to provide educational services to children with disabilities during the first 10 cumulative days of suspension in a school year. However, when the total number of school days of suspension in a school year reaches 11 for a student who has been determined to have a disability, schools need to carefully consider a number of factors before determining what disciplinary consequence will be imposed, if any, and how special education services will be provided.

The IDEA (Individuals with Disabilities Education Act) affords protections to children who have not been determined to be eligible to receive special education services if – and only if – a school district had knowledge that a student was a child with a disability before the behavior which precipitated the disciplinary action of suspension occurred (See K.S.A. 72-3436).

A school district is deemed to have such knowledge if:

- the parents of the child have expressed concern in writing to supervisory or administrative school personnel, or a teacher of the child, that the child is in need of special education and related services;
- ***the parents of the child have requested an evaluation of the child*** (emphasis added); or
- the teacher of the child or other school personnel expressed specific concern about a pattern of behavior demonstrated by the child directly to the special education director or other supervisory school personnel.

Although teachers and other school personnel may casually express concern about the behavior or performance of children in their classrooms, such expression of concern do not create knowledge on the part of the school district.

If the child's parents request an evaluation of the child during the period of suspension or expulsion or other disciplinary action, the evaluation must be conducted in an expedited manner. No timeline is specified with regard to an expedited evaluation. However, in this context, the term "expedited" suggests the evaluation should be concluded in a shorter time frame than a normal evaluation.

Pending the results of the evaluation, the disciplinary consequences imposed by school authorities may be implemented. The school is not required to put disciplinary proceedings on hold until the evaluation is completed. If the child is subsequently determined to be a child with a disability, based on the evaluation and review of information supplied by the parents, the school must provide the child with all of the protections of the IDEA, including the provision of special education and related services during the suspension. If the child is determined to not be a child with a disability, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors.

Parent's Position

It is the position of the parent that the student was denied FAPE because he was suspended from school a total of 12 times between November 1 and December 18, 2018. The parent contends that school records are not all inclusive and do not reflect all of the times she was contacted by the school to pick the student up early from school. According to the parent, the building principal called her daily for a period of one week in the month of December, asking the parent to pick up the student before the end of the school day stating, "I know my child and he's bound to act out."

The parent asserts that from the time the student was first enrolled in the school, the building principal has taken actions that have singled the student out for removal from school.

District's Position

It is the district's position that 11 days of out-of-school suspension did not deny the student FAPE as the team was gathering data during that same period regarding the student's response to general education interventions. However, the district recognizes that there was an "unreasonable" delay in obtaining consent to evaluate after receiving multiple requests for evaluation from the parent.

Investigative Findings

Discipline Issues:

The Student Discipline Profile for the student shows that the student was suspended for 2 school days on September 17, 2018 – only 22 school days after his entrance into Kindergarten on August 15, 2018. The behaviors involved in the incident leading to his suspension included physical aggression toward students and adults. A second incident involving physical aggression toward a student was reported on September 27, 2018. A third similar incident followed on October 2, 2018.

The student was suspended for 3 additional school days after what was labeled a "Sexual Offense – Non-Violent" incident on October 9, 2018. On October 31, 2018 – 8 school days after his transfer into B Elementary – the student ran out of the classroom and spent much of the morning evading staff. The parent was called to the school for a conference regarding the student's behavior and then stayed with the student for the event held on that day.

On November 1, 2018, the student was given a one-day suspension after "punching, kicking and biting other students at recess. He then screamed and threw sand and kicked sand at a teacher. He came back into the classroom where he was yelling that he wanted to play after he lost his recess time and told the teacher to shut her mouth because he wasn't listening." On both November 9 and 13, 2018, the student was involved in incidents of physical aggression toward other students; as a consequence of

his actions, he was assigned one day of in-school suspension. Another incident of physical aggression toward another student was logged on November 26, 2018, and on November 28, 2018, the student pinched a staff member. The student was once again suspended from school for two school days after an incident on November 29, 2018 that ended with the student striking two staff members.

On December 4, 2018, the student struck another child and later in the day hurt another student. When a teacher spoke to the student about his behavior, he hit her several times; when that same teacher broached the same topic later in the day, the student hit and kicked her and "had a tantrum in the class." As a consequence, the student was given a 3-school day suspension. On December 13, 2018, the student threw chairs in the classroom and "punched 5 students" at recess; this behavior resulted in one day of in-school suspension. On December 17, 2018, the student "poked another student in the eye" and "threw punches at the counselor and custodian. He then ran outside, refusing to come into the building." At one point during this period, the student pushed and hit other students as well as a custodian who stopped the student's behavior. The student was then suspended from school for 1 school day.

The student returned to school after Winter Recess (no school for students from December 20, 2018 through January 2, 2019), and on January 7, 2019 was given "Detention" after a series of disruptive behaviors ended with the student throwing chairs. On January 9, 2019, the student pushed and hit another student. On January 10, 2019, the student was sent to the "Recovery Room" after throwing furniture. While in the Recovery Room, the student bit a staff member on the hand and kicked that same staff member and another individual. Additionally, he lunged at a staff member with a pair of scissors. Security was called. At another point during that same day, the student hit his teacher in the head with a wooden pole and while in the Recovery Room committed what was described as a sexual assault on a staff member. For his actions, the student was suspended from school for a total of 3 school days.

In addition to the suspensions outlined above, records provided by the district show that the student had 3 days labelled as "Early Out." On one additional day, the student's 1:10 PM departure was noted as being "Principal Approved." Absences between January 17 and 29, 2019 have been labeled as "Principal Approved."

The last day of attendance for the student at B Elementary School was January 10, 2019. The school made a request for a therapeutic intervention placement for the student on January 11, 2019. The Mediation/Due Process Supervisor for the district contacted the parent on January 14, 2019 and was told by the parent that the student would only return to school in the therapeutic intervention placement location. The Mediation/Due Process Supervisor assured the parent that the student would not be counted as absent during the pendency of the placement. The parent visited the therapeutic intervention placement location on January 16, 2019, and transportation was to be set up to begin 3-5 school days later. However, there were delays in communication between the transportation department and the therapeutic intervention placement location, and the student did not begin school in the new location until

January 30, 2019.

Academic Performance:

The student's Kindergarten Progress Report shows that during the second quarter of the 2018-19 school year the student participated in class activities, and completed tasks on time, and, in PE, exhibited responsible personal and social behavior. He sometimes respected the rights of others, sometimes demonstrated peaceful conflict resolution, sometimes showed self-control, and sometimes followed safety rules and procedures,

Early Reading screening conducted in the fall of 2018 placed the student at the 55%ile; his Early Math score from that same time period placed the student at the 45%ile. (Subsequent testing in the winter of 2018 placed the student at the 39%ile in reading and at the 70%ile in math. He was able to identify 17/20 numbers and 21/26 letters as of November 8, 2018.)

Parental Requests for Evaluation:

The parent made and withdrew requests for the evaluation of the student on September 20 and November 1, 2018. Two additional requests for evaluation of the student were made on December 17 and 20, 2018.

Summary and Conclusions

The number of behavioral incidents resulting in disciplinary consequences for this student and the severity of those incidents increased as the school year progressed. By December 20, 2018, the student had missed 12 days of school due to out-of-school suspension. The student was given four more days of out-of-school suspension between January 11 and 17, 2019. "Principal approved" absences and "early out" days accounted for 11 more days of full or partial removals. Additionally, the student spent two days in in-school suspension, had 3 school days labeled "early out," and has had at least 9 days where his absences have been "principal approved."

Despite more than a month of missed instruction, the student has made progress in developing Kindergarten skills – although, not surprisingly, his performance has begun to suggest that he is at some risk of falling behind his peers.

Regardless of whether a student has a disability, districts are allowed to suspend a student from school for a period of 10 school days in any given school year. In establishing whether or not a school district "had knowledge" that a student may have a disability, the law states that a parent's request for evaluation provides such knowledge.

The parent's first request for evaluation was made on September 20, 2018 – three days after the student was given a 2-day out-of-school suspension (the first of the school year). The parent subsequently withdrew that request in order to allow the school team to implement general education interventions. The parent made and then withdrew a

second request for evaluation on November 1, 2018. Two additional requests for evaluation were made on December 17 and 20, 2018. The parent provided her signed consent for evaluation on January 7, 2019. The district has initiated the evaluation of the student which is being conducted by staff at a therapeutic day school where the student has been placed with the understanding that evaluators there will conduct an "unbiased" assessment. The evaluation is to be completed no later than April 20, 2019 – not an "expedited" time line.

The law does not specifically address the issue of a district's "knowledge" of a student's possible disability in cases where a parent makes and then subsequently withdraws a request for evaluation. However, in the opinion of this investigator, this parent has made not one but four requests for evaluation. It was not until the Mediation/Due Process Supervisor for the district instructed them to do so that the school team obtained parent consent for an evaluation. The district then implemented additional disciplinary suspensions and transferred the student to another location before actually beginning the evaluation process, and set a timeline for completion of the evaluation that in no way expedited the assessment process. Under these circumstances, a violation of special education laws and regulations is established.

<u>Issue Two:</u> The district did not conduct an initial evaluation as requested by the parent and did not provide the parent with prior written notice of refusal to conduct such an evaluation.

While most decisions to move forward into an initial evaluation of a student with regard to his/her need for special education services come as a result of screening and general education intervention (GEI) activities initiated by the school, there are instances when requests for evaluation are made by parents.

Parents may make either an oral or written request for evaluation at any time (K.A.R. 91-40-7 (c)(3)). Districts may set a policy as to how a referral is to be made. Once a parental request for evaluation is received, the district must respond within a "reasonable period of time," which has been interpreted by the Kansas State Department of Education (KSDE) as being no more than 15 school days, unless there are unusual circumstances. The building principal or person designated to respond to parent requests for evaluations, should explain to the parents the following:

> (a) A GEI process that precedes an initial evaluation is available to assist in determining the specific concerns and needs of their child. ***Parents may elect to withdraw their request for an evaluation and have their child participate in GEI.*** If a parent withdraws a request for an evaluation, it is important that the school has documentation of that withdrawal.
>
> (b) The parents may request the initial evaluation be conducted without waiting for general education interventions to conclude; in that case, the general education intervention process may be conducted as part of the initial evaluation.

(c) The school may refuse to conduct the evaluation. Under that circumstance, a Prior Written Notice must be provided to the parent which explains why the school refuses to conduct the evaluation.

The law does not place a specific limit on the number of times a parent can make and then withdraw a request for evaluation.

Parent's Position

According to the parent, she requested on several occasions that an evaluation of her son be conducted in order to determine whether he was eligible to receive special education services under an IEP. The parent states that she requested an evaluation during both the first and second quarter of the 2018-19 school year, at each of the schools attended by the student during that period.

The parent asserts that while she has never been provided with prior written notice of the district's refusal to evaluate the student, no initial evaluation had yet been initiated at the time of the filing of this complaint. The parent acknowledges that she signed forms withdrawing her request for evaluation but asserts that she felt forced by staff to withdraw her request even though she did not want to do so.

The parent further asserts that the district cancelled a meeting scheduled for December 14, 2018 for the purpose of discussing an IEP for the student, and had not rescheduled that meeting by the time this complaint was filed.

District's Position

It is the position of the district that the parent signed two forms indicating she was withdrawing both her requests for evaluation in order to allow the district to first implement general education interventions. It is the district's position that the meeting proposed for December 14, 2018 was to be held to discuss data related to the progress the student had made after interventions had been implemented, but the district had not firmly committed to meet on December 14th. The district acknowledges receipt of two additional requests for evaluation from the parent shortly before and during Winter Recess. The district states that the signed written consent of the parent to conduct an evaluation was obtained on January 7, 2019, and the evaluation process will be completed no later than April 12, 2019.

Investigative Findings

According to a form provided by the district, the parent's first request for a comprehensive evaluation of the student was received on September 20, 2018, while the student was attending Washington Elementary. The parent signed the form, checking to indicate that she was withdrawing her request for a comprehensive evaluation to "start the Problem Solving Process around general education interventions." According to that form, a meeting would be held on "4/1/18" (sic) to

discuss the student's progress. As stated on the form, the parent could "initiate (her) request again at any point throughout the Problem Solving Process."

By report of the district, upon the transfer of the student to B Elementary, the Social Worker at Washington Elementary contacted staff at the receiving school to make them aware of the parent's request for evaluation and her agreement to withdraw that request to allow for interventions to be implemented.

A form provided by the district shows that the parent did initiate a second request for comprehensive evaluation. That request was received by staff at B Elementary on November 1, 2018. The school team met with the parent and the district's Parent Liaison for the district on November 16, 2018. At that time, the school team had no concerns regarding the student's academic performance and talked with the parent about their desire to continue to implement general education interventions to address behavioral issues. At least one district staff member felt that the parent did not at that time have a clear understanding of the form presented to her, but the parent once again checked the box indicating she was withdrawing her request for evaluation and signed the form on November 17, 2018.

According to the Families Together caseworker assigned to this family, the parent told her on more than one occasion that while she acknowledged signing forms withdrawing her request for evaluation, the parent did so under duress believing that her failure to withdraw her request could result in her losing custody of her child. The parent also offered the investigator this same explanation for the signed form in a telephone call on January 28, 2019.

The withdrawal-of-consent form signed by the parent stated that the team would "reconvene on December 14, 2018 to discuss (the student's) progress in order to support continued success."

A discipline report dated December 4, 2018 contains the following "Comment:"

> "We think the plan for now should be to get him regulated and stabilized with the things you are trying and have him return on Monday with a plan for an afternoon nap daily next week, or ½ days next week. ***We can look at progress on Friday, December 14th*** (emphasis added). Please let us know what you would like to see additionally for supporting his success."

According to the district, the school team viewed the December 14th review date as "flexible" and "approximate" and believed that - due to student absences – they did not have sufficient data to make decisions regarding interventions. The district contends that it was anticipated that a team meeting would be held during the week of January 1, 2019 to discuss the effectiveness of interventions, but the parent was not informed of this plan and was offered no explanation for the delay.

On December 17, 2018, the district received a written request from the parent asking that the student be evaluated for a 504 Plan or MTSS behavior plan. On December 20, 2018 – during Winter Recess – the parent sent an email to the building principal and Social Worker requesting that the student be evaluated.

On the morning of January 3, 2019, the principal contacted the parent to schedule a meeting for 3:45 PM that same day. The parent agreed to the meeting and confirmed that she would attend in a phone call at 3:30 PM. At approximately 3:55 PM the parent came to the school to pick up the student from school and stated that she would not be attending the meeting.

The Mediation/Due Process Supervisor contacted the school on January 3, 2019 and directed the team to provide the parent with the necessary paperwork to move forward with an evaluation of the student. On January 4, 2019, the social worker sent an email to the Families Together advocate working with the parent attaching forms for the advocate to review with the parent including a release of information for all physicians, a social history, an evaluation consent form, and a health history. The advocate informed the social worker that a meeting scheduled for January 7, 2019 would involve a different advocate – this individual from another agency – and that individual would be the person who would help the parent with the district's forms.

The written consent for evaluation was obtained from the parent on January 7, 2019. The parent has agreed to have the evaluation conducted while the student is attending G Alternative Elementary School on a therapeutic intervention placement for a period not to extend beyond April 12, 2019 by which time the evaluation will be completed.

Summary and Conclusions

This investigation has established that the parent has made four requests for an evaluation of the student. The law does not place a limit on the number of times a parent can make and subsequently withdraw a request for evaluation nor does the law specify the type of notice that must be provided to the parents before they are asked to acknowledge their desire to withdraw such a request. Districts are merely asked to have documentation of the parent's intent. In this case, the district has provided documentation that the parent opted to withdraw two of her four requests for evaluation. The district was not required to provide the parent with prior written notice of refusal to conduct an evaluation in either instance because the parent withdrew her request.

The parent has expressed to this investigator and others that she felt pressured to withdraw her requests, and at least one district staff member believed that the parent did not have a complete understanding of the paperwork that she was signing. However, the parent did sign and date two forms indicating her desire to allow the team to implement the Problem Solving Process.

There is documentation to support the parent's contention that a meeting was to be held on December 14, 2018. The parent and the district disagree as to the purpose of the

meeting. The district asserts that despite notice the parent was given on two occasions that there would be a meeting on December 14th, that the date was "flexible." Special education laws set no requirements regarding notice or scheduling of meetings related to the Problem Solving Process.

Following additional parental requests in mid-December, the district obtained the written consent of the parent to conduct an evaluation. The district has stated that the evaluation will be completed no later than April 12, 2019. The district obtained the parent's consent for evaluation within less than 15 school days to the parent's December requests for evaluation.

Under all the circumstances described above, a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

In the opinion of this investigator, the district's response to this parent's repeated requests for evaluation of the student was far less than optimal. While the district provided documentation that the parent had on two occasions withdrawn her requests for evaluation, at least one staff member and the parent's advocate believed that the parent did not understand what she was signing. It took four requests from the parent and a specific directive from the district's Mediation/Due Process Supervisor before the district obtained consent for evaluation. Then, additional delays in the initiation of that evaluation were imposed when the student was moved to another school where a staff unfamiliar with the student will conduct the evaluation.

While this investigator respects a district's desire to implement MTSS interventions before rushing to identify any student as having a disability, this student has had more than 15 disciplinary incidents and has spent more than 15 days on out-of-school suspension, not to mention early dismissals and principal approved absences. Nothing in the law would have prevented the district from implementing MTSS interventions concurrent with the completion of an evaluation to determine whether this student was eligible for and in need of special education services.

The Mediation/Due Process Supervisor has developed an article for the district's February special education newsletter to inform staff regarding appropriate and inappropriate responses to parental requests for evaluation. In the opinion of this investigator, it will be critically important that district staff have a clear understanding that an appropriate response to a parent's request for evaluation will not always be to ask the parent to withdraw that request.

Issue Three: The district discriminated against the student by placing his desk apart from the desks of other students and by requiring him to take a nap while other students are not required to take naps.

For children in kindergarten through age 21, Kansas screening laws require that schools utilize observations, instruments, measures, and techniques that disclose any potential exceptionality and indicate a need for evaluation, including hearing and vision screening, and age-appropriate assessments for school-aged children designed to identify possible physical, intellectual, social or emotional, language, or perceptual differences. (See 34 C.F.R. 300.131(a)).

In Kansas, this screening is conducted, in part, through the required 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 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 initial evaluation for special education.

GEI may be carried out through a school-wide approach of providing a multi-tiered system of scientifically, evidence-based interventions for all children (e.g. MTSS) or through an individual child problem solving approach.

Special education laws and regulations do not include any listing of “appropriate” or “approved” general education interventions nor do these laws and regulations impose specific restrictions on the nature of the interventions a district might choose to use. Any intervention should be developed with the unique needs of the student in mind. Particularly when addressing behavioral needs, districts often find it necessary to do some “out of the box” thinking and may implement strategies that may on the surface seem unusual.

Parent’s Position

According to the parent, she was contacted by the building principal and asked to bring a sleeping bag to school so that the student could take a nap after lunch even though no other students in the student’s class are required to take an afternoon nap. The parent states that despite her reservations, she complied with the principal’s request and provided the school with a sleeping bag for the student.

While acknowledging that her son “doesn’t socialize well,” the parent also objects to the classroom seating arrangement wherein the student’s desk was placed away from all of his classmates.

District’s Position

It is the position of the district that the student was receiving general education interventions to address challenging behaviors. The district asserts that the use of preferential seating is a common intervention for many students and that the intervention was not implemented with an intent to single the student out. According to

the district, students in the class have their seating rearranged on any given day based on individual needs.

With regard to the sleeping bag, the district contends that the parent was aware of the intervention and brought the sleeping bag to school for the student to use as a comfort and a means to "reset" himself for the afternoon after lunch recess. While not a “typical” intervention, the parent and the district agreed to its implementation.

Investigative Finding and Conclusions

In this case, the parent was aware of the interventions the district was implementing. The parent brought a sleeping bag to school for the student to use, and there is no evidence that she expressed to the school any desire that the bag not be used as an intervention. Similarly, there is no evidence aside from the filing of this complaint to suggest that the parent had contacted the school to object to the seating arrangement that was being implemented – an intervention that, in the opinion of this investigator, is used quite commonly. A violation of special education laws and regulations is not substantiated on this issue.

Issue Four: The district scheduled two doctor’s appointments for the student, transported the student and parent to those appointments, purchased medicine for the student, and forced him to take it.

Public schools are allowed to share concerns with parents about a child’s behavior and nothing in the law prohibits teachers from suggesting that medication might improve a child’s classroom performance. However, districts may not ***require*** any student to take specific medications as a condition for receiving special education services.

Parent’s Position

It is the parent’s contention that a member of the building staff scheduled two appointments for the student with a doctor and transported the student and parent to those appointments during school hours.

By report of the parent, the first appointment was on December 3, 2018 at GraceMed center. The parent contends that the physician who saw the student on that date diagnosed him as having ADHD and suggested that the parent give the student Benadryl each morning before school. The parent asserts that the staff member purchased Children’s Benadryl for the student and forced him to take the medication over the parent’s objections, stating, “Do not show (this to) staff. I can get in trouble.”

According to the parent, the second appointment for the student was on December 10, 2018 at Hunter Health. The parent states that the physician who first saw the student subsequently brought in a psychiatrist for consultation. The parent reports that the psychiatrist prescribed Vyvanse for the student, but the parent opted not to continue to

administer the drug when the student experienced what the parent believed to be negative side effects.

District's Position

It is the district's position that while an individual employed by the district did in fact take the parent and student to the doctor's appointments as described by the parent, that individual was not acting in the capacity of a district representative when providing this service. While acknowledging that information was provided to the parent to share with doctors regarding attentional concerns, the district contends that medical evaluation was not established as a pre-condition for evaluation for special education services.

Investigative Findings

At a meeting on November 16, 2018, the district presented the parent with a copy of the Vanderbilt ADHD Diagnostic Rating Scale (VADRS) which had been completed by the teacher as well as a version of the rating scale to be completed by the parent. It was the intent of the district to make this information available to the parent for her to share with the student's doctor if she chose to do so. (The VADRS is a psychological assessment tool for parents of children ages 6-12 designed to weigh the severity of attention deficit hyperactivity disorder (ADHD) symptoms.)

The Vanderbilt is not given to parents of all students. The district did not obtain the consent of the parent for the completion of the Vanderbilt by the classroom teacher asserting that the instrument is not a "formal assessment." The standard practice for the use of the instrument is for the nurse to pass the form out to the teacher and parents in order for the parent to be able to provide completed questionnaires to the student's health care provider if they so choose.

The school district employee who transported the parent and student to two doctor's appointments was acquainted with the family through her church. In a written statement provided by the district, the employee stated that she had assisted the family with groceries and transportation and took the parent and student to the doctor's because the parent had told her that she had no resources to purchase a bus pass and no other way to get to the appointments. The individual denies purchasing medication for the student.

School staff communicated with a Families Together advocate regarding a medical diagnosis for the student.

A "Comment" on a discipline form documenting a December 4, 2018 incident, states, "We think the plan for now should be to get him regulated and stabilized with the things you are trying…"

The parent presented no documentary evidence to the investigator to support her contention that the district ***required*** her to secure a diagnosis of ADHD for the student as a pre-condition for conducting a special education evaluation.

Summary and Conclusions

In the opinion of this investigator, it is easy to see why the parent was under the impression that the district wanted her to have the student seen by a physician regarding a possible diagnosis of ADHD. The district gave her rating scales that were designed to look at the severity of ADHD symptoms. Although not in the capacity of a district representative, a district employee took the parent to two appointments to consult with physicians regarding an ADHD diagnosis. The parent advocate spoke with the district regarding having the student see a physician to obtain an ADHD diagnosis. The use of ADHD medications was encouraged in a statement on a form related to a disciplinary incident.

However, the parent provided no documentary evidence to show that the district specifically ***required*** the parent to obtain an ADHD diagnosis for the student as a precondition of conducting a special education evaluation, and the district denies that any such requirement was ever put in place. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to K.S.A. 72-3436 which considers that a district has knowledge that a child is a child with a disability prior to the implementation of disciplinary consequences if the child's parent has requested an evaluation of the child.

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

1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with K.S.A. 72-3436 by accepting a parent's request for evaluation as notice that a student may have a disability when considering disciplinary consequences for that student.

2) Expedite the special education evaluation of this student.

3) Within 5 school days of the conclusion of the evaluation outlined above under Item 2, provide to Special Education and Title Services a copy of the evaluation report generated by the team.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
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
_____ PUBLIC SCHOOLS, USD #___
ON FEBRUARY 4, 2019

DATE OF REPORT: FEBRUARY 27, 2019

This report is in response to a complaint filed with our office by KS, Educational Advocate, on behalf of . _____ will be referred to as "the student" in the remainder of this report. Ms. S will be referred to as "the advocate."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with AG, Mediation/Due Process Supervisor for _____ Public Schools, on February 8 and 21, 2019. The investigator spoke by telephone with the educational advocate on February 13, 2019.

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

- IEP for this student dated March 2, 2018
- Appointment letter dated October 3, 2018
- Email dated October 12, 2018 from the School Social Worker to the advocate regarding the advocate's appointment as educational advocate for the student
- Email dated October 12, 2018 from the advocate to the School Social Worker
- Email dated October 15, 2018 from the School Social Worker to the advocate regarding the student's IEP
- Email dated November 2, 2018 from the advocate to the School Social Worker regarding the scheduling of a classroom observation
- Email dated January 14, 2019 from the advocate to the School Social Worker regarding the scheduling of the IEP Meeting for the student
- Email dated January 17, 2019 from the Counselor to the DCCCA case manager regarding the scheduling of a teleconference
- Email dated January 18, 2019 from DCCCA case manager the Counselor requesting the addition of another participant in the proposed teleconference
- Email dated January 22, 2019 from the Counselor to DCCCA case manager regarding the teleconference
- Emails dated January 23, 2019 between the St. Francis case manager and DCCCA case manager regarding the teleconference; St. Francis case manager notes she has sent call information to the advocate

- Email exchange dated January 22, 2019 between the advocate and the building principal regarding progress reports, grade card, and behavioral issues of the student
- Email dated January 24, 2019 from the advocate to the building principal regarding her address
- Email dated January 24, 2019 from the St. Francis case manager to the advocate regarding a conference call
- Email dated January 24, 2019 from the building principal to the advocate
- Email exchanges dated February 4, 2019 between the teacher and the advocate regarding the scheduling of the student's annual IEP review
- IEP Progress Report dated December 18, 2018
- Elementary Progress Report for the second reporting period of the 2018-19 school year
- Online district calendar

Background Information

This investigation involves a 10-year-old boy who is enrolled in the 4th grade at G Alternative Elementary School, a building that serves students from Kindergarten through 5th grade who have been suspended or expelled from other schools or who have emotional disturbances. While most students attending G qualify for special education services, the school provides services to some students who have not been determined to need special education.

The student was determined to be eligible for special education services under the category of Emotional Disturbance. On October 4, 2018, the student transferred to the district with an active IEP developed by another Kansas school district on March 2, 2018. According to the student's IEP, he was to receive special education services and counseling in an alternative school setting.

The student had previously been placed at KVC Prairie Ridge Hospital in Kansas City, Kansas. The hospital offers psychiatric inpatient and residential treatment services for children and adolescents. The student's residential placement at the hospital was not the result of an IEP Team recommendation.

The student is currently served by case workers from two outside agencies – DCCCA and St. Francis. The complainant was designated as the educational advocate for the student on October 3, 2018. A copy of the appointment letter was sent to the school district. The social worker for G sent an email to the advocate on October 12, 2018 indicating that it was her understanding that she was the educational advocate for the student. The advocate went to the school on November 14, 2018 to observe the student in his educational setting.

Educational Advocates

An education advocate (referred to as "surrogate parents" in Federal law) is appointed to act on behalf of the child when parents are unknown, unavailable, or parental rights have been severed. The state special education statutes and regulations give the Kansas State Board of Education (KSBE) the authority to appoint education advocates to act on behalf of the child, if parents are unknown, unavailable, or parental rights have been severed or relinquished.

A person appointed as an education advocate for a child shall not be: (1) An employee of the agency which is required by law to provide special education or related services for the child; (2) an employee of the state board, the department, or any agency which is directly involved in providing educational services for the child; or (3) any person having a professional or personal interest which would conflict with the interests of the child." (K.S.A. 72-3404(o)).

In Kansas, a foster parent may make educational decisions for an exceptional child ***only*** if the foster parent receives the required training and is appointed by KSBE as an education advocate. In other circumstances when a judge orders someone to serve as the child's legal education decision maker, the district must follow the judge's orders. Documentation from the court should be retained in the student's file.

KSDE (Kansas State Department of Education) and the Kansas Department for Children and Families (DCF) have developed a system for assigning education advocates when necessary. Details of the education advocate system are given in K.A.R. 91-40-24. KSDE contracts with Families Together (the State's Parent Training and Information Center) to:

- provide training for potential education advocates,
- receive referrals for students who need an education advocate,
- match an education advocate to the student,
- notify KSDE to appoint the education advocate, and
- provide support for education advocates.

The appointment of an education advocate is to be made within 3 business days of receiving a request for an appointment. The school or agency making the request will be notified by KSDE of the name, address, and telephone number of the person appointed to serve as the child's educational advocate. 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.

As stated in K.A.R. 91-40-24**,** any person appointed as an educational advocate shall perform the following duties:

1) Assert the child's rights in the education and decision-making process, including the identification, evaluation, and placement of the child;
2) comply with applicable confidentiality requirements imposed by state and federal law;
3) participate in the development of the child's individualized education program; and
4) ***exercise all the rights given to parents under the special education for exceptional children act*** (emphasis added)**.**

Issues

In her complaint, the advocate raised two issues:

Issue One: The district failed to provide the advocate with advance notice of a conference call regarding the educational placement of the student.

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 (See 34 C.F.R. 300.501(b)(1). Paragraph (2) of this regulation states: "Each public agency must provide notice consistent with § 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section." What this means is that whenever there is a meeting regarding identification, evaluation, placement, or the provision of FAPE [with certain specified exceptions discussed later in this report], the education decision maker of the child must be given notice of the meeting in the same manner as notice is required for IEP team meetings.

With regard to IEP Team meetings, § 300.322(a)(1) and (b)(1) state that the school must take steps to ensure that a parent or, in the case of this student, the "surrogate parent" for the student – the educational advocate – is present or is otherwise afforded the opportunity to participate in the meeting. The meeting is to be scheduled at a mutually agreed upon time and place. The school must provide notice of an IEP meeting to the parents for the initial IEP meeting and any subsequent IEP meetings. The notice must be provided in writing at least 10 days prior to the meeting and inform the parents that their child is invited to attend the meeting. That notice must also indicate the purpose, time, and location of the meeting, and who will be in attendance.

Advocate's Position

The advocate asserts that the district failed to provide her with advance notice of a telephone conference held to discuss the placement of the student.

District's Position

It is the district's position that due to communication confusion following a request for a meeting from an outside agency, the education advocate was not notified of that meeting in a timely manner. The student's St. Francis case manager has stated she sent the advocate an email regarding the date/time of the teleconference. The district avers that regardless of which agency requests a meeting and whether or not representatives of an outside agency notify the education advocate of that meeting, it is the district's responsibility to ensure the education advocate (or parent) has been notified in a timely matter to allow for meaningful participation.

Investigative Findings

On January 16, 2019, the DCCCA case manager contacted the social worker at G requesting that a teleconference be set up as soon as possible to discuss the student and his school needs. The social worker responded to the DCCCA case manager on January 17, 2019, informing him that she would be forwarding his request to the counselor who would then contact the DCCCA case manager to arrange the teleconference.

On January 17, 2019, the counselor contacted the DCCCA case manager via email indicating that she had spoken with the student's teacher about arrangements for a teleconference and offered the DCCCA case manager two options for conducting the teleconference – January 24 or 25, 2019 between 9:15 and10:15 AM. After speaking with another team member who, according to the the DCCCA case manager, "needs to be involved," the DCCCA case manager sent the counselor an email on January 18, 2019 agreeing to meet on January 24th. On January 22, 2019, the counselor again emailed the DCCCA case manager telling him that the January 24th date would be fine and asking him what number the school staff should call. On January 23, 2019, the DCCCA case manager provided the call-in number "for our meeting at 9:15 tomorrow…" On January 23, 2019, the case manager from St. Francis (the other team member referenced in an earlier email from the case worker) sent an email to the DCCCA case manager and counselor stating "I sent the call info to his educational advocate as well."

By report of the advocate, she received a call on her cell phone at 9:26 AM on January 24, 2019 but was not in a position where she could take that call. The caller – the school social worker – left a message which the advocate was able to retrieve a few minutes later. According to the advocate, the social worker's message was an inquiry as to whether or not the advocate would be participating in a conference call regarding the student that was already underway. The advocate states that she immediately called the number left by the social worker, was put on hold, and then asked to call in again using a different number. Once she was connected to the conference call, the advocate expressed her objection to receiving no notice of the meeting. One of the participants in the call stated that the advocate had been notified of the meeting via email by the student's case manager from St. Francis. The advocate again stated that she had not been notified. The school social worker told the advocate that if the

advocate was unable to participate, the meeting could be rescheduled. The advocate – recognizing that the scheduling of meetings with a large number of participants was never an easy process – declined the offer, and the conference call continued.

According to an email from the building principal to the Mediation/Due Process Supervisor dated February 8, 2019, the teleconference was held "to inform and to see how we could meet (the student's) needs at school. It was not a re-evaluation or IEP. Basically, a Q&A session with all parties."

According to the advocate, the topic being discussed when she joined the conference call was a transfer of the student from his current placement in a district alternative school (a building that provides services to students with behavioral challenges) to a comprehensive elementary school. The reason for the change as reported by the advocate was that the student's behavior was "getting worse." The advocate recalled that one of the participants on the call had stated that the teacher had been looking into other placements and a school that had a "Positive Behavior Supports" program. According to the advocate, someone on the call indicated that this transfer would be discussed at an IEP meeting on February 20, 2019. When the advocate stated that she had not been notified about any upcoming IEP meeting, she was told that it actually hadn't yet been scheduled.

Once the call had ended, the advocate found that an email had been sent by the St. Francis case manager at 9:28 AM on January 24, 2018, two minutes after the school social worker had called to notify the advocate that a conference call was in progress. The email stated that the student's school had "set up a conference line to discuss behaviors and concerns for (the student) surrounding school. The conference is ***tomorrow at 9:15 am*** (emphasis added)…call…if you are available."

The advocate sent an email to the social worker and building principal at 10:43 AM on January 24, 2019 expressing her displeasure over being contacted after a conference call about the student had been started.

On the afternoon of January 24, 2019, the advocate received an email from the building principal reporting that he had been told by "various parties that you were belligerent with staff." The principal stated that he was aware that the case manager at St. Francis had informed or attempted to inform the advocate about the conference call via an email sent to the "Family Support Worker" on January 23, 2019 at 9:16 AM – copying school staff and the advocate.

In an email to the advocate dated January 27, 2019, the case manager from St. Francis stated, "I am sorry about that, I was having trouble sending and receiving emails yesterday. For some reason I have also been told by others my email is sending SPAM emails so IT is having to work through those issues. I had originally sent you the conference email info yesterday morning when it was sent to me. Sorry for all the confusion."

Summary and Conclusions

The teleconference held on January 24, 2019 was not an IEP Team meeting. No educational decisions regarding the student were made during the teleconference. The advocate was given the opportunity to reschedule the teleconference in order to facilitate her participation but out of respect to the other participants agreed to allow the meeting to continue.

The district and the advocate concur that the annual IEP review for the student was scheduled to occur at another time in February 2019. However, even though this was not an IEP meeting, it was a meeting with respect to this student's educational placement. These kinds of meetings have the same notice requirements as IEP meetings: See page 4 of this report regarding the notice requirements in 34 C.F.R. 300.501(b).

Federal regulations, at 34 C.F.R. 300.501(b)(3), add this narrow exception:

"A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting."

The meeting on January 24, 2019, was not merely a preparatory activity for which this exception would apply because it was not an activity restricted only to school personnel. This meeting also included a DCCCA case manager and a case manager from St. Francis. Accordingly, this meeting required notice consistent with the notice requirements of an IEP team meeting. The notice provided to the education advocate fell far short of meeting these requirements. A violation of special education laws and regulations is substantiated on this issue.

Comment

The technology issues reported by the case manager from St. Francis should not have played any part in this situation. The district failed in executing their responsibility to the advocate and the student by delegating the task of ensuring that the advocate knew of the meeting to an outside agency. The advocate – the “surrogate parent” – was arguably the last person to be consulted about participating in a meeting to discuss the student’s needs when she should have been one of the first people consulted by the district about a proposed meeting schedule.

Individuals who assume the role of Educational Advocate take on an important responsibility in the educational lives of some of the most at-risk students. It is vital that districts recognize the role played by designated Educational Advocates and ensure their participation in protecting the rights of the student in the education and decision-making process.

Additional Comments

The district has scheduled training for staff regarding the role of the Educational Advocate. The training will be conducted by Families Together and will cover such topics as the following:

- What is an Educational Advocate?
- What are the relevant regulations?
- What rights should be afforded to an Educational Advocate?
- When might a student need an Educational Advocate?

A total of six sessions will be conducted – two on each of the following dates: February 27 and 28 and March 5 and 6, 2019.

Issue Two: The district has failed to provide the advocate with a report card or progress reports for the student since her appointment as educational advocate on October 3, 2018.

Parents – or, in this case, the educational advocate – must be provided with periodic reports of how a student is progressing with regard to the attainment of his/her annual goals. 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 (See K.S.A. 72-3429(c)(3); 34 C.F.R. 300.320(a)(3)).

Advocate's Position

The advocate asserts that she has not received a copy of IEP Progress Reports, grade card, or reports regarding behavior for the student since assuming her role as educational advocate on October 3, 2018. According to the advocate, she contacted the building principal via email on January 22, 2019 asking for the aforementioned reports but at the time of the filing of this complaint had not yet received copies of any of the requested information. By report of the advocate, she made another verbal request on January 24, 2019 during the conference call referenced above under Issue One, and was told that the report card had not been sent because the teacher did not have the advocate's mailing address.

District's Position

According to the Mediation/Due Process Supervisor for the district, IEP Progress Reports and grade cards are provided to parents at the end of each grading period every nine weeks as established by the district calendar (October 19 and December 19, 2018 and March 8 and May 23, 2019 for the 2018-19 school year).

The district stipulates that the advocate was not provided with periodic reports of the student's progress toward attainment of his annual goals in December 2018 and acknowledges that it did not meet its legal obligation to provide such reports.

Investigative Findings

On January 22, 2019, the advocate sent an email to the building principal informing him that she had not received progress reports or a grade card for the student for the second quarter of the 2018-19 school year. The advocate also stated that while she had recently been contacted by the student's case manager that the student was having problems at school, the school had not informed the advocate of any problems. The advocate asked the principal to remind his staff that she was to "receive progress reports and grade cards as well as information about difficulties my student is experiencing." The principal sent an email reply to the advocate stating that he would get the information to her.

On January 24, 2019, the advocate sent another email to the principal and Social Worker following the teleconference on that date. The advocate referenced a comment made by a staff member that the student's progress reports and grade card had not been sent to her because the school did not have her address. The advocate told staff that her address had been included in her letter of appointment and noted that staff had previously been able to communicate with her for other purposes via email but had not asked for her mailing address. The advocate included her address in the January 24th email.

In a telephone conference with the investigator on February 13, 2019, the advocate stated that she has now received copies of the student's IEP Progress Reports and his grade card. As of that date, she had not received any additional information regarding the student's behavior.

Summary and Conclusions

The district failed to provide the advocate with any report of the student's progress toward attainment of his IEP goals during the second monitoring period for the 2018-19 school year. A violation of special education laws and regulations is substantiated on this issue.

Additional Findings

In the process of reviewing documents related to issues raised by the advocate, the investigator identified an additional issue associated with the reporting of progress toward the attainment of annual goals.

Once the 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***. The IEP must also 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)). The reporting may be carried out in writing or through a meeting with the parents (including documentation of information shared at the meeting) – whichever 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.

The March 2, 2018 IEP for this student does not include a clear statement regarding **how** or **when** the student's progress toward attainment of his annual goals will be measured and reported. The "Annual Goals and Benchmarks or Short Term Objectives" section of the student's IEP includes the single word "Quarterly" with no additional explanation and nothing to suggest any context for the term.

In the opinion of the investigator, this single word statement with no additional explanatory context falls far short of meeting the legal requirements for the reporting of student progress. Under these circumstances, a violation of special education laws and regulations is identified.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, violations have been substantiated with regard to the following:

- 34 C.F.R. 300.501(b)(2) which [with certain specified exceptions that do not apply to the facts of this complaint] requires a notice of any meeting regarding the identification, evaluation, placement, or the provision of FAPE that is consistent with the notice requirements for IEP team meetings.

- 34 C.F.R. 300.320(a)(3) which requires districts to include in every student's IEP a description of how progress toward attainment of annual goals will be measured and when periodic reports of progress will be provided to parents, and

- K.A.R. 91-40-24 which allows Educational Advocates to exercise all the rights given to parents under the special education for exceptional children act, in this case the right to be apprised of the student's progress toward attainment of his annual goals.

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

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

a) 34 C.F.R. 300.320(a)(3) by including in the IEP of every student a statement specifying how the student's progress toward attainment of his/her IEP goals will be measured and when periodic reports of progress will be provided, and

b) K.A.R. 91-40-24 by reporting to this Educational Advocate the progress of this student toward attainment of his annual goals. (Note: The Educational Advocate has already received Progress Reports for the second monitoring period.)

c) 34 C.F.R. 300.501(b)(2) by providing notice of any meeting regarding identification, evaluation, placement, or the provision of FAPE that, except for the exceptions specified in this regulation, is consistent with the notice requirements for IEP team meetings.

2) Submit, within 30 school days of the receipt of this report, a plan showing how the information specified in Item 1) a) above will be incorporated into the IEPs of all special education students served by the district.

3) Submit, by no later than March 7, 2019, a copy of agendas (or other summative material) reflecting the content of the Educational Advocate training sessions conducted on February 27 and 28 and March 5 and 6, 2019. Include in each of these training sessions a short presentation on the notice requirements for meetings related to identification, evaluation, placement, and the provision of FAPE, and when these notice requirements apply to meetings that are not IEP meetings. If Families Together does not make this presentation, qualified school district personnel shall make the presentation.

4) Notify Early Childhood and Title Services when the training sessions specified in paragraph (3) have been completed.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
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
_____, USD #___
ON APRIL 11, 2019

DATE OF REPORT: MAY 11, 2019

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____, Mediation/Due Process Supervisor for _____, on April 18 and 26 and May 3, 2019. The investigator spoke by telephone with the parent on April 29, 2019.

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

- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated August 23, 2018
- Manifestation Determination and Review dated September 17, 2018
- Psychological Evaluation conducted by an outside agency dated October 3, 2018
- IEP for the student dated November 15, 2018
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 15, 2018
- Withdrawal/Entry Slip dated March 29, 2019
- Manifestation Determination and Review dated April 1, 2019
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated April 9, 2019
- Daily Attendance Profile for the 2018-19 School Year
- Medicaid Log for Providers for this student for the 2018-19 School Year

Background Information

This investigation involves a 5-year-old boy who is enrolled in kindergarten at his neighborhood school. The student began receiving special education services at age 3 on April 25, 2017 under an IEP that addressed both behavior and speech/language

needs.

According to his mother, the student has been diagnosed with Oppositional Defiant Disorder (ODD). There is a history of difficult social behavior in the home and at school that includes aggression, isolation, and social problems with peers and adults. After biting and hitting his teacher at one preschool, he was transferred to another where his behavior reportedly worsened. The parent reports that the student was seen for an outside evaluation in October 2018 and was diagnosed with Autism Spectrum Disorder.

The student has been enrolled in kindergarten for the 2018-19 school year and receives 20 minutes a week of speech/language services. In addition to the public-school program, he attends TOPS (The Opportunity Project), a preschool and day care center for children ages 1-5.

The student and his family have also been receiving support through COMCARE of _____ County, a mental health center with family and children's services that include case management, psychosocial treatment, in-home family therapies and respite care.

In a telephone call with the investigator on April 29, 2019, the parent expressed her desire to have the student placed in a school setting serving students with Autism. She noted that at one point she believed that consideration was being given to moving the student to _____ Elementary School, which serves students from kindergarten through 5th grade who have been suspended or expelled from other schools or who have emotional disturbances. The parent stated that she did not believe that _____ would be an appropriate school for the student because his behavior could be negatively influenced by other students in that placement.

Issues

In her complaint, the parent raised the following issue:

<u>Issue One:</u> The district delayed in completing a full re-evaluation of the student to determine whether he needed additional special education services and improperly applied disciplinary consequences that failed to take into account his diagnosis of Autism.

<u>Applicable Laws and Regulations</u>

This complaint focuses on two key areas: evaluation and discipline. Relevant laws and regulations are discussed below:

<u>Evaluation</u>

Most components of the reevaluation process are identical to those required for initial evaluation. However, there may be some differences from the initial evaluation including the people who make up the evaluation team. Whenever a district proposes

to conduct either an initial evaluation or a reevaluation, it must provide the parents with prior written notice that describes any evaluation procedures the district proposes to use in addition to a number of other standard notice content elements (see 34 C.F.R. 300.304(a) and 300.503). Federal laws and regulations prescribe specific requirements for membership on an evaluation/reevaluation team, outline procedures for conducting an evaluation/reevaluation, and specify how parents will be informed of the results of evaluation/reevaluation. While many of the key elements of reevaluations are quite similar to those of initial evaluations, there are some differences. It is important that parents are fully informed of what the district intends to do so that they can participate in a meaningful way in the evaluation process.

Discipline

The law has special provisions which sometimes require schools to treat children with disabilities differently than other children when it comes to disciplinary action (see 34 C.F.R. 300.530 through 300.537). Schools must provide a free appropriate public education (FAPE)to all children with disabilities, including those who are suspended or expelled from school (see 34 C.F.R. 300.101(a)). School officials may use in-school or out-of-school suspension as a consequence for disciplinary infractions by a student with a disability so long as the imposition of these consequences does not constitute a "change of placement." The law does not set an absolute limit on the number of cumulative school days needed to constitute a change of placement, but requires a case-by-case examination of specific factors (see 34 C.F.R. 300.536(a)(2)) and mandates that special education services be provided to students determined to be eligible for special education after the 10th school day of suspension in a school year (see 34 C.F.R. 300.530(a)(2), (d)).

The school is not required to provide educational services to children with disabilities during the first 10 cumulative days of suspension in a school year (see 34 C.F.R. 300.530(a)(2)). However, when the total number of school days of suspension in a school year reaches 11 for a student who has been determined to have a disability, schools need to carefully consider a number of factors before determining what disciplinary consequence will be imposed, if any, and how special education services will be provided (see 34 CFR 300.530(a)(2), (d)).

When a child with a disability has more than a single suspension in a school year, school officials should carefully monitor the cumulative number of school days of suspension and make decisions about the effect of imposing additional short-term suspensions. A "school day" is defined as any day, including a partial day, that all children, including children with disabilities, are in attendance at school for instructional purposes (K.A.R. 91-40-1(eee); 34 C.F.R. 300.11(c)). Given this definition, if a child is suspended for part of a school day, ***the partial day counts as a full day for purposes of determining if a change of placement has occurred***, or if educational services are required during the period of suspension.

When a series of suspensions/removals totals more than 10 school days in a school year, school officials should determine whether a pattern of removals has developed by considering:

- Whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- Other factors such as:
    - The length of each removal;
    - The total amount of time the child has been removed;
    - The proximity of the removals to one another; and
    - Any other unique circumstances on a case-by-case basis.

Federal regulations (34 C.F.R. 300.536(a)(2), (b)(1)) address these requirements, as do Kansas regulations at K.A.R. 91-40-33. If school officials determine that a series of short-term removals/suspensions totaling more than 10 cumulative school days show a pattern constituting a change of placement, then the school, the parent and all relevant members of the child's IEP team must have a manifestation determination review (34 C.F.R. 300.530(e)). In this review, the group must determine if the child's violation of the school's code of student conduct was a manifestation of his or her disability. The team must meet to review the following:

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

Upon review of this information, the child's conduct must be determined to be a manifestation of the child's disability if the group determines that a) the conduct was caused by or had a direct and substantial relationship to the child's disability or b) the conduct was the direct result of the school's failure to implement the IEP. Requirements for the manifestation determination review, as stated above, are found in federal regulations at 34 C.F.R. 300.530(e) and also in State statutes (see K.S.A. 72-343(e)).

Parent's Position

The parent contends that the district has disregarded the results of an outside evaluation that diagnosed the student as having Autism and has held him responsible for behaviors that are beyond his control. She asserts that the district has told her that it is too late in the school year to conduct an evaluation/re-evaluation and believes that the district has failed to fully inform her of all the options available to her and to the student to address his behavioral needs.

District's Position

It is the position of the district that the student's school has been providing the student with behavioral interventions since the first month of the school year. On August 22,

2018, consent was obtained to conduct what the district recognizes was erroneously labelled an "initial evaluation." The district acknowledges that parental consent should have been requested for a "reevaluation" with the specified intent of completing only a Functional Behavior Assessment (FBA). The district asserts that the FBA was used to direct the development of a Behavior Intervention Plan (BIP) which was added to the student's IEP on November 15, 2018. In addition to the BIP supports, the district contends that the student's daily schedule provided for adult supervision for the whole school day. That supervision has not been provided under the umbrella of special education services with the exception of those times when he is receiving his 20 minutes of speech therapy once a week.

The district stipulates that there appears to have been some confusion on the part of school staff regarding the rights of students who have been identified as "Speech Only." Staff did not appear to clearly understand that any student with an identified disability must be afforded the same disciplinary procedural protections as any other student with a disability who has an IEP. Further, the district concedes that staff did not appear to recognize that the disciplinary removal of a student for a part of the school day would be counted as a full day.

Investigative Findings

The student received his first suspension on August 17, 2018, two days after the start of the 2018-19 school year. The student struck and kicked district staff and struck other students. On August 21, 2018 following an incident of "defiant behavior," the parent was contacted and, as stated on the Student Discipline Profile, "chose to take the student home for the day." Another incident occurred on August 24, 2018. According to district records, the student had demonstrated "intolerable behavior" and "inappropriate physical contact."

The principal conferenced with the parent who gave written consent for the district to conduct what the district labelled as an "initial evaluation" – even though the student had been receiving special education services for over a year. Although the district contends that consent was requested so that the school team could conduct a functional behavior assessment, the prior notice form indicated that both "new" and "existing" data would be collected/reviewed in the following areas:

- Health/Motor Ability,
- Vision,
- Hearing,
- Social/Emotional Status/Behavioral Status
- General Intelligence,
- Academic Performance,
- Communicative Status,
- Transition Skills, and
- Other ("collect behavior data to determine if the student needs a functional behavior plan")

According to the prior notice and evaluation consent form, the student had "several behavior problems since starting kindergarten (and) these behaviors have included but are not limited to assault/battery of student and staff." Under a section of the form entitled "Options Considered and Why the Options Were Rejected," it was noted that the team "considered not collection data or reevaluating the student but determined that the student could possible (sic) benefit from additional support for academic success." The team also considered "other factors," noting that the student was new to the elementary school and had "struggled in other educational environments."

Another behavioral incident occurred on August 29, 2018. Again, "inappropriate physical contact" was noted on the discipline report along with "intolerable" and "defiant" behavior. The social worker met with the student, and the student left school early. On September 6, 2018, another behavior incident was reported. The principal spoke with the student and his mother regarding the student's "intolerable behavior" and "inappropriate physical contact." Records show that the parent removed the student from school for the rest of the day for a "previous outside appointment."

Discipline records show that on September 11, 2018 the student vandalized school property. The principal spoke with the student and his mother, and the student left school early.

According to the Student Discipline Profile, the principal gave the student a half day suspension on September 14, 2018 after he "punched another student."

By the date of his first manifestation determination review (MDR) meeting on September 17, 2018, he had been "written up" a total of 7 times – an average of one write-up per week. The incident that prompted the development of the MDR report involved the student striking another student in the mouth after the other student asked him to stop bothering him with a pencil. According to the Daily Attendance Profile for the student, he arrived at school at 11:17 AM and left at 12:41 PM.

According to the MDR report, the student's teacher felt that his "behavior is very impulsive, but not 'intentionally violent.'" It was noted that the teacher was trying to reinforce natural consequences, and the student was having difficulty sitting in a chair and keeping his body safe and in control. The MDR report noted that the student was involved with "Comcare for therapy, behavioral link for attentive care." The report also stated that the student had a diagnosis of ODD and was "in the process of completing outside Autism diagnosis." Per the report, data was "being collected to create his FBA/BIP." It was determined that the student's misconduct was not a manifestation of his speech/language disability. According to the report and signature page, the only participant in the MDR meeting was the student's IEP Manager (the Speech/Language Clinician providing services to the student).

On September 19, 2018, per the Student Discipline Profile, the student struck another student. The principal conferenced with the parent by phone, and the student left

school early. Yet another incident occurred on September 24, 2018. In this case, the student was given "in-school suspension" and lost a recess. Records indicate the principal contacted the parent and "left [a] message regarding this and another afternoon incident."

The parent took the student for an outside evaluation on September 24, 2018. The evaluation was conducted by a licensed master's level psychologist/licensed specialist clinical social worker with degrees in school psychology, educational psychology, and social work. The evaluation resulted in a diagnosis for the student of "Autism Spectrum Disorder, requiring substantial support, without accompanying intellectual impairment, with accompanying language impairment." The evaluator offered a number of recommendations to address the student's aggression, social problems, and emotional regulation and suggested the use of a picture exchange system to help the student learn appropriate social interaction. She also noted that the student could benefit from sensory integration work with an occupational therapist.

The next behavioral incident involving the student occurred on October 10, 2018. The student lost a lunch recess as a consequence for "kicking other students." The principal spoke with the student's mother about the situation when the parent picked the student up from school.

On November 1, 2018, the student was given a one-day out-of-school suspension for an incident of "intolerable behavior" that took place on October 31, 2018. There was another episode on November 7, 2018 when the student demonstrated "defiant behavior" and "intentional physical contact." As a consequence, the student lost recess for two days. A three-day out-of-school suspension followed an incident on November 9, 2018 where there was "intentional physical contact on peers." Records show a "Principal Approved" absence on November 9, 2018; the suspension was implemented on November 13, 14, and 16, 2018.

An IEP Team meeting was held on November 15, 2018. The IEP Team reviewed and revised the student's IEP. According to the revised IEP, the student was "very well-liked in class…because his behavior has improved some, it makes the other kids want to be around him." It was also noted that "since starting the behavior chart [at the beginning of November], his behavior has gotten worse. This could be because of too much change at one time."

At the November 15th meeting, the parent asked what would happen if the behavior plan developed by the social worker and behavior specialist did not work. She was told by the building principal that the "downtown people will get involved." The parent told the group that she had "run out of things to do" and was concerned for other students. The parent shared with the group that the student's behaviors were "typical of students with autism." She also noted that the student was on a waiting list for occupational therapy services. The student's case manager from Comcare was present at the meeting and stated that they had just reviewed his goals (using words, not violence) and were

teaching social skills to work on boundaries, on “reducing his lieing (sic), and coping skills for when he starts feeling upset.”

The section of the November 15, 2018 IEP entitled “Relevant Medical Information” contained the following statement:

> “Diagnoses: (The student) has the diagnosis of Autism per MKC services and ‘other specified disruptive, impulse-control, and conduct disorders’ from Comcare.”

Five classroom accommodations were specified:

- the use of a weighted compression vest for 4 hours per day (2 hours at a time)
- the use of a “whisper phone” in an effort to keep his voice quieter at his seat
- the use of a “stretchy band on his desk…to help with his wiggling…to help him have a way to bounce his legs without getting into trouble”
- sitting in his own seat, “but not completely isolated…to help him keep his hand and feet to himself”
- the use of a behavior chart to address completing work and keeping his hands to himself, earning a prize for getting 70% of his smiley faces, “to help motivate him to keep his hands to himself and to complete his work”

The November 15, 2018 IEP stated that the student’s behavior impeded his learning or that of others and stated that the student had “difficulty keeping his hands and feet safe. He has pushed others, thrown objects and torn papers in the classroom.” It was noted that a Functional Behavior Assessment had been conducted and that a “Behavior Plan is warranted.” The BIP noted that the speech/language pathologist (SLP) would assist with visual aids and supports, including social stories to help the student remember to “keep safe hands and feet and complete his work every day.”

No evaluation report was generated by the school team, and there is no indication that any assessment other than a Functional Behavior Assessment was conducted. The parent was given prior written notice that the district had added a behavior plan to the student’s IEP on November 15, 2018.

The next behavioral incident happened on December 5, 2018 when the student displayed “intolerable behavior” and spent the remainder of the day in in-school suspension. No additional disciplinary consequences were recorded during the month of December 2018, but attendance records show that the student left school early on December 6, 7, 13, and 14, 2018.

The student left school early on January 8, 2019, and on January 9, 2019, the student was given a half-day of in-school suspension for “intolerable behavior” and “intentional physical contact.” Another “early out” – this one at 1:45 PM – occurred on January 11, 2019. Records note additional “early outs” for the month on January 17, 22, 28, and 30, 2019.

Another behavioral incident was recorded on February 12, 2019 – again for "intolerable behavior" and "intentional physical contact." Once again, the student left school early. The student was given in-school suspension on February 13, 2019. On February 14, 2019, the student was suspended from school for a day and a half for demonstrating "intolerable behavior" and "intentionally hitting a peer." Attendance records for the dates of February 14 and 15, 2019 show that the student's absence was "principal approved." The student left school early on February 22, 2019. He was given a two-day out-of-school suspension on February 27, 2019 for "intolerable behavior" and "inappropriate physical contact." The Daily Attendance Profile shows that the student's absence on February 27-28 and March 1, 2019 was "principal approved."

Another "early out" – this one at 12:20 PM was recorded on March 5, 2019. A second "early out" – at 12:28 PM was noted on March 25, 2019. On March 29, 2019, the student left school under suspension at 1:45 PM following an incident when the student pushed a peer off the top of a playground slide. He was given an additional three-day out-of-school suspension for April 1-3, 2019. The student's mother officially withdrew the student from school as of March 29, 2019 citing as her reason "other children's safety."

On April 1, 2019, a second MDR meeting was held. Again, it was determined that the student's behavior was not a manifestation of the student's speech/language disability, though it was noted that the student had a behavior plan in place which his "teacher has been diligent in implementing." The MDR report also noted that the student had "a history of impulsive behaviors which have been addressed by this team and strategies have been put into place to help him control his urges." According to the report, the parent felt the student had "great difficulty with impulsive behaviors and seeks sensory input that may not be safe." The MDR form lists the parents, principal, general education teacher, nurse, school psychologist, social worker, and IEP Manager as participants although there are no signatures on the form provided by the district.

There is no indication that the MDR team considered the results of the outside evaluation obtained by the parent in October of 2018 or any other additional information including disciplinary reports in making their determination. The Mediation/Due Process Supervisor subsequently determined that the members of the MDR team did not believe at the time of the meeting on April 1, 2019 that the student's needs relative to his diagnosis of Autism and any related supports could be considered when making the determinations regarding his misconduct. Additionally, at least some MDR team members appeared to believe that IDEA (Individuals with Disabilities Education Act) disciplinary guidelines were not applicable to students with "speech only" IEPs.

A disciplinary hearing was scheduled for April 9, 2019. On April 4, 2019, the Mediation/Due Process Supervisor was contacted by Families Together who apprised the Supervisor of the student's situation, including his diagnosis, concerns regarding the outcome of the MDR, the number of suspension days, and the pursuit of a disciplinary

hearing and asked the Supervisor to investigate further.

After reading the student's file, the Supervisor contacted the student's principal and explained the situation, advising the principal that the student would be returning to school on April 8, 2019 and that the disciplinary hearing was cancelled. The Supervisor directed the school team to obtain the written consent of the parent to conduct a re-evaluation of the student. The principal scheduled the Supervisor to provide professional development for her Child Study Team (CST) regarding MDRs.

The student did return to school on April 8, 2019. The student's Daily Attendance Profile shows that absences from April 4-9, 2019 were "Principal Approved." The Student Discipline Profile for the student shows that these dates were suspensions.

On April 9, 2019, the parent gave written consent for a "re-evaluation" which, according to a prior written notice form, she had requested based upon her belief that "Autism is effecting (sic) her student's ability to have academic success in the educational environment. Currently the student has speech services and mother believes he could benefit from additional support throughout the school day." The prior written notice form also includes the statement that the "teacher stated to the parent that student has had some academic regression due to his behavior." According to the form, the student has had "several behavior incidents. The student has had outside mental health assistance in the classroom." The school team has specifically requested that the re-evaluation not be expedited in order to allow for the full 60 school days to complete a "thorough and valid assessment of this child and his needs." At the time the parent provided consent for the reevaluation of the student, there were 32 school days remaining in the school year.

On April 10, 2019, the student was given in-school suspension for part of a day for "intolerable behavior" and "intentional physical contact on peer." An additional 3 days of in-school suspension followed beginning on April 12, 2019 for the same behaviors.

A review of information provided by the district shows that the student had at the time of the filing of this complaint been provided with all of the speech/language services called for in his IEP.

Summary and Conclusions

The district has made a number of interventions available to the student since August of 2018 including the provision of adult supervision throughout the school day. Further, despite numerous in and out-of-school suspensions, the student has been provided with all the speech/language services required by his IEP. However, beginning early in the 2018-19 school year, the district made substantive and procedural errors with regard to the evaluation of the student and to the application of disciplinary procedures.

First, the district erroneously requested parental consent for an initial evaluation even though the student was already identified and receiving special education services. The

district outlined for the parent an evaluation plan that indicated that new and existing data would be collected and reviewed in a number of areas but failed to follow through on that plan. The only assessment that was actually completed was a Functional Behavior Assessment. No evaluation report was developed and presented to the parent.

According to records provided by the district, the student was given a total of 8 days of in-school suspension between the start of the 2018-19 school year and April 17, 2019. Fourteen (14) days of out-of-school suspension were given to the student during that same period. There were 6 days of "Principal Approved" absence and 20 days when the student left school early.

All but one of the disciplinary exclusions were a result of the following behaviors:

- intentional physical contact on peer
- intolerable behavior
- defiant behavior
- inappropriate physical contact

The first manifestation determination review meeting was conducted after the student's seventh behavioral write-up and after he had been given two days of out-of-school suspension. Records show that the only documented attendee at that "meeting" was the student's speech/language clinician. There is no indication that an agency representative or the parent was present.

The second MDR meeting was not held until after the student had been given 14 days of out-of-school suspension – per records provided by the district. According to the MDR report, the only information considered by the team when determining that the student's behavior was not a manifestation of his disability was the student's current IEP and placement. There is no record that the team looked at the October 2018 outside evaluation of the student which provided a diagnosis of Autism or that the team considered the student's current academic or behavioral performance. There is no indication that the team considered the student's disciplinary record which showed a repetitive pattern of inappropriate behaviors. The MDR team did not appear to understand that the disciplinary considerations afforded to students with other disabilities were to be afforded to students with "Speech Only" IEPs and did not appear to recognize that exclusion of the student for any portion of the school day counted as a full day of removal.

The district failed to follow proper procedures with regard to the reevaluation of the student, to the imposition of disciplinary consequences, and to the proper conduct of a manifestation determination review. Under the circumstances outlined above, allegations of violations of special education laws and regulations are substantiated.

Additional Comments

The school team has told the Mediation/Due Process Supervisor that they will need the full 60-school-day time period to complete a "thorough and valid assessment of this child and his needs." In the opinion of the investigator, the team has had a full year to observe this student, to implement interventions, and to review and revise a behavior plan. A thorough outside evaluation has been provided by the parent, and a 32-school-day period will have lapsed between the time the district obtained consent for reevaluation on April 9, 2019 and the end of the 2018-19 school year. If the district believes that it will be unable to complete the reevaluation before the start of the 2019-20 school year, the district should refer the student for an outside evaluation paid for by the district, and develop an evaluation plan that guarantees that the team has all the information it needs to make decisions regarding the provision of FAPE to this student.

The district began taking action to address some of the concerns related to this complaint prior to the parent's filing. The following training has been conducted:

On April 11, 2019, the Director of Related Services for the district provided professional development for the district's speech/language pathologists (SLPs) specifically targeting the obligation of SLPs to implement federal regulations governing disciplinary actions for students with disabilities, including those students who are identified as "Speech Only."

At the request of the principal at the student's school, the Mediation/Due Process Supervisor provided training to staff at the student's school regarding the development of compliant MDRs. On April 24, 2019, the Supervisor met with the school's Child Study Team (CST) as well as other school staff members who participate in MDRs. She reviewed each component of the MDR, and associated state and federal requirements were explained. The Supervisor explained to the team that any student with an identified disability under the IDEA and/or the ADA is protected in accordance with state and federal regulations governing the discipline of children with disabilities, including the use of suspension (short-term removals), MDRs, disciplinary hearings (long-term removals), FAPE, and Parents Rights.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to the following:

- 34 C.F.R. 300.304(a) which requires that parents be given notice describing evaluation procedures the district proposes to conduct;
- K.A.R. 91-40-1(eee) and 34 C.F.R. 300.11(c) which define a partial day as a full "school day" when determining if a change of placement has occurred for the purpose of disciplinary actions; and
- 34 C.F.R. 300.530(e) which outlines procedures to be followed when conducting a manifestation determination review.

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

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

    a. 34 C.F.R. 300.304(a) by giving notice to parents of a reevaluation when proposing to conduct an assessment of a student who is already receiving special education services and by accurately describing in that notice only those areas of assessment and assessment procedures that will be utilized for the evaluation;
    b. K.A.R. 91-40-1(eee) and 34 C.F.R. 300.11(c) by considering each partial day of removal of a student for disciplinary consequences as a full "school day;" and
    c. 34 C.F.R. 300.530(e) by following all procedural requirements for properly conducting a manifestation determination review meeting.

2) Expedite the reevaluation of this student and convene a team meeting for the purpose of discussing the evaluation and, as appropriate, reviewing/revising the student's IEP prior to the start of the 2019-20 school year on August 14, 2019. If the district believes that it will be unable to complete the reevaluation before that deadline, the district should refer the student for an outside evaluation paid for by the district, and develop an evaluation plan that guarantees that the team has all the information it needs to make decisions regarding the provision of FAPE to this student. USD #___ will submit a copy of the completed reevaluation and the student's revised IEP to SETS no later than August 14, 2019.

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
_____, USD #___
ON APRIL 5, 2019

DATE OF REPORT: MAY 4, 2019

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with SM, Assistant Director of the _____ County Area Educational Interlocal Cooperative #___, and with Sarah Loquist, General Counsel for the Interlocal, on April 12, 2019. Also on April 12, 2019, the investigator spoke by telephone with the student's mother.

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

- Letter to the parents from the Director of Dyslexia Screening at Fundamental Learning Center dated March 22, 2018
- Academic Language-Reading Evaluation dated August 6, 2018
- OT Outpatient Evaluation dated August 6, 2018
- Occupational Therapy Initial Evaluation dated September 5, 2018
- Psychoeducational Evaluation dated October 18, 2018
- Occupational Therapy report from Heartspring dated October 22, 2018
- Notice of Meeting dated October 23, 2018
- Notice of Meeting Acknowledgement dated October 23, 2018
- Evaluation/Eligibility Team Report dated October 23, 2018
- Meeting Notes dated October 23, 2018
- Notice of Meeting dated November 5, 2018
- Notice of Meeting Acknowledgement dated November 5, 2018
- Agenda for Eligibility/Potential Eligibility Meeting dated November 5, 2018
- IEP Meeting Notes dated November 11, 2018
- Email dated January 30, 2019 from the parents to the principal requesting an IEP meeting
- Notice of IEP Meeting for February 26, 2019

- Email communications between February 9 and 22, 2019 between school staff and parents regarding the rescheduling of proposed IEP Team meeting
- Notice of Meeting dated March 21, 2019
- Draft of amended IEP dated March 21, 2019
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 21, 2019
- IEP Meeting Notes for March 21, 2019 IEP Team meeting
- Audiotape of the IEP Team meeting of March 21, 2019 provided by the parents
- Email dated March 29, 2019 from the parent to the School Psychologist
- Email dated April 4, 2019 from the School Psychologist to the parent
- Email correspondence dated April 8-10, 2019 regarding the scheduling of an IEP Team meeting
- Notice of Meeting for an IEP Team meeting scheduled for May 7, 2019

Background Information

This investigation involves an 8-year old boy who is enrolled in the 2nd grade in his neighborhood elementary school. The student was diagnosed in December of 2017 with ADHD and was diagnosed by an outside agency in August of 2018 as having dyslexia.

On November 5, 2018, the student was determined by a school-based team to be eligible to receive special education services under the category of Specific Learning Disability, and special education services were initiated.

On January 30, 2019, the parents contacted the building principal via email to request an IEP Team meeting to address their concerns about the appropriateness of the student's IEP. The parents stated that they wanted to discuss the possibility of expanding the interventions provided to the student. A meeting was set for February 26, 2019, but that meeting was rescheduled by the district for February 20, 2019. The parent was called for jury duty, and the February 20th meeting was rescheduled for March 21, 2019.

On February 22, 2019, the student's mother sent an email to the building principal stating that she wanted to discuss the withholding of recess and PE from the student because his work was not done. The parent stated that this topic could be covered in the upcoming March 21st IEP Team meeting.

At the scheduled March 21st meeting, it was determined that another IEP Team meeting would be needed. In an email dated April 10, 2019, the parents asked that the meeting be scheduled from 12 to 2 PM on a date after April 30, 2019. The meeting has been scheduled for May 7, 2019.

Issue

In their complaint, the parents have identified the following issue:

<u>Concern #1:</u> At a scheduled IEP Team meeting on March 21, 2019, there was no one present who was qualified to discuss the evaluation results in order to determine more appropriate interventions for the student.

Federal regulations, at 34 C.F.R. 300.321, state that the “IEP team” for each child with a disability must include the following individuals:

1) The parents of the child;
2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
3) not less than one special education teacher, or, where appropriate, not less than one special education provider of the child;
4) a representative of the agency who –
    a) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
    b) is knowledgeable about the general curriculum; and
    c) is knowledgeable about the availability of resources of the agency.
5) an individual who can interpret the instructional implication of evaluation results, who may be a member of the team described (in 2 – 6 of this section);
6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
7) whenever appropriate, the child with a disability.

Kansas Statutes, at K.S.A. 72-3404(u) define an "Individualized education program team" or "IEP team" as “a group of individuals composed of: (1) The parents of a child; (2) at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment; (3) at least one special education teacher or, where appropriate, at least one special education provider of the child; (4) a representative of the agency directly involved in providing educational services for the child who: (A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of exceptional children; (B) is knowledgeable about the general curriculum; and (C) is knowledgeable about the availability of resources of the agency; (5) ***an individual who can interpret the instructional implications of evaluation results*** (emphasis added); (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child.

The law allows for individuals to represent more than one of the membership roles on the IEP Team. If a person is representing more than one role, that person must meet the individual qualifications for each role they represent. Though not required by law, individuals assuming one or more roles at an IEP team meeting should, for the sake of clarity, document their roles somewhere such ason the signature page of the IEP. There is no legal minimum number of participants at IEP team meetings as long as legal requirements for required IEP Team members is met.

A requisite member of the IEP Team is not required to attend an IEP Team meeting, in whole or in part, if the parent of the child with an exceptionality and the school agree, in writing, that the attendance of the IEP Team member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

Schools are encouraged to carefully consider, based on the individual needs of the child and the issues that need to be addressed at the IEP Team meeting, whether it makes sense to offer to hold the IEP Team meeting without a particular IEP Team member in attendance or whether it would be better to reschedule the meeting so that person could attend and participate in the discussion (Federal Register, August 14, 2006, p. 46674).

At the time of the March 21, 2019 IEP Team meeting, the Kansas Special Education Process Handbook, which can be found on the KSDE website, stated in Chapter 4, Section A, that membership on the IEP team must include

> "(f) A person who can interpret instructional implications of any ***new*** (emphasis added) evaluation or assessment results"

Regarding the specific reference to "new" evaluation results, it should be noted that the Process did not say that team member was required for "***only***" new evaluations or assessments. Further, the handbook is written in narrative form and attempts to explain the legal requirements of special education laws in a manner that makes sense to people who do not know the law. But, the Process Handbook is only a guide; it is ***not*** a statement of law. That is why the Process Handbook cites the actual statute and regulation in insets within the narrative. Where there is a discrepancy between the Process Handbook and the law, the law takes precedence.

This section of the Kansas Special Education Process Handbook was subsequently amended, and now reads in its entirety as follows:

> "A person who can interpret instructional implications of any evaluation or assessment results must also be a member of the IEP team. This may include individuals who participated on the evaluation team. Certainly, a school psychologist, a special education teacher, general education

teacher, speech/language pathologist, or other related service provider might have evaluation results that need to be interpreted and provide instructional implications."

Parent's Position

The parents assert that in January 2019 they requested an IEP Team meeting to address what they saw as growing stress and frustration in the student. According to the parents, they were concerned that the student's IEP did not include specific interventions to address reading, spelling, or handwriting. They felt that accommodations and the support of a paraeducator for reading were not sufficiently addressing the student's need. The parents believed that the school district's evaluation of the student as well as input from the student's physician and an outside Occupational Therapy (OT) evaluation indicated that more intensive services were needed for the student to receive FAPE.

The parents contend that there was no one present at the March 21, 2019 IEP Team meeting able to interpret and apply evaluation data. It is the position of the parents that the district was not prepared to discuss the issues they had raised, the district did not take the concerns of the parents seriously, and the district made no changes to the student's IEP in order to address the needs identified by the parents.

District's Position

It is the position of the district that the IEP Team meeting of March 21, 2019 was not – to the knowledge of the district – scheduled to determine the eligibility of the student, nor was it scheduled to discuss the results of the student's recent initial evaluation.

The district asserts that the parents and their advocate insisted that because the School Psychologist was not present at the March 21, 2019 IEP Team meeting, no one else was in attendance who could interpret the instructional implications of evaluation results. The district states that had they known that the parents and advocate specifically wanted to discuss evaluation results, the district would have included the School Psychologist in the meeting. It is, however, the district's position that several other team members could, in the absence of the School Psychologist, fulfill that role including the student's teacher, the local education agency (LEA) representative, or the student's special education teacher.

Investigative Findings

The parents first contacted the district via email on January 30, 2019 to request an IEP Team meeting. They wanted to discuss the possibility of expanding the interventions provided to the student due to their concerns and wanted to discuss the appropriateness of the student's November 5, 2018 IEP. Samples of student

work products were attached to the email in support of their request. On February 22, 2019, the student's mother sent another email to the building principal stating that she wanted to discuss the withholding of recess and PE from the student because his work was not done.

IEP Team meeting dates were established and rescheduled during the month of February due to conflicts on the part of both the district and the parents, and the parties ultimately agreed to convene the IEP Team meeting on March 21, 2019.

Parent/teacher conferences were held on March 8, 2019. At the conference, the teacher and parent discussed the parent's concerns related to the student's writing and spelling and the parent's belief that recess and PE had been withheld from the student as punishment. The district reports that the teacher believed that all of the parent's issues had been resolved and was unsure what would be discussed at the upcoming March 21st IEP Team meeting.

The Notice of Meeting form for the March 21, 2019 IEP Team meeting stated that a 45-minute meeting would be held to "discuss possible changes to your student's individualized education program (IEP)." in addition to the parents, the form stated that the following people would be in attendance:

1) "At least one (1) general education teacher of your student;
2) At least one (1) special education teacher or, where appropriate, at least one(1) special education provider for your student;
3) At least one (1) administrator, or their designee, of the Public Agency involved in providing educational services for your student;
4) If this is an initial IEP, a representative of the Part C system (Early Intervention Program for Infants and Toddlers with Disabilities) if your student is transitioning from Part C to Part B, and you have requested Participation of a Part C representative; and
5) Student _____. As required by federal law and state regulations, the Cooperative invites this student to attend the IEP meeting when postsecondary goals and transition services will be considered. Postsecondary goals and transition services can be considered at any age, but must be included in the first IEP to be in effect when your student reaches age 14.
6) ***Other(s) who can help explain the evaluation results or who have knowledge of special expertise regarding your student or services that may be needed*** (emphasis added)***;*** and if necessary, and with your consent, staff from other agencies that may be able to provide appropriate transition services/linkages will be invited to our meeting. The agencies they represent are shown below." (No additional participants were listed on the form.)

An audiotape of the meeting was provided to the investigator by the parents. In reviewing that tape, the investigator heard the following:

After introductions of those present were made, the parent advocate is heard asking district staff why the "School Psychologist or someone else" was not present who could "discuss the evaluation results." The advocate specifically asked one of the team members whether she would be assuming that role for that meeting and was told "no, we already went over that…the School Psych has already reviewed that." The advocate then asked whether the meeting was considered to be an IEP Team meeting. The district confirmed that they were holding an IEP Team meeting and stated that the parent had been provided prior notice of an IEP Team meeting. The advocate asked if the parent would be provided a waiver of a required team member. The district responded that "she" (the School Psychologist) was not required for the meeting. The advocate asserted that someone should be present at every IEP Team meeting who could talk about the evaluation. Staff asked whether the purpose of the current meeting was to discuss evaluation results. The advocate stated that the purpose of the meeting was to discuss the student's IEP and again asked if the parent was to be asked to waive the participation of a required team member. Again, the district insisted that all required team members were present.

The advocate affirmed that the purpose of the meeting was to review all available data and evaluations in order to address the parents' concerns and noted that a person able to address evaluation data was required to be at every meeting regardless of the stated purpose of the meeting. The special education teacher stated that it had not been brought to her attention that the team would be going over the evaluation at the meeting. Again, the advocate insisted that regardless of the purpose of the meeting, someone – "a School Psychologist or Social Worker or somebody who could talk about any of the testing…and could go back and say this is what that means" should be present. The advocate reiterated that the parent would be happy to sign a waiver but wanted it on the record that a required team member was not present.

The district offered to reschedule the meeting if the advocate felt "she" (the School Psychologist) needed to be present. The advocate stated that she wanted to proceed with the meeting having made the trip to attend but wanted the record to show that a required team member was not present.

The team proceeded to conduct the meeting. The parent explained her current concerns regarding the student with regard to behavioral and academic needs and her desire to add elements to his IEP to help him make greater progress. The parent also expressed concerns over the student being "switched around," and missing recess. The parent also expressed concerns regarding the student's handwriting and spelling. The advocate presented a summary of her review of past assessment results as well as her own assessments and observations regarding student performance, outlining items which supported the contention of the advocate that the student was in need of specific interventions in addition to previously established accommodations.

The student's mother noted that the student's ADHD medications had been increased and that the student was now riding his bicycle to school to expend additional energy. The classroom teacher stated that she had observed positive changes in the student's ability to focus on academic tasks.

Other discussion addressed the advocate's concerns regarding the student's being required during writing instruction to copy a scribed version of his ideas. The advocate insisted that such a requirement was not a good use of the student's time in view of short term memory deficits identified during the initial evaluation. The classroom teacher asserted that the student's scores on previous testing may have been negatively impacted by the student's ADHD. The advocate asserted that the results of cognitive assessments were not likely to change significantly over time, but stated that if there were questions about the validity of previous assessments, an independent evaluation or a re-evaluation might be in order.

At this point, the district then stated that the School Psychologist should be present if the team expected to pursue further discussion of the results of her evaluation. The district again reiterated that the School Psychologist was not a required member of the team for an IEP review or IEP amendment discussion, but stated that she should be present if specific elements of the psychologist's evaluation were being discussed.

The advocate then asked the school team to pull up the required members of an IEP Team on the computer. The district stated that they had already pulled up the Kansas Special Education Process Handbook, and quoted the guidelines as saying that "a person who can interpret instructional implications" was only needed if there was to be a discussion of any "***new*** (emphasis added) evaluation or assessment" and asserted that the earlier evaluation was not "new" information since it had already been reviewed by the team.

The team went on to review some changes made to the IEP related to present levels of performance as well as to parent concerns. There was also extended discussion regarding having the student copy products developed by the scribe at school. Work products were shared and discussed, and the parent shared input from a private Occupational Therapist who works with the student outside of school. The staff responded to concerns of the parents regarding missed recesses, assuring the parent that the student had never missed a recess in order to complete classwork.

There was further discussion about the need for a re-evaluation and about the need to schedule an additional meeting. As the meeting concluded, the advocate again asked for a waiver for a missing required IEP Team member. A district staff member stated that the parent could indeed sign a waiver but the form could not be made immediately available because there was no printer in the room. That same staff member again stated that "she" (the School

Psychologist) was not a required team member until the district became aware of what was to be discussed. According to district staff, the psychologist was not required because a "new evaluation or assessment" was not being discussed. The advocate asserted that federal requirements take precedence over handbook statements.

Summary and Findings

Federal statutes and regulations state that a number of individuals may assume the role of the individual who can interpret the instructional implications of evaluation results. Statutes and regulations do not prohibit the option of allowing a district to assign more than one person at any given meeting to fill this position. However, the law does require that ***someone*** be present who could interpret the instructional implication of evaluation results – regardless of the purported purpose of the IEP Team meeting.

The notice of meeting form provided to the parent states that among those who would be present at the meeting would be someone **"**who can help explain the evaluation results…." During this investigation, the district asserts that there were several district representatives at the meeting capable of filling that role, and, in fact, district personnel including the student's classroom teacher offered opinions regarding assessment data. However, no one from the district made any ***affirmative*** statement to indicate that they were assuming this required role when the advocate specifically asked that the person in that role be identified. Rather, the district team repeatedly stated that the School Psychologist was not required to be present because no "new" assessment or evaluation information was being presented.

The advocate did not place a limit on who she believed might fill the required position saying only that it could be "a School Psychologist or Social Worker or somebody who could talk about any of the testing…and could go back and say this is what that means." It was the district that continued to focus exclusively on the presence/absence of the School Psychologist. The district did not at any time during the meeting point to one or more of the individuals present as being able to function in the required role. No one from the district noted on the signature page of the amended IEP that they had assumed that role.

The district initially offered to reschedule the meeting if the ***parent and advocate*** felt that the School Psychologist needed to be present but asserted that all required team members were present. According to the district, no waiver of a required team member was needed because no "new" assessment/evaluation information was being presented and the parent had not made it clear ahead of time that existing evaluation data would be a topic of discussion. It was only after the advocate challenged specific elements of the district's assessment that the district stated that another meeting should be scheduled with the psychologist present.

While the School Psychologist was not specifically required by law to attend the IEP Team meeting of March 21, 2019, ***someone*** from the district was required to assume the mantle of "person able to interpret the instructional implications of evaluation results." No one from the district affirmatively assumed this role. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issue presented in this complaint. Specifically, a violation has occurred with regard to 34 C.F.R. 300.321 which requires someone to be in attendance at every IEP Team meeting who can interpret the educational implications of evaluation results.

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

1) Submit, within 10 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with 34 C.F.R. 300.321 by having someone in attendance at every IEP Team meeting who can interpret the educational implications of evaluation results unless the presence of such an individual is waived in the manner specified by law.

2) Within 20 school days of the receipt of this report, the district shall submit to Special Education and Title Services a written plan showing

    a. how all district staff will be trained in order to ensure understanding of the legal mandate for IEP Team membership, and

    b. how the district will document that all required IEP Team members are present at every IEP Team meeting unless attendance is properly waived.

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).

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Public Schools: 19FC___-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on April 5, 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 team at the Kansas State Department of Education. Following the investigation, an Initial Report, addressing the allegations, was issued on May 4, 2019. That report concluded that there was a violation of special education statues and regulations, and ordered a variety of corrective actions.

Thereafter, on May 13, 2019, the school district filed an appeal of the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the report, the district's notice of appeal, the attachments to the notice of appeal (including an audio recording of the March 21, 2019, IEP meeting), the parent's written response, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

The Appeal Committee will limit its inquiry to the issue 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.

DISCUSSION OF ISSUE ON APPEAL

The complaint involved one issue. The parents alleged that: "At a scheduled IEP Team meeting on March 21, 2019, there was no one present who was qualified to discuss the evaluation results in order to determine more appropriate interventions for the student."

As cited on page 3 on the Initial Report, the pertinent federal regulation is 34 C.F.R. § 300.321. That regulation requires that the IEP team must include certain specified members, including "an individual who can interpret the instructional implications of evaluation results…" That regulation also states that the member of the team who can interpret the instructional implications of evaluation results may be a member of the team who is also filling another specific role on the team (excepting only the parent and the child with a disability).

The Appeal Committee concludes that there is sufficient evidence to support the findings and conclusions in the report of the investigator. The Appeal Committee agrees with all of the findings and conclusions, specifically including all of the following:

- Someone must be present at the meeting who can interpret the instructional implications of evaluation results, regardless of the purported purpose of the IEP meeting (p. 9).

- No one from the district made any affirmative statement to indicate that they were assuming this required role when the advocate specifically asked that the person in that role be identified (p. 9).

- The district did not at any time during the meeting point to one or more of the individuals present as being able to function in the required role. No one from the district noted on the signature page of the amended IEP that they had assumed that role (p. 9).

- No one from the district affirmatively assumed the role of a person who can interpret the instructional implications of evaluation results.

In its appeal, the district asserts that: "although no one specifically stated that they were the one interpreting the instructional implications of the evaluation results, both the general education teacher and the special education teacher can be heard doing just that." The Appeal Committee listened to the audio recording of the March 21, 2019 IEP meeting and did not hear that. The parent's advocate wanted to discuss the instructional implications of the student's profoundly low cognitive processing speed and short-term memory. The special education teacher and general education teacher provided information regarding their observations of the student and questioned the validity of the evaluation due to changes in medications, but the Appeal Committee did not hear them discussing the instructional implications of the cognitive processing speed and short-term memory deficits of the student, as those deficits were described in the evaluation report. Instead, team members repeatedly stated that if these portions of the evaluation were to be discussed, they would need the school psychologist to come to a meeting to provide the requested interpretation.

The Appeal Committee also notes:

The requirement that the IEP team include a member who can interpret the instructional implications of evaluation results is useless if the member that has that ability to serve in that roll declines to provide the needed interpretation. There must be a member of the IEP team who is both able and willing to fill that role.

The Kansas Special Education Process Handbook is a guidebook. It is intended to provide general guidance to the public. It is not law or regulation. It should not be cited in legal analysis, particularly in situations where it is inconsistent with law or regulation. The Appeal Committee agrees entirely with the investigator's analysis (on page 4 of the Initial Report) of a portion of the Handbook indicating the team needed to include a member who can interpret instructional implications of any "new" evaluation. That statement is correct, but misleading because there must be a member who can interpret the instructional implications of evaluation

results even if the most recent evaluation is not a new evaluation. That provision has been removed from the Handbook.

On pages 3 and 4 of their response, the parents assert that neither the general education teacher or special education teacher conducted any formal assessment for the evaluation, "and thus, were not qualified even by the informal explanation in the Kansas Special Education Handbook, to be the person to interpret the instructional implications of that evaluation report for (the student)." The Appeal Committee wants to communicate to both parties that there is no requirement that the person filling this role on the team have actually conducted any formal assessment for the evaluation. The special education teacher or the regular education teacher of this student may well have been able to fill this role, without any participation in conducting the evaluation. The Initial Report is sustained because, as the investigator stated on page 10 of her report, "No one from the district affirmatively assumed this role."

CONCLUSION

All findings and conclusions in the original report are sustained, including the corrective actions.

This is the final decision on this matter, there is no further appeal. This final decision is issued this 28th day of May, 2019.

APPEAL COMMITTEE:

_____
Tiffany Hester

_____
Brian Dempsey

_____
Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ UNIFIED SCHOOL DISTRICT #___
ON JANUARY 25, 2019

DATE OF REPORT: FEBRUARY 22, 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

The investigator, spoke by telephone with the parent on February 14, 2019. The investigator has also reviewed the written response of the district and communicated by e-mail with the attorney for the district.

Background Information

The facts of this case are not in dispute. The student is a twelve-year old girl in the 7th grade. The district conducted a comprehensive initial evaluation and prepared an evaluation report. In meetings held on January 5, 2018, regarding reading, and January 12, 2018, regarding math, the eligibility team determined the student was not eligible for special education. Subsequently, on August 31, 2018, the student was determined to be eligible for a Section 504 plan, and a 504 plan was written on September 14, 2018. On November 28, 2018, the parent requested an Independent Educational Evaluation (IEE). In a letter, dated December 10, 2018, the district notified the parent that her request for an IEE was denied.

Issues

In the complaint, the parent raises one issue:

<u>Issue One:</u> The district is in violation of Kansas Administrative Regulation 91-40-12 because it denied the request for an IEE without initiating a due process hearing.

The issue presented involves an interpretation of law. Accordingly, the investigator will not analyze this issue through the state regulation, but instead will look to the

more authoritative federal regulations. 34 C.F.R. § 300.502, in relevant parts, says that parents of a child with a disability have a right under the Individuals with Disabilities Education Improvement Act (IDEA) to obtain an IEE of the child at public expense, if the parent disagrees with an evaluation obtained by the district, and that if a parent requests such an evaluation, the school district must, without unnecessary delay, either: (1) file a request for a due process hearing; or (2) ensure that the IEE is provided at public expense. It is the parent's position that the district has failed to comply with this federal regulation because it performed neither of the two available options. Instead, in denying the request for an IEE at public expense without requesting a due process hearing, it used a third option that the parent argues is not available under the regulation.

The district interprets this regulation differently. The district correctly notes that 34 C.F.R. § 300.502(a)(1) begins with these words: "The parents of a **child with a disability** have a right under this part to obtain an independent educational evaluation of the child…[emphasis added]." The district also correctly notes that the term "child with a disability" is a defined term in the federal regulations. In 34 C.F.R. § 300.8(a), the term "child with a disability" is defined as a child evaluated in accordance with the evaluation regulations of the IDEA as having one of the listed categories of disability and who, by reason thereof, needs special education and related services. In short, this regulation defines a child with a disability to be a child who has been determined to be eligible for special education.

It is the district's position that the two options available to the district under 34 C.F.R. § 300.502 apply only to parents of a child with a disability, as that term is defined in § 300.8(a). Because this student is not a child with a disability, and has never been a child with a disability, as that term is defined in § 300.8(a), the district believes it was not limited to the two options in 34 C.F.R. § 300.502, and had the option it took, to deny the request for an IEE at public expense without requesting a due process hearing.

Research

A search for guidance on this particular issue, relating specifically to IEEs, was unsuccessful. The only case found was a special education due process hearing case, from another state, in which the hearing officer determined the parent was not entitled to an IEE at public expense because the school was able to show that its evaluation was appropriate in a due process hearing. The hearing officer in that case made, what appeared to be a side comment, stating:

> Furthermore, the right to an IEE is limited only to those parents whose child has been identified as "a child with a disability" under the IDEA. 34 C.F.R. § 300.502(a)(1). This provision suggests that if a child is not eligible for special education under the IDEA the child does not meet the definition of "a child with a disability" for IEE purposes. Because Student is not eligible for special education services under IDEA

student's mother is not entitled to an IEE at charter school expense.

This comment does appear to be a literal interpretation of the regulation. It has little precedential value, however, because the hearing officer did not use it as a basis for the decision, and there is no binding effect from the decisions of a due process hearing officer in another state.

Accordingly, the investigator is treating this issue as a matter of first impression in Kansas.

Statutory Construction

In its written response, the district cites a number of cases stating that statutes and regulations are subject to rules of construction. It cites Gannon v. State, 298 Kan. 1107, 1221 for "The best and only safe rule for ascertaining the intention of the makers of any written law, is to abide by the language they have used;" and Caminetti v. U.S., "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion; and U.S. v. Missouri Pac. R. Co., 278 U.S. 269, 278 (1929) "But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended"

Implicit in all of these cases regarding the importance of using a literal interpretation of statutes and regulations is the condition that the language is clear, that the language does not admit to more than one meaning, and that the language does not lead to absurd or impracticable consequences. However, the guidance is different if the regulation is ambiguous, or is inconsistent, or is contradictory, or leads to absurd or impracticable consequences. A variety of courts, including the United States Supreme Court have provided guidance under such circumstances, which are summarized as:

- "…laws are not to be construed so strictly as to defeat the obvious intention of the legislature." Helvering v. Stockholms & Co. Bank, 293 U.S. 84 (1934)

- When construing statutes where there is a conflict between reasonable intention and a 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).

- "The Court is mindful of its obligation to give full force and effect to statutory language when such language, given its normal and natural effect, is subject to but one reasonable interpretation. The Court

> cannot search for ambiguity where it does not exist but neither can it isolate words for the microscopic dissection of the grammarian. If the language employed, when literally defined, causes confusion, does violence to or conflicts openly with the intent of the section, the Court must resort to a construction of the language that will resolve the ambiguity without defeating the purpose of the Statute. Words should not be applied in a manner that would accomplish results contrary to the reasonable purpose of the legislators." American Bankers Insurance Co. of Florida v. United States, 265 F.Supp. 67 (S.D. Fla. 1967)

On this same subject, the Kansas Supreme Court has said:

> In construing a statute the legislative intention 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. Hessell v. Lateral Sewer District, 202 Kan. 499, 449 P.2d 496 (1969).

Analysis

The use of the term "child with a disability" in the federal regulations is consistent with the use of that term in the statute. However, there does appear to be an internal inconsistency with how that term is used in the regulations, and the statute for that matter. It appears, at times that the term "child with a disability" means a child who has been evaluated and determined to be eligible for special education and, at other times, the term seems to have a broader meaning.

Because the right to an IEE is a procedural safeguard, it is important to look at how the term "child with a disability" is treated in relation to the other procedural safeguards in the regulations.

Procedural Safeguards include right of parent of a child with a disability to:

- have an opportunity to examine records of their child § 300.501(a);
- participate in meetings related to identification, evaluation, placement, and the provision of a FAPE § 300.501(b);
- be involved in placement decisions § 300.501(c);
- request an IEE at public expense § 300.502;
- be provided with a Prior Written Notice (PWN) for specified reasons § 300.503
- be provided with a notice of procedural safeguards at specified times § 300.504
- file a due process hearing § 300.507
- be awarded attorneys' fees when prevailing in a due process hearing § 300.517
- request mediation § 300.506

All but one of these rights are conditioned on the status of the parent being a parent of a child with a disability. Oddly, mediation is not tied to parents of a child with a disability, but only to "parties to disputes" regarding identification, evaluation, placement, or the provision of FAPE. So, the right to request mediation is not relevant to this analysis.

At first glance, there does not appear to be any inconsistency with the above referenced regulations. All of the procedural safeguard rights accorded by the above regulations belong to parents of a "child with a disability." However, a closer review does find internal inconsistencies.

For example:

(1) Parents of a child with a disability have the right to participate in meetings with respect to the **identification**, **evaluation**, educational placement, and the provision of FAPE [300.501(b)]. If the term "child with a disability" is to be given its literal meaning in this regulation, and a parent meets that condition only after the child is found to be eligible for special education, how is it possible for a parent to assert the right to participate in meetings regarding the initial evaluation and initial identification of their child? The interpretation advanced by the school district leads to the absurd (and contradictory) result that this regulation provides parents with a right to participate in meetings with respect to the initial evaluation and identification of their child and that it does not provide that right. The interpretation that a parent does not have a right to attend such meetings also appears inconsistent with other regulations, such as § 300.306(a)(1), which says: "A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8…" How is that implemented if a parent does not have a right to attend meetings regarding initial evaluation?

(2) Parents of a child with a disability must be given a prior written notice (PWN) a reasonable time before the district proposes to: (a) **initiate** or change the **identification**, **evaluation**, placement, or provision of FAPE to the child; or (b) **refuses to initiate** or change **the identification**, **evaluation**, placement or provision of FAPE to the child [§ 300.503(a)]. If the term "child with a disability" is to be given its literal meaning in this regulation, and a parent meets that condition only after the child is found to be eligible for special education, how is it possible to initiate an evaluation or to initiate identification of a child with a disability, much less provide prior notice of doing so? Likewise, how is it possible to refuse to initiate an initial evaluation and identification of a child with a disability? Equally impossible is providing prior written notice to parents of a "child with a disability" refusing to conduct an initial evaluation or to identify the child. Yet, this regulation requires that this notice be given to parents. The inconsistency with the literal interpretation advanced by the district spreads across other regulations. For example, § 300.300(a)(1)(i) says: "The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after

providing notice consistent with §§ 300.503 and 300.504, obtain informed consent consistent with § 300.9 from the parent of the child before conducting the evaluation. This regulation specifically requires that PWN be provided to parents when proposing an initial evaluation, and that the notice be consistent with §§ 300.503 and 300.504. Under the district's literal interpretation, however, the notices required under §§ 300.503 and 300.504 are not required when a district is proposing an initial evaluation, because these children are not yet a "child with a disability." The conflict between these regulations is unresolvable under the district's interpretation. Finally, the Office of Special Education Programs (OSEP) has provided this guidance: "If, however, the public agency does not suspect that the child has a disability and denies the request for an initial evaluation, the public agency must provide written notice to the parents consistent with § 300.503(b)… (Federal Register, August 14, 2006, p. 46636)." How can a public agency provide notice to parents of a refusal to conduct an initial evaluation that is consistent with § 300.503(b) if that section applies only to children who have already been identified? The interpretation advanced by the school district is in direct contradiction to the OSEP guidance. The district's interpretation leads to the absurd (and contradictory) result that § 300.503(a) provides parents with a right to receive a prior written notice with respect to proposals related to the initial evaluation and initial identification of their child and at the same time, that it does not provide that right because the child is not a "child with a disability," as that term is defined in § 300.8.

(3) Parents of a child with a disability must be provided with a notice of procedural safeguards at specified times [§ 300.504(a)], including upon the initial referral or initial parent request for evaluation. This regulation has the same internal inconsistency referenced above. If the term "child with a disability" is to be given its literal meaning in this regulation, and a parent meets that condition only after the child is found to be eligible for special education, it is not possible to provide this notice of procedural safeguards to parents of a child with a disability upon the initial referral or initial parent request for evaluation because that child has not yet been identified. Yet, the regulation requires that this notice be given to parents upon the initial referral or request for evaluation. Again, the interpretation advanced by the school district leads to the absurd (and contradictory) result that this regulation provides parents with a right to be given a notice of procedural safeguards upon the initial referral or initial parent request for evaluation, and at the same time, does not provide that right.

(4) A parent may file a due process complaint on any matter related to the identification, evaluation, or placement of a child with a disability, or the provision of FAPE to the child [§ 300.507(a)]. "Any matter" regarding identification and evaluation would certainly include matters where a district has refused an initial request to evaluate a child or where a district has refused to identify a child after an initial evaluation. This regulation has the same internal inconsistency referenced above. If the term "child with a disability" is to be given its literal meaning in this

regulation, and a parent meets that condition only after the child is found to be eligible for special education, that leads to an absurd and contradictory result. The result is absurd and contradictory because it is not possible, under this regulation, for a parent of a "child with a disability" to file a due process complaint regarding matters related to an alleged failure to evaluate or an alleged failure to identify the child, even though the regulation says parents may file for due process on "any matter" related to evaluation or identification.

(5) In § 300.517(a), reasonable attorneys' fees may be awarded to a prevailing party "who is the parent of a child with a disability [emphasis added]. If the term "child with a disability" is to be given its literal meaning in this regulation, that leads to the same absurd result. For example, a parent who prevails in a hearing where the district has denied a request for an initial evaluation and the hearing officer orders an initial evaluation, that parent is a prevailing party, but would not be able to request attorneys' fees.

How are these inconsistencies to be resolved in this complaint? The answer is probably best found in a recent case where the United States Supreme Court was faced with the task of an apparent discrepancy between the plain language in the Individuals with Disabilities Education Improvement Act (IDEA) and the "express purpose of the Act."

In Forest Grove School District v. T.A., 557 U.S. 230, (2009), the United States Supreme Court ruled that parents of a child who was evaluated and determined to be not eligible for special education services were, nevertheless, entitled to reimbursement of the costs of special education services at a private school if the parents request a due process hearing and a court or hearing officer finds the school district failed to provide a FAPE. In that case, the statute [20 U.S.C. 1412(a)(10)(C)(ii)] stated that reimbursement for private school placement was available "If the parents of a **child with a disability**, who previously received special education and related services under the authority of a public agency…[emphasis added]" was enrolled by parents in a private school and a court or hearing officer finds the district did not make a FAPE available to that child in a timely manner. The school district's position was that, under this statute, a child's parents were only entitled to reimbursement of private school tuition if: (a) the child had been determined to be eligible; and (b) the child had actually received special education and related services from a public school.

The Supreme Court disagreed with both of these interpretations, stating (emphasis in bold print added):

> The School District's reading of § 1412(a)(10)(C) is also at odds with the general remedial purpose underlying IDEA and the 1997 Amendments. The express purpose of the Act is to 'ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related

> services designed to meet their unique needs,' § 1400(d)(1)(A) -- a factor we took into account in construing the scope of § 1415(i)(2)(C)(iii), *see Burlington,* 471 U.S., at 369. Without the remedy respondent seeks, a "child's right to a free appropriate education ... would be less than complete." *Id.,* at 370. The District's position similarly conflicts with IDEA's "child find" requirement, pursuant to which States are obligated to "identify, locate, and evaluate" all children with disabilities residing in the State" to ensure that they receive needed special-education services. § 1412(a)(3)(A); see § 1412(a)(10)(A)(ii). **A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services**.
>
> **Indeed, by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational.**

Conclusion

The use of the term "child with a disability" in the procedural safeguards section of the federal regulations cannot be restricted to the definition of that term in 34 C.F.R. § 300.8. If it was, the United States Supreme Court could not have reached the decision it reached in Forest Grove. Moreover, as described in the Analysis portion of this report, restricting the term "child with a disability" to the meaning in § 300.308, would effectively remove procedural safeguards that were obviously intended to apply to children who had not yet been identified as a child with a disability. At minimum, that would include the right of parents: to participate in any meeting regarding the initial evaluation and identification of their child; to be given prior written notice (PWN) of proposals or refusals regarding the initial evaluation and identification of their child; to be given a notice of procedural safeguards upon the initial referral or initial request for evaluation; to file a due process complaint on matters relating to the initial evaluation and identification of their child (as was the situation in Forest Grove); and to request attorneys' fees as a prevailing party in a case involving the initial evaluation and identification of their child (again, as was the situation in Forest Grove).

These internal contradictions lead to absurd results, producing inconsistencies within the regulations themselves. As such, they cannot be ignored. As stated previously in the Statutory Construction portion of this report, the Kansas Supreme Court has said that when adherence to the letter of the law results in contradictions, or defeats the plain purpose of the act, effect must be given to the

entire statute to reconcile the different provisions so as to make them consistent and practicable. Hessell v. Lateral Sewer District, 202 K. 499, 449 P.2d 496 (1969).

In reconciling the procedural safeguards in the IDEA, it is important to focus on the purpose of those procedural safeguards. The United States Supreme Court addressed that question in Honig v. Doe, 484 U.S. 305 (1988). There the Court stated:

> …aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. Accordingly, the Act establishes various procedural safeguards that **guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate** [emphasis added]**.**

Certainly, decisions regarding the initial eligibility of a child for special education services is a decision affecting the child's education. When the decision is made that a child is not eligible for special education, an independent educational evaluation at public expense may the only reasonable method for a parent to have an opportunity for meaningful input into that decision and to obtain information necessary to seek review of decisions they think inappropriate.

Consistent with the analysis in this report, and instruction from the United States Supreme Court as to the purpose of the procedural safeguards, it is concluded that the right to an IEE at public expense extends to the parents of a child who has been evaluated and determined to be not eligible for special education services. Accordingly, the parent's allegation, that by refusing the parent's request for an IEE without requesting a due process hearing the district is in violation of special education requirements, 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 with regard to 34 C.F.R. § 300.502, which requires public schools, upon request, to ensure that an IEE is provided at public expense or to request a due process hearing to show that its evaluation is appropriate.

It is noted that the district did not act in bad faith. It denied the parent's request for an IEE based on its literal reading of the special education regulations. Further, the district notified the parent of its decision and the basis for its decision.

Accordingly, the district will have the opportunity to select from the options available in § 300.502.

USD # ____ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD # ___ shall either: (a) notify the parent in writing that it will provide an independent educational evaluation at public expense, subject to its already established criteria; or (b) send written notice of a request for a special education due process hearing to the parent and to Special Education and Title Services. If the district takes option (a), the district shall send Special Education and Title Services a copy of the written notice.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
Mark Ward, Complaint Investigator

K.A.R. 91-40-51(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: 19FC___-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on January 25, 2019, by _____ on behalf of her daughter _____. A complaint investigator undertook the investigation of the complaint on behalf of the Special Education and Title Services team at the Kansas State Department of Education. Following the investigation, the complaint investigator issued an Initial Report addressing the allegations on February 22, 2019. That report concluded that the allegations of a violation of special education statues and regulations was substantiated.

Thereafter, on March 5, 2019, the school district and _____ ("Interlocal") filed an appeal of the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the report, the school district and Interlocal notice of appeal and accompanying documents, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

The Appeal Committee will limit 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 documents described above. 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.

DISCUSSION OF ISSUES ON APPEAL

ISSUE: The USD #___ is in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA) by refusing the parent's request for an independent educational evaluation (IEE) without requesting a due process hearing.

The pertinent regulation is 34 C.F.R. § 300.502, which states, in part: "The parents of a child with a disability have a right under this part to obtain an independent educational evaluation of the child..." and "If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense...".

This regulation provides no guarantees that an IEE will be provided to the parent of a child with a disability but rather it defines action that must be taken by the district once an IEE is requested. The district identified its reason for refusing the parent's request for an IEE is that the parent is not a parent of a "child with a disability." The wording ".. .parents of a child with a disability.. ." precedes the 34 C.F.R. § 300.502 regulatory language on IEE. The district applied a strict interpretation of "child with a disability" as defined in 34 C.F.R. § 300.8(a), as a child who has been determined eligible for special education because the student, in this instance, was not found eligible. As a result of this interpretation, the district determined an IDEA procedural safeguard, the right to an IEE, was not available to the parent of the student.

In the Initial Report, the investigator acknowledged that the district's decision was based on a literal reading of the special education regulations and was not made in bad faith. The investigator concluded that although a literal reading could be made, and its interpretation applied, the act of doing so would strip the parent of other procedural safeguards that were intended to apply to children not yet identified for special education services.

The Committee finds that the district's literal reading of "child with disability" and its application to deny the procedural safeguard to request an IEE at public expense is in direct conflict with the precedent established by the United State Supreme Court in Honing v. Doe, 484 U.S. 305 (1988). In that case, the Court stated:

> ....the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.

The denial of procedural safeguards affecting a child' s education is a serious undertaking, and one not without far reaching repercussions. It is incumbent that when adherence to the letter of law results in contradictions, or defeats the plain purpose of the act, effect must be given to the entire statute to reconcile the different provisions so as to make them consistent and practicable. Hessel v. Lateral Sewer District, 202 K. 499, 449 P.2d 496 (1969). As noted by the Investigator, the reading of "child with a disability" in its strictest sense would not only impact the right to an IEE but other procedural safeguards afforded to parents during the initial evaluation of their child.

Although, not cited in the facts, it can only be assumed that the parent in this complaint was afforded a Prior Written Notice (PWN) before the evaluation of her child (34 CFR §300.503); that she was invited to participate in any meetings related to the identification, evaluation, placement, and the provision on FAPE to her child (34 CFR §300.501(b)); had an opportunity to examine records pertaining to her child (34 CFR §300.501(a); and, was provided with a notice of procedural safeguards prior to the initial evaluation (34 CFR §300.507). If the district's reading of "child with a disability" was upheld, the district could disregard the afore cited procedural safeguards, and other procedural safeguards not listed, until a child was identified and found eligible for special education. This is contrary to the very nature of procedural safeguards.

CONCLUSION

The conclusion of the investigator on this issue is sustained.

COMMENT: Toe Committee finds it troubling that the district in its request for appeal lists other actions that the parent has taken in advocacy of her child's education between the initial evaluation and the filing of the complaint Those actions are not relevant to the request for an IEE and the procedural safeguards afforded to parents under IDEA. If the district believes its initial evaluation was appropriate, it must requesta hearing under 34 C.F.R. § 300.502.

Also, it must be noted that recognizing the district's literal interpretation of "child with a disability" would also strip the parent's right to equitably challenge a district decision concerning an initial evaluation and eligibility determination. Toe request of an IEE at public expense, while not a guarantee for the parent, provides a way for a parent of any means to effectively seek an outside independent opinion when it comes to the education of his or her child. Again, if the district does not agree to the need for an IEE, it must request a hearing under 34 C.F.R § 300.502.

CORRECTIVE ACTION

Because the Committee has concluded that the allegation is substantiated, the Committee requires the following corrective actions:

USO # is directed to take the following actions:

> Within 15 calendar days of the date of this report, USO # ___ shall either: (a) notify the parent in writing that it will provide an independent educational evaluation at public expense, subject to its already established criteria; or (b) send written notice of a request for a special education due process hearing to the parent and to the Kansas State Department of Education Special Education and Title Services. If the district takes option (a), the district shall send Special Education and Title Services a copy of the written notice.

Colleen Riley, Appeal Committee

Stacie Martin, Appeal Committee

Rosborough, Appeal Committck

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON MAY 20, 2019

DATE OF REPORT: JUNE 19, 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 was received by the Kansas State Department of Education on May 20, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on June 19, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on June 14, 2019 as part of the investigation process.

USD #___ did not make any staff member available to be interviewed during this investigation. USD #___ reported the pertinent staff were unavailable since it is the summer break and school was not in session. Sarah Loquist, General Counsel for USD #___, provided a written response to the allegations and then to specific questions from the Complaint Investigator.

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

- Email dated September 12, 2018 from the parent to DN, Assistant Principal at M South High School, requesting an initial special education evaluation
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent (PWN) dated September 24, 2018 and signed by the parent on September 26, 2018
- Evaluation / Eligibility Team Report dated January 11, 2019
- Draft copy of the Individualized Education Program (IEP) dated January 11, 2019

- Final copy of the Individualized Education Program (IEP) dated January 11, 2019
- PWN for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated January 11, 2019 and signed by the parent on the same date
- USD #___ School Calendar for the 2018-19 school year
- Email dated May 2, 2019 from CM, Counselor at M South High School, to Stephanie E Special Education Teacher, requesting a copy of the IEP be sent to the parent
- Email dated May 31, 2019 from Ms. E to Ms. M stating the IEP was sent home to the parent
- Paraeducator Schedule
- Email conversation dated April 22 and April 23, 2019 between the parent and TL, Special Education Teacher, regarding plan for assistance in Algebra I
- Email dated March 8, 2019 from Mr. L to AM, Entrepreneurship Teacher, providing summaries of the student's accommodation/modifications
- Parent Call Log between September 13, 2018 and May 6, 2019 written by Mr. N
- Copies of Algebra I assignments for 8-5, 8-7, and 8-8 provided by Mr. Shelly
- Copies of Algebra I assignments for 8-5, 8-7, and 8-8 provided by the parent
- Screenshot of student's IEP data showing the IEP was mailed to the parent on April 1, 2019
- Email dated February 4, 2019 written by Ms. E to Ms. M regarding the plan for English 9
- Email dated June 17, 2019 written by Ms. E to Ms. Loquist describing the English 9 class

Background Information

This investigation involves a 16-year-old male who was previously enrolled in the 10th grade at M South High School in USD #___ during the 2018-19 school year. He attended USD #___ beginning in 6th grade and was given a 504 plan in 7th grade because of a medical diagnosis of Attention Deficit Disorder. The student was originally evaluated for special education at the beginning of 10th grade and found eligible for services under the exceptionality category of Specific Learning

Disability on January 11, 2019. An IEP was developed on that same date and the student received special education services in USD #___ until the student transferred to USD #259 on or about May 3, 2019.

Issues

Based upon the written complaint and an interview with the parent on May 29, 2019, 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 conduct a special education evaluation of the student in a timely manner during the past 12 months.
>
> Findings:

The parent reported she had verbally expressed her belief that the student needed special education to school staff on multiple occasions during the 2017-18 school year but nothing ever happened. She finally put her request for a special education evaluation in writing at the beginning of the 2018-19 school year and the school agreed to conduct the evaluation; however, the evaluation took more than four months. The parent stated that this was an extremely long time and believes the evaluation was not completed in a timely manner as required by the IDEA.

USD #___ reported they have no record of any verbal requests for an evaluation last school year.

Documentation shows the parent made a written request for a special education evaluation in an email to Mr. N on September 12, 2019. USD #___ provided the parent with prior written notice (PWN) requesting consent for an evaluation and the parent gave written consent for the special education evaluation on September 26, 2019.

The Evaluation / Eligibility Team Report documents that the student was determined eligible for special education and related services on January 11, 2019 and that an IEP was developed on that same date. That IEP lists an implementation date of January 11, 2019.

The USD #___ calendar shows 59 school days between September 26, 2018 and January 11, 2019.

Federal regulations, at 34 C.F.R. 300.301(c)(1)(i) and (ii) require initial evaluations for special education must be conducted within 60 days of receiving parental consent for the evaluation, or if the state establishes a timeframe within which the evaluation must be conducted, within that timeframe.

Kansas has established a 60 school-day timeframe, at K.A.R. 91-40-8(f), consistent with federal regulations. The timeframe 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 (see K.A.R. 91-40-8(f)(1) through (3)).

In this case, the parent gave written consent for the initial special education evaluation on September 26, 2018. USD #___ determined eligibility and then developed and implemented an IEP on January 11, 2019. There were 59 school days between September 26, 2018 and January 11, 2019, which is within the required 60 school-day timeframe.

Based on the foregoing, the allegation of a violation of special education laws and regulations of failing to conduct a special education evaluation within appropriate timelines 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 copy of the student's IEP following the January 2019 IEP team meeting.
>
> Findings:

The parent reported that she was never provided with a final copy of the IEP developed at the January 11, 2019 IEP team meeting until after she requested it in person from Ms. M on May 3, 2019. Even after her request, the parent reports a copy of the IEP was not provided to her until after the student had transferred to USD #259 and after the end of the 2018-19 school year in USD #___.

USD #___ reported that the parent was provided a copy of the draft IEP at the January 11, 2019 IEP team meeting. The draft copy of the IEP shows Mr. L provided the parent with a copy of the IEP that was developed at the IEP team meeting on January 11, 2019. The draft copy includes multiple handwritten comments and edits throughout the document. The parent initialed that she received a copy of the IEP at the January 11, 2019 IEP team meeting.

USD #___ has a standard procedure to mail copies of the clean copy of the IEP home to the parent once all of the information has been entered into the WebKIDSS program. USD #___ provided documentation that shows a clean copy of the student's IEP was mailed to the parent on April 1, 2019; however, the parent indicated that she does not remember ever receiving this copy of the IEP.

Documentation shows the parent requested a copy of the final IEP on May 3, 2019 in a meeting with Ms.M. On that same date, Ms. M sent an email to Ms. E requesting that she provide the parent with a copy of the student's IEP. Ms. E responded to Ms. M on May 31, 2019 indicating that she had mailed another copy to the parent.

Federal regulations at 34 C.F.R. 300.322(f), require school districts to provide a copy of the student's IEP at no cost to the parent. Accordingly, Kansas regulations, at K.A.R. 91-40-18(d), also require that parent must be provided a copy of the IEP at no cost to the parent. While it can be assumed that the copy is provided in a timely manner following the IEP team meeting, there is no requirement in either the federal regulations or the Kansas regulations regarding the timeline for the final copy of the IEP to be provided to the parent, only that a final copy be provided.

In this case, USD #___ provided the parent with a draft copy of the IEP at the January 11, 2019 IEP team meeting. Documentation shows, and the parent acknowledged, that she received this draft copy. Although the parent indicated she never received a mailed copy of the final IEP, USD #___ provided documentation from the WebKIDSS system showing that a final copy of the IEP was mailed to the parent on April 1, 2019. Documentation and interviews show USD #___ also provided the parent with a final copy of the IEP on May 31, 2019.

Based on the foregoing, the allegation of a violation of special education laws and regulations of failing to provide the parent with a copy of the student's IEP following the January 2019 IEP team meeting is not substantiated.

It is noted that documentation shows that USD #___ mistakenly believes they are meeting the requirement to provide the parent with a copy of the IEP by providing the draft copy following the IEP team meeting and having the parent initial that the IEP has been provided. Instead, USD #___ is actually meeting this requirement when it mails the final copy to the parent after it has been entered into the WebKIDSS system. It is suggested that USD #___ review these procedures and begin to document this date as the date the final copy is provided to the parent.

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP as written, specifically by not providing special education services and paraprofessional support during the 2018-19 school year.

Findings:

The parent reported that the student has never received the special education support services in all of his classes as required by the January 11, 2019 IEP. The parent also reported that the modification of reducing assignments by up to 30% has not been provided in the Algebra I class. The parent indicated her understanding of this modification was that the number of problems on the math worksheets would be reduced. The parent indicated this has not happened and provided multiple copies of Algebra I worksheets that had not been modified.

The January 11, 2019 IEP requires the student receive special education daily in English/reading in the special education classroom and special education services daily in math, science, social studies, and all electives in the general education setting. It is noted that neither of these services include a specific amount of time for the service to be provided. The IEP also requires the student receive 10 minutes of direct social work services in the special education setting once every other week. This IEP also includes the modification for assignments and assessments to be reduced by up to 30% in all core classes and electives.

The parent acknowledged the social work services were provided to the student as required.

USD #___ reported the student was enrolled in an online English 9 class during the third term of the school year in Ms. E's special education classroom. An email dated February 4, 2019 written by Ms. E to Ms. M states "The plan is as follows – the parent's payment for February was processed for the English 9 online class and the student will continue in this class until 3/8 – the end of term 3. During this time, the student will make progress toward a reading elective in Mrs. E's room. If the student does not pass his online class, he will stay in Mrs. E's class for Term 4 to earn his English 9 credit. If he passes his online class by March 8th – the beginning of Term 4, then he will move to another nine week elective class." USD #___ reported the student passed the English 9 class at the end of third term and was enrolled in the following classes for the fourth term: Entrepreneurship, Algebra I, Biology, and Graphic Design.

USD #___ acknowledged that the special education services were not provided in the general education setting because of a shortage of paraprofessional staff during the second semester of the 2018-19 school year. During this time period, there was one para position that was not filled despite job postings, advertisements, and other recruitment efforts. In addition, the paraprofessional shortage was exacerbated by attendance issues with one of the other paraprofessionals. The paraprofessional schedule provided by USD #___ shows a paraprofessional was assigned to check on the student in the Entrepreneurship class during first block and Algebra I during second block. The substitute para was assigned to check on the student in Biology during third block. A paraprofessional was assigned to check grades and cover as needed in Graphic Design during fourth block.

The parent provided copies of three worksheet assignments from the Algebra I class given to the student by Mr. Shelly. The worksheet for chapter 8, section 5 included 14 problems; for chapter 8, section7 included 11 problems; and for chapter 8, section 8 included 12 problems. Mr. Shelly reported these worksheets were the modified versions of each assignment and provided documentation that shows the unmodified version of the worksheet for chapter 8, section 5 included 20 problems; for chapter 8, section7 included 16 problems; and for chapter 8, section 8 included 17 problems. The number of problems on each of the student's worksheets was reduced by approximately 30%.

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. 300.17(a) require school districts to provide special education and related services at public expense, under public supervision and direction, and without charge.

Federal regulations at 34 C.F.R. 300.320(a)(4) require school districts to develop an IEP for each student with a disability that includes 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, or on behalf of the child. Federal regulations at 34 C.F.R. 300.320(a)(7 require the special education and related services, supplementary aids and services, program modifications, and supports for school must indicate the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services.

The comments to the federal regulations state: “The meaning of the term ‘duration’ will vary, depending on such things as the needs of the child, the service being provided, the particular format used in an IEP, and how the child’s day and IEP are structured. 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.” (Federal Register, August 14, 2006, p. 46667)

The Kansas Special Education Process Handbook, in Chapter 4, Section E. 2.h., clarifies that the amount of time to be committed to each of the various services to be provided must be stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

In this case, USD #___ acknowledged the paraprofessional services were not provided in accordance with the IEP when the student did not receive the paraprofessional support necessary to provide special education services daily in math, science, social studies, and all electives in the general education setting.

In addition, the IEP requires the student be provided “special education daily in English/reading in the special education classroom.” USD #___ reported the student did receive this service during the third term, but acknowledged the student was not enrolled in any special education instruction for English/reading during fourth quarter because the student had completed the online course. However, the IEP was not amended to reflect this change following appropriate procedures described in 34 C.F.R 300.324(a)(6).

It is unclear exactly how much specialized instruction was not provided on a daily basis because the IEP did not clearly describe the duration of the services to be provided to the student. It is also noted that specialized instruction must be provided at no cost to the parent; however, documentation shows the parent payed for the online English 9 class that was used as the curriculum for the reading class taught by Ms. E.

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. In addition, because the parent was required to pay for the online English class used as the curriculum for providing

specialized instruction, a violation of special education laws and regulation is found in regards to providing a free appropriate public education for the student. Finally, a violation of special education laws and regulations related to developing an IEP with a statement describing the duration of the special education and related services to be provided to the student is found.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. 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.

   The findings of this investigation show the student was not provided with the paraprofessional support services or special education services for English/reading required by the IEP.

B. Federal regulations at 34 C.F.R. 300.17(a) require school districts to provide special education and related services at public expense, under public supervision and direction, and without charge.

   The findings of this investigation show the English/reading service was not provided at no cost to the parent. The parent was required to pay for the English I online class that served as the curriculum in the special education classroom for the student.

C. Federal regulations at 34 C.F.R. 300.320(a)(4) require school districts to develop an IEP for each student with a disability that includes a statement of the special education and related services to be provided to the child, or on behalf of the child. Federal regulations at 34 C.F.R. 300.320(a)(7) require that the statement of services must include the anticipated frequency, location, and duration.

   The findings of this investigation show the IEP does not include a clear description of the duration for each of the special education services that must be provided.

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

1. Within 10 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) by ensuring that special education and related services are made available to the child in accordance with the child's IEP as soon as possible following the development of the IEP.

   b) Comply with Federal regulations at 34 C.F.R. 300.17(a) by ensuring special education and related services are provided at public expense and without charge to the parent.

   c) Comply with Federal regulations at 34 C.F.R. 300.320(a)(4) and 300.320(a)(7) by ensuring that services listed in the IEP include a clear description of the duration of each service in a manner that can be understood by the parent and other persons who develop and implement the IEP and in a manner that makes clear the level of the district's commitment of resources.

2. No later than August 15, 2019, the student's IEP team at USD #___ shall meet with the parent to determine the amount of compensatory services owed to the student.Based upon those services, USD #___ will make a written offer of compensatory services owed to the student and shall provide documentation of this offer to SETS on the same day it is sent to the parent. The parent can accept all, part, or none of the compensatory services offered and has 15 school days from the date she receives the offer to notify the district of her decision. Within 15 school days of making this written offer to the parent, USD #___ shall notify SETS, in writing, of the parent's decision regarding the offer of compensatory services. If the parent accepts all or some of the compensatory services, USD #___ shall contract with USD #259 to provide those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS. USD #___ shall notify the parent and SETS when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, USD #___ must notify SETS in writing of the reason and

propose a schedule to SETS and the parent to finish the compensatory services.

3. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices in regards to providing coverage for required IEP services due to staff absences or shortages. As a result of this review, USD #___ will create new written policies and procedures to ensure that steps are taken to 1) identify and resolve the lack of appropriate staff, 2) determine the amount of compensatory services that are owed to each student in order to provide FAPE when services are not provided in accordance with IEPs, and 3) inform parents in a timely manner of the lack of services and the plan for compensating for these missed services. This new procedure will include active administrative oversight and monitoring. No later than August 30, 2019, 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 teachers, special education providers, and administrators in the district and implement the procedure for the 2019-20 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

4. No later than October 1, 2019, USD #___ will provide training to all special education teachers and special education providers working in USD #___ regarding the requirement for the services listed in the IEP to include a clear description of the duration of each service and the appropriate procedures to amend an IEP. The training for duration shall include but not be limited to a review of the information in the KSDE Special Education Process Handbook, Chapter 4 Section E.2.h. and Chapter 5 Section G. USD #___ will choose a person to conduct the training and obtain prior approval from SETS for that person to conduct the training. No later than October 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

5. No later than August 15, 2019, USD #___ shall reimburse the parent for the cost of the online English 9 class. USD #___ will provide SETS with documentation of the amount of the reimbursement and the date the reimbursement was provided to the parent.

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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Public Schools: 19FC___-002

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on May 20, 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 team at the Kansas State Department of Education. Following the investigation, an Initial Report, addressing the allegations, was issued on June 19, 2019. That report concluded that the allegations of a violation of special education statutes and regulations were substantiated, with regard to Issue 3 in the report. Within that issue the investigator substantiated three violations: (1) failure to provide special education services in accordance with the IEP; (2) failure to provide special education services at no cost; and (3) failure to include a clear description in the IEP of the duration for each of the special education services.

Thereafter, on June 28, 2019, the district filed an appeal of the findings and conclusions in the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the report, the district's notice of appeal and exhibits, the parent's response, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Final Report.

PRELIMINARY MATTERS

The Appeal Committee will limit 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.

In its appeal, the district states that certain corrective actions are inappropriate. The pertinent regulation, 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 corrective actions. The Appeal Committee may remove, alter, or add corrective actions if appropriate in light of the Appeal Committee's decision in the appeal regarding the findings and conclusions of the investigator, but it will not address any direct appeal of corrective actions.

DISCUSSION OF ISSUE ON APPEAL

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP as

written, specifically by not providing special education services and paraprofessional support during the 2018-2019 school year.

This is the only issue in which the investigator substantiated a violation of special education laws and regulations. The investigator substantiated a violation with regard to three regulations:

34 C.F.R. § 300.323(c)(2), which requires that special education and related services be made available in accordance with the child's IEP;

34 C.F.R. § 300.17(a), which requires that special education and related services be provided at no cost to the parent; and

34 C.F.R. § 300.320(a)(7), which requires the IEP to include the anticipated duration of services specified in the IEP.

In its appeal, the district provides fourteen "Responses."

Response 1: The district asserts that the investigator made an inaccurate statement in the Initial Report when she stated that the district had not made any staff member available to be interviewed.

The Appeal Committee has determined that this statement was not a finding or a conclusion, and so is not subject to appeal. Moreover, the Appeal Committee has determined that the district was able to provide sufficient evidence to the investigator and the unavailability of staff members for interview was not cited as the basis for any finding or conclusion in the report. The Appeal Committee also advises the district that it is not the obligation of the investigator to make staff available for interview or to, in any other manner, assist the district in presenting evidence. When a district believes evidence is relevant to a defense in a complaint such as this one, it is the district's obligation to make that evidence available to the investigator.

Response 2: The district asserts that the investigator mistakenly concluded that the "draft" IEP, which the parent initialed as having received at the IEP meeting on January 11, 2019, was not the final IEP.

The Appeal Committee has determined that the investigator did not make any finding or conclusion regarding this matter. Therefore, it is not subject to appeal. The investigator did make a note indicating that USD #___ "mistakenly" believes it is complying with the requirement to provide a copy of the IEP to the parent by giving the parent a copy of the draft IEP with all of the handwritten changes. This was simply a comment. There was no finding or conclusion indicating any violation of law, and no corrective action was directed toward this comment. The Appeal Committee believes that providing a parent with a copy of the draft IEP with a complete set of all of the changes agreed upon by the team, and handwritten into the draft IEP, would satisfy the requirement to provide a copy of the IEP to the parents. The Appeal Committee compared the IEP with the handwritten changes that was initially given to the parent at the January IEP meeting (Exhibit A5) with the "clean" IEP provided later to the parent (Exhibit A9) and found significant differences between the two documents. Those differences

include: the durations for extended time and preferential seating in the Accommodations section, the Supplementary Aids and Services section and the Participation with Non-Disabled Students in the General Education Environment section. Accordingly, it appears there may have been a deficiency in the process in this particular case, but the parent was provided with a copy of both the original draft IEP with the handwritten changes and with the "clean" copy. Providing the parent with a copy of the draft IEP with the handwritten changes complies with the requirement to provide a copy of the IEP to the parent, as long as the copy with the handwritten changes is identical to the "clean" copy of the IEP (and it should always be so).

Response 3: The district asserts that the investigator made an incorrect finding on page 6 of the report when she said, "It is noted that neither of these services include a specific amount of time for the service to be provided."

The Appeal Committee agrees with the district. There is a sufficient statement in the IEP of the amount of time, or duration, for which each service is to be provided. On page 15 of the IEP under the column heading "Duration," it is stated "For the same duration as general ed peers receive instruction." This description of duration is completely acceptable. This is the kind of language Special Education and Title Services (SETS) has advised schools to use in order to build in necessary flexibility for scheduling. In this IEP, for example, the frequency for special education services for math is daily, and the duration is for the same duration as general education students receive instruction. That is a clear statement of the duration of special education math instruction. If regular education students are receiving an hour of instruction in math on Monday, this student will receive an hour of special education in math. If on Tuesday, the regular education students are going to skip math, this student will also skip math, and on Wednesday, if the regular education students are going to receive math instruction for only 30 minutes, that is the length of time this student will receive special education math services. This kind of flexibility is needed in most school settings. The important thing is that this student's IEP clearly describes how long the student will receive these special education math services during every school day.

The finding and conclusion that the district failed to clearly state the duration of special education services in this student's IEP, in violation of 34 C.F.R. 300.320(a)(7), is reversed, and corrective actions 1.c. and corrective action 4., connected to this conclusion in the Initial Report are removed.

Response 4: The district asserts that the investigator inaccurately described the paraprofessional schedule for Algebra I and Biology (blocks 2 and 3) on page 7 of the report when she said the para was assigned to “check on the student” during those particular classes. Further, the district admits that full-time para support was not provided for Entrepreneurship and Graphic Design Fundamentals (blocks 1 and 4), but argues that this did not result in a denial of FAPE to the student. Finally, the district argues that a para was not needed for the Graphic Design class because the general education teacher, who also has a special education license, “was well capable of modifying the instruction to meet [the student’s] needs, as well as providing the accommodations from his IEP.”

The Appeal Committee agrees with the district in regard to the paraprofessional schedule for Algebra I and Biology. The Appeal Committee reviewed the paraprofessional schedule (Exhibit A11) which shows a para assigned to both Algebra I and Biology, and can find no evidence that the para only checked on the student during those classes.

The Appeal Committee, however, agrees with the investigator (and the district's admission) that a para only checked in during Entrepreneurship (block 1) and there was no para during Graphic Design (block 4). The Graphic Design teacher may have been ***capable*** of providing special education services to the student, but the Appeal Committee finds no evidence that this teacher actually provided special education services to this student for the frequency and duration required by the IEP. This teacher was the full-time regular education teacher of an entire classroom. That evidence is sufficient support for the investigator's conclusion that this student was not actually receiving special education services daily for the same duration as general education peers receive instruction, as required by the IEP, while attending Graphic Design Fundamentals.

The district states the position that the para shortage for Entrepreneurship and Graphic Design did not result in a denial of FAPE. The Appeal Committee finds no reason to make a finding whether the para shortage did or did not result in a denial of FAPE. As stated above in the Preliminary Matters section, no new issues will be decided by the Appeal Committee. The appeal process is a review of the Initial Report. The Initial Report did not make a finding or conclusion that the para shortage was a denial of FAPE, rather, the Initial Report found a violation of 34 C.F.R. 300.323(c)(2), which requires school districts to ensure that special education and related services are made available to the child in accordance with the child's IEP.

The Appeal Committee sustains the conclusion in the Initial Report that the failure to provide paraprofessional support for Entrepreneurship and Graphic Design was a failure to make special education services available in accordance with the IEP. The corrective actions 1.a. and 3. connected to this conclusion remain in force.

Response 5: This response is addressed in Response 4, above.

Responses 6, 7, 8, and 9: These responses include the district's position that: (1) the online English course the student was taking was a credit recovery course the student was taking at his own election. It was not part of Ms. Espinoza's curriculum for the special education English class, not part of the IEP, and not used during school, and so the district was not responsible for the cost of that course; and (2) the student was not enrolled in an English course during the last term of the school year and so, even though the IEP was not changed, the district was not required to provide special education services in an English classroom for that last term.

The Appeal Committee agrees with the district with regard to the online credit recovery English course. There is nothing in this student's IEP which would obligate the district to pay for that course. Therefore, the conclusion in the Initial Report that the district failed to provide special education at no expense to the parent is reversed and corrective action 1.b. and corrective action 5., connected to this conclusion in the Initial Report, are removed.

The Appeal Committee, however, agrees with the conclusion in the Initial Report that during the fourth term the district was required to continue to provide this student with special education services in English, as specified in his IEP. When the student completed English 9, the IEP team had an opportunity to review his IEP to determine whether this service was still needed. It did not do so. As a result, the IEP requirement to provide special education services in English was left intact. The district was not free to simply ignore this provision in the IEP. In addition, the Appeal Committee noted, on page 12 of this student's IEP, one of the student's Post-Secondary Goals is: "Upon completion of high school, [the student] will enroll in a four-year college or university and complete work toward a degree in automotive design engineering." On page 13 of the IEP, the Graduation Plan states that the student is currently taking English 9B and he will take English 11 in 11th grade. Currently, this student is not on track to take English 11 or to graduate due, at least in part, to insufficient credits in English. The IEP team had a duty to address this transition need (to meet the graduation credit requirements in English) by at least exploring options to help the student meet his post-secondary goals. Had it performed this duty, it is highly likely the team would have retained the special education services in English. Accordingly, the Appeal Committee sustains the conclusion in the Initial Report that the failure to provide special education services in English for the fourth period was a failure to make special education services available in accordance with the IEP.

Response 10: This Response is addressed by the Appeal Committee in Response 3, above.

Response 11: This is an appeal of corrective action. As stated above, under the title "Preliminary Matters," the Appeal Committee will not consider an appeal of corrective action.

However, the Appeal Committee will address the district's statement that it believes it should not be required to provide compensatory services to a child who is no longer enrolled in the district. The Appeal Committee disagrees. In D.F. v. Collingswood Borough Bd. Of Ed., 694 F.3d 488, 59 IDELR 211 (3rd Cir. 2012), citing Independent. School. District. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001), the court said that the fact that the student had moved out of the school district does not relieve the school of its obligation to provide compensatory services. School districts must be subject to awards for compensatory relief even after students have moved away, even to other states, in order to prevent districts from intentionally refusing services as a means of encouraging students to seek educational services elsewhere. The court said even after a school district is no longer responsible for educating a child, it still must be held responsible for its past transgressions, and added that the school may provide such compensatory services by contracting with the receiving school or setting up a fund to be spent on the child's education.

Response 12: This is an appeal of corrective action. As stated above, under the title "Preliminary Matters," the Appeal Committee will not consider an appeal of corrective action.

The Appeal Committee will respond to this statement made by the district in its appeal: "KSDE staff has stated on multiple occasions that we are listing the **anticipated** frequency, location and duration and so long as we are making good faith efforts to attempt to fill the vacancy, that it will not be deemed a denial of FAPE." However, the district gives no citation to such a statement by KSDE.

If a child misses an IEP service for an extended period of time, there could certainly be a failure to provide FAPE for that child no matter how much good faith is being made to find a new provider. KSDE has said when a service provider becomes unavailable, the district needs to make a good faith effort to find a replacement and arrange for the necessary compensatory services to the child. That is a correct statement. However, if a person were to file a complaint as a result of the missed services, a complaint investigator would likely find a violation of FAPE, and, in that case, the corrective action would be to make a good faith effort to find a replacement. Making an upfront good faith effort to find a replacement provider is a necessary course of action, but is not a shield from a finding of a failure to provide FAPE.

An example of KSDE commentary on this subject may be found in the presentation regarding special education legal requirements at the 2016 Summer Leadership Conference on July 27, 2016. See document titled A7: Legal Updates posted at https://ksdetasn.org/tasn/2016-summer-leadership-conference-materials. In a "Question and Answer" portion of those materials, Question 6, on page 24 was presented as follows:

> Q6. I have a service provider who has taken leave for the remainder of the school year due to health reasons. I have no replacement for this provider and children are missing services. What should I do?
>
> A6. It is important that you notify parents of this situation and let them know: (a) of your efforts to obtain another service provider; and (b) that upon obtaining another provider, each student's IEP team, including the parents of course, will review each student's progress or lack of progress to determine whether compensatory services are needed, and, if so, in what amount.

There is no statement in this guidance, or any guidance from KSDE of which the Appeal Committee is aware, indicating that as long as a district is making a good faith effort to attempt to fill a staff vacancy, the failure to provide services "will not be deemed a denial of FAPE." Nor is there any KSDE guidance, of which the Appeal Committee is aware, to indicate that making a good faith effort to find a replacement provider would mitigate the need for compensatory services

Response 13: This is an appeal of corrective action. As stated above, under the title "Preliminary Matters," the Appeal Committee will not consider an appeal of corrective action.

Response 14: This is an appeal of corrective action. As stated above, under the title "Preliminary Matters," the Appeal Committee will not consider an appeal of corrective action.

CONCLUSION

The Appeal Committee concludes that:

(1) The conclusion that this student's IEP did not clearly describe the duration of special education and related services is reversed, and Corrective Actions No. 1.c. and No. 4 are rescinded.

(2) The conclusion that the district is required to pay for the private on-line English 9 course in which he was enrolled is reversed, and Corrective Actions 1.b. and No. 5 are rescinded.

(3) The conclusion that the district failed to make available to this student special education services for English in accordance with the student's IEP is sustained. Corrective Action No. 2 remains in force, except to specify that the compensatory services offered shall be for English and that the portion which says, "If the parent accepts all or some of the compensatory services, USD #___ shall contract with USD #259 to provide those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS," is modified to state:

If the parent accepts all or some of the English compensatory services, USD #___ shall schedule the provision of those services to begin and to be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and to SETS. The compensatory services may be provided by appropriate USD #___ staff members, by contract with another public or private school, or by setting up an adequate fund to be used for the purchase of private tutoring. USD #___ must make a good faith effort to work with the parent to determine a mutually agreeable location for the provision of compensatory services. If that good faith effort to determine a mutually agreeable location for the provision of compensatory services is unsuccessful, USD #___ shall determination the location of the compensatory services. The offer for the provision of compensatory services shall be made at no cost to the parent, including any costs for transportation.

(4) Corrective Action No. 1.a. remains in force and shall be completed within ten calendar days of the date of this decision.

(5) Corrective Action No. 3 remains in force and shall be completed no later than August 15, 2019. This Corrective Action does not require or prohibit Board action, nor does it require the district o force people to apply for , accept, or remain in positions. It requires a review of policies, procedures, and practices regarding coverage for required IEP services due to staff absences or shortages, and a new written policy or procedure for the purposes specified in Corrective Action 3, including a policy/procedure for notifying parents when staff shortages cause an interruption in IEP services and a policy/procedure for determining the amount of compensatory services that are owed. This review and revision of policies and procedures may be conducted and sent to SETS by appropriate school personnel, unless the USD ___ Board elects to conduct this review. If the review will be conducted by the Board, the district should notify SETS and make a request for any additional time that may be needed for the Board to conduct its review and make any necessary or appropriate revisions.

This is the final decision on this matter. There is no further appeal. This Final Report is issued this 19th day of July, 2019.

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Brian Dempsey

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON MAY 31, 2019

DATE OF REPORT: JUNE 29, 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 _____ Kansas Special Education 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 May 31, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on June 30, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on June 4 and June 25, 2019 as part of the investigation process.

USD #___ staff made two staff available for an interview. JS, School Psychologist at USD #368, was interviewed on June 14, 2019. MH, Director of Special Education at _____ Kansas Special Education Cooperative (____), was interviewed on June 18, 2019.

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

- Email dated March 4, 2019 from the parent to Mr. H requesting an independent educational evaluation (IEE)
- Independent Evaluators List from the Kansas Association of School Psychologists

- Email dated March 7, 2019 from Mr. H to the parent explaining the IEE requirements
- Letter dated April 29, 2019 from Lauren Spears, Clinical Psychologist at Midwest Neuroeducational Services (MNS), to the parents of the student describing their evaluation services
- Email dated May 5, 2019 from the parent to Mr. H regarding the choice of an independent evaluator
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent (PWN) dated May 13, 2019 refusing the parent's choice to conduct the IEE
- Email dated May 13, 2019 from the parent to Mr. H regarding the cost of the IEE
- Email dated May 15, 2019 from Mr. H to the parent regarding the cost of the IEE
- Email dated May 16, 2019 from the parent to Mr. H questioning the cost restriction for the IEE

Background Information

This investigation involves a male who was enrolled in the 5th grade at _____ Elementary School in USD #___ during the 2018-19 school year. He has attended USD #___ since second semester of 2rd 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.

Issues

Based upon the written complaint and an interview with the parent on May 4, 2019, 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 provide an independent educational evaluation (IEE) of the student at public expense.

Parent Position

The parent reported the student was evaluated for special education during 5th grade but was not eligible for any special services because the student was not doing poorly enough in his class. Even though the student was not eligible for special education, he was identified as a student with a disability and given a 504 plan. The parent indicated that the 504 plan has not worked and the student is now failing. The parent disagrees with the evaluation conducted by USD #___ and requested an independent educational evaluation (IEE) on March 4, 2019.

The parent noted USD #___ staff checked with the _____ Kansas Special Education Cooperative (____) and they agreed to pay for the IEE. USD #___ sent the parent a partial list of school psychologists as IEE providers but did not provide any specific information about the cost of the IEE.

After doing research, the parent identified Dr. Lauren Spears, a clinical psychologist at Midwest Neuroeducational Services (MNS) located in the Kansas City area as an evaluator who could "take into consideration the trauma my son has been through."

MNS sent a letter to the parent on April 29, 2019 describing their services and charges as well as the credentials of Dr. Spears showing she is a licensed clinical psychologist specializing in psychoeducational assessment. It is noted that Dr. Spears earned her doctorate in Clinical Psychology from the University of Kansas, completing her pre-doctoral internship at the University of Kansas Medical Center and her post-doctoral residency at the Kansas City VA Medical Center. In addition to psychoeducational assessment, Dr. Spears specializes in the evidence-based diagnosis and treatment of anxiety and trauma/stressor-related disorders.

The evaluation would cost $250 for the initial consultation and about $250 per hour to conduct the evaluation with an estimated total cost of between $2,000 to $3,000 depending upon what tests were administered. The parent believed this was a reasonable cost as the least expensive evaluator recommended by Children's Mercy Hospital was $176 per hour with an estimated total cost of between $1,000 to $4,000, again depending upon the tests that were administered.

The parent sent an email to MH, Special Education Director at (____), on May 5, 2019 requesting that Lauren Spears, Clinical Psychologist at the MNS, conduct

the IEE. USD #___ denied that request on May 13, 2019 because “the cost greatly exceeded the standard price.”

The parent reported trying to find out the “standard price” from Mr. H and was told the standard cost was $600. The parent understood that this amount was based on the cost of the last two IEE’s conducted by school psychologists through the _____ Mr. H agreed to pay $600 towards the cost of the evaluation at Midwest Neuro Educational Services; however, the parent has not accepted this offer because the IDEA requires the school district to pay for the full cost of the evaluation.

The parent reported that USD #___ has not provided the IEE that was requested almost four months ago and believes the school district has not appropriately responded to their request for an IEE for the student..

School District Position

JS, School Psychologist in USD #368, reported she conducted the initial evaluation of the student at the request of USD #___ because the parent did not want the school psychologist assigned to USD #___ to conduct the evaluation. Ms. S stated she is a credentialed as a school psychologist for grades K-12 in the state of Kansas and has 17 years of experience as a school psychologist.

Ms. S indicated the initial evaluation was conducted during first semester of the 2018-19 school year and an eligibility determination meeting was held on January 17, 2019. Ms. S stated the student has medical diagnoses of attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD) and was evaluated in the areas of cognition, academics, and social/emotional/behavior through formal assessment, observations, teacher interviews, and a record review of the results of general education intervention strategies. The multidisciplinary team considered eligibility for the exceptionality of Other Health Impaired (OHI) but found the student did not need any special education services at this time.

Mr. H acknowledged and documentation shows the parent made a written request for an IEE in an email to Mr. H on March 4, 2019. Mr. H responded by email to the parent on March 7, 2019 that stated “I am attaching a list of independent evaluators. You may select an evaluator from this list or you may select someone else. The requirements are as follows: The person must be similarly credentialed as the school psychologist; the person must be geographically proximate; the person must charge a rate consistent with current

practice." The list of evaluators attached to the email was from the Kansas Association of School Psychologists and included the names of 14 school psychologists from a variety of school districts and universities located in the Northeast region of the state.

Mr. H acknowledged the parent notified him on May 5, 2019 of their choice of Lauren Spears, Clinical Psychologist at MNS, to conduct the IEE. Mr. H reported this request was considered but ultimately denied because of the cost of the evaluation. The parent was provided with a PWN on May 13, 2019 refusing the choice of Dr. Spears as the IEE evaluator. The explanation of why the action was refused states, "The cost of the evaluation greatly exceeds standard pricing for such an eval."

The PWN also included a description of other factors relevant to the refusal referencing the comments in the federal regulations and several letters from the Office of Special Education Programs (OSEP) and Office of Special Education and Rehabilitation Services (OSERS) as noted below:

> The OSEP comments to the 2006 IDEA regulations in 71 Register ppp.46689 state "It is the Department's longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs . . .Although it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to the personnel used by the parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify the selection of an evaluator whose fees fall outside the agency's cost containment criteria." This comment is reinforced in several OSEP and OSERS letters: Letter to Parker, 2004 (41 IDELR 155); Letter to Anonymous, 2010 (111 LRP 13073); Letter to Thorne, 1990 (16 IDLR 606).

Mr. H reported the parent responded to the PWN by asking if it was an option for the parent to pay the difference in the cost of the evaluation. Mr. H responded via email to the parent on May 15, 2019 stating "The Cooperative agrees to pay $600.00 toward the expense of the independent educational evaluation. This amount represents the typical fee that would be charged. If you wish to pay the remaining balance I would have no objection."

Mr. H acknowledged that the IEE has not yet been provided because he is still waiting for the parent to pick an evaluator. He indicated the student ended the school year with failing grades and the staffing team at USD #___ would be meeting in the fall to review data collected since the January 17, 2019 evaluation was completed and determining whether or not to proceed with another evaluation for special education.

USD #___ believes they have appropriately responded to the parent's request for an IEE and indicated that they are ready, willing, and able to provide an IEE that meets their established criteria.

Applicable Regulations and Findings

- Federal regulations at 34 C.F.R. 300.502(a)(1) gives parents the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district.

In this case, the student was evaluated for special education during the 2018-19 school year and an eligibility determination was made on January 17, 2019. The parent disagrees with the school district's evaluation and requested an IEE on March 4, 2019. Based on these facts, no violation related to this regulation was found.

- Federal regulations at 34 C.F.R. 300.502(a)(2) requires that, upon request for an IEE at public expense, school districts must provide parents with information about where an IEE may be obtained, and the agency criteria applicable for IEEs.

In this case, USD #___ received the parent's request for an IEE via email on March 4, 2019. The school district responded to this request by emailing the parent on March 7, 2019. That email included the Kansas Association of School Psychologists' list of 14 school psychologists in the Northeast region of the state who could provide the IEE. The email made it clear that the parent could choose someone from the list or could choose another evaluator who met the following requirements: 1) The person must be similarly credentialed as the school psychologist; 2) The person must be geographically proximate; and 3) The person must charge a rate consistent with current practice. Based on these facts, no violation related to this regulation was found.

- Federal regulations at 34 C.F.R. 300.502(e) requires the criteria under which the IEE is obtained must be the same as the criteria that the school

uses when it initiates an evaluation to the extent that those criteria are consistent with the parents' right to obtain an IEE at public expense. These same criteria include the location of the evaluation and the qualifications of the evaluator. The credentials of the independent evaluator or evaluators must be comparable to the school's evaluators. The school district cannot not impose other conditions or timelines for obtaining the IEE.

It is noted that Mr.H's reference to the OSEP comments in the 2006 IDEA regulations in 71 Register ppp.46689 as well as the OSEP and OSERS letters is relevant in clarifying that it is appropriate for school districts to establish reasonable cost containment criteria for the cost of the evaluator conducting an IEE at public expense. However, it is also noted these same resources require the school district to provide the parent with the opportunity to demonstrate that unique circumstances justify the selection of an evaluator whose fees fall outside the school district's cost containment criteria thus not limiting the parent's right to an IEE.

In this case, the parent chose an evaluator who was not on the list provided by the school district that they believed met the school district's criteria. This evaluator would charge between $2000 - $3000 to conduct the IEE. The parent informed USD #___ of their choice on May 5, 2019. USD #___ responded to the parent on May 13, 2019 through a PWN refusing the parent's choice of the chosen evaluator because "The cost of the evaluation greatly exceeds standard pricing for such an eval."

It is noted that the rate "consistent with current practice" was not specified when the school district's IEE criteria was originally shared with the parent on March 7, 2019. In addition, the "standard price" was not described in the PWN provided to the parent on May 13, 2019. Documentation and interviews found this rate was not specifically stated until May 15, 2019 when Mr. H wrote in an email to the parent that $600 "represents the typical fee that would be charged." There is no evidence following this disclosure to show the parent was provided with an opportunity to justify the unique circumstances they believed existed to warrant the additional cost of their chosen evaluator to provide the IEE. This unilateral limitation interfered with the parent's right to obtain an IEE as required by the IDEA. Based on these facts, a violation of this regulation is found.

- Federal regulations at 34 C.F.R. 300.502(b)(2) require school districts to take one of the following steps, without unnecessary delay, when a parent requests an IEE at public expense:

1) Initiate a due process hearing to show that the school's evaluation was appropriate; OR

2) Ensure the IEE is provided at public expense by either paying the full cost of the IEE unless a due process hearing found that the evaluation obtained by the parent does not meet the school district's criteria.

It is noted that the IDEA does not make any other options available to school districts for responding to a parent request for an IEE at public expense. The Office of Special Education Programs (OSEP) has directly addressed this issue, stating:

> If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed. See: Letter to Anonymous, 103 LRP 22731 (OSEP 2002). And See, Letter to Petska, 101 LRP 633 (OSEP 2001) stating "the school district must ensure that the IEE is provided at public expense unless it demonstrates in a due process hearing that the parent's IEE did not meet the district's criteria, including criteria related to location."

In this case, USD #___ did not choose the first option to initiate a due process hearing to show that their January 17, 2019 evaluation was appropriate. Evidence shows the school district responded to the parent's request by sending the required information for conducting an IEE at public expense as described at 34 C.F.R. 300.502(a)(2).

On May 5, 2019, the parent requested Dr. Lauren Spears at MNS provide the IEE of the student. USD #___ responded to the parent on May 13, 2019 through a PWN refusing the parent's choice because "The cost of the evaluation greatly exceeds standard pricing for such an eval." USD #___ then offered to pay their standard price of $600 towards the cost of the parent's chosen evaluator with the parent paying for the difference. This practice does not meet the requirement for the school district to pay for the **full cost** of the IEE. The parent informed USD #___ of their choice for the IEE evaluator on May 5, 2019 and nearly eight weeks have passed; however, the school district has neither payed for the full cost of

the IEE or initiated a due process hearing without unnecessary delay to show the parent's choice of an evaluator does not meet the school district's criteria. Although the term "unnecessary delay" used in 34 C.F.R. 300.502(b)(2) is not defined, OSEP has described it to permit a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE (Letter to Anonymous, 56 IDELR 175 (OSEP 2010).The school district's failure to provide the parent with clear information about its cost criteria and give the parents an opportunity to justify the excess cost of their chosen evaluator has created an unnecessary delay in the IEE process of nearly eight weeks. Based on these facts, a violation of this regulation is found.

Based on the foregoing finding of facts and the application of the relevant regulations, the parent's allegation that USD #___ failed to provide an IEE at public expense in violation of special education laws and regulations is substantiated.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

> A. Federal regulations at 34 C.F.R. 300.502(e) which state that If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. A public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

The findings of this investigation show the school district includes cost as one of the qualification criteria for the person selected as the IEE evaluator; however no specific amount was provided to clarify "a rate consistent with current practice." When the parent chose an evaluator they believed met the stated criterion of "must charge a rate consistent with current practice," the school district denied their request but did not provide the parent with an opportunity to justify the unique circumstances they believed existed to warrant the additional cost of their

chosen evaluator to provide the IEE. This unilateral limitation interfered with the parent's right to obtain an IEE as required by the IDEA.

B. Federal regulations at 34 C.F.R. 300.502(b)(2) which require school districts to take one of the following steps, without unnecessary delay, when a parent requests an IEE at public expense: 1) Initiate a due process hearing to show that the school's evaluation was appropriate; OR 2) Ensure the IEE is provided at public expense by either paying the full cost of the IEE or by demonstrating in a due process hearing that the evaluation obtained by the parent does not meet the school district's criteria.

The findings of this investigation show the school district caused an unnecessary delay of nearly eight weeks in the IEE process. It is also noted USD #___ made an offer to pay for a portion of the cost of an IEE conducted by the parent's chosen evaluator with the parent paying for the balance of the cost of the IEE. This practice is in conflict with the requirement that the school district pay the full cost of the IEE.

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

1. Within 10 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. 300.502(e) by ensuring that limitations to the parent's right to an IEE are not restricted by school district criteria by allowing the parent the opportunity to justify the unique circumstances they believe exist to warrant an exception to the school district's criteria.

   b) Comply with Federal regulations at 34 C.F.R. 300.502(b)(2) by without unnecessary delay either filing a due process complaint to request a hearing to show their evaluation is appropriate or by paying for the full cost of the IEE unless the school district demonstrates in a due process hearing that the IEE obtained or requested by the parent does not meet the agency criteria.

2. No later than July 15, 2019, USD #___ shall provide the parent with written notice that the school district will either agree to provide the IEE of the student at district expense using the evaluator previously chosen by

the parent or request a due process hearing to contest the requested IEE. USD #___ shall provide SETS with a copy of the written notice. USD #___ shall then provide documentation that the action in the written notice has been completed without unnecessary delay.

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).

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
PRAIRIE VIEW PUBLIC SCHOOLS, USD #___
ON MAY 29, 2019

DATE OF REPORT: JUNE 25, 2019

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with MH, Director of Special Education for the _____ Kansas Special Education Cooperative (Coop.) on June 3 and 6, 2019. The investigator spoke by telephone with the student's father on June 20, 2019. Also on June 20, 2019, the investigator spoke by telephone with MH, school psychologist.

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

- Email dated September 21, 2017 outlining district criteria for Gifted Eligibility
- _____ Elementary KIDS Team Meeting Notes dated September 11, 2018
- Parent Request for Special Education Evaluation dated September 11, 2018
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated September 12, 2018
- _____ Elementary KIDS Team Meeting Notes dated October 30, 2018
- Wechsler Intelligence Scale for Children – Fifth Edition cover sheet dated October 30, 2018
- Scoring summary for the Wechsler Intelligence Scale for Children – Fifth Edition dated October 30, 2018
- _____ Elementary KIDS Team Meeting Notes dated December 4, 2018
- Gifted Evaluation dated January 8, 2019
- Enrichment Plan for the student for the 2018-2019 school year
- Online calendar for USD #___

Background Information

This investigation involves a 10-year-old girl. She has just completed the 3rd grade in her neighborhood elementary school.

According to the student's father, the student has participated in enrichment activities since kindergarten and has been provided reading instruction at an advanced level.

The student's progress has been followed through the KIDS Team process at the building level, a student assistance team process wherein the needs of students are discussed and interventions are developed, implemented and monitored. The KIDS team first discussed the student on September 11, 2018, and an Enrichment Plan was developed. That plan had three goals:

- "To provide opportunities for instruction and enrichment at [the student's] ability level [reading].
- For [the student] to have the opportunity to extend herself so that she does not view learning as coming to [sic] easily and can thus develop the skills needed to persevere when learning tasks become more challenging at upper levels.
- Allowing opportunities for [the student] to maintain appropriate grade level peer relationships so that emotional intelligence and social skills can develop in conjunction with academic skills."

The following specific supports were put in place under the Enhancement Plan:

- provision of enrichment services by the gifted teacher,
- guided reading groups at the 3rd grade level with peers who demonstrate comparable skill levels,
- core reading instruction at the 4th grade level in a 4th grade classroom (for the 2018-19 school year only),
- "high ceiling" math activities in the 3rd grade classroom,
- technology resources for enrichment or personalized practice in reading and math available at home and school, and
- family support

Following the parents' request on September 11, 2018 for an evaluation of the student with regard to eligibility for gifted services, the student's progress was monitored by the KIDS Team on October 30, 2018. Another KIDS Team meeting regarding the student was held on December 4, 2018.

In a telephone conversation with the investigator on June 20, 2019, the student's father stated that the primary reason he and the student's mother have wanted to have the student considered for gifted services was that they wanted to see her continually challenged throughout her school career so that she knows what it means to have to study and is well prepared to face the rigors of college. The parents fear that if the student is not continually challenged and feels that learning comes too easily, she may

simply not “know how to study” when she needs to do so at the post-secondary level.

Issues

In their complaint, the parents raise five issues.

Issue One: The school psychologist exceeded the 60-day timeline for completing an evaluation of the student.

Kansas has established a 60 school-day timeline for conducting an initial evaluation (K.A.R. 91-40-8(f)). The time for conducting the evaluation starts upon the district’s receipt of written parental consent to conduct the evaluation and ends with the implementation of an IEP if the student is found eligible for special education services or upon completion of the evaluation report if the student is not found eligible for special education services.

The parents assert that they gave written consent for the evaluation of the student on September 12, 2018, but the district did not provide them with the results of the evaluation until more than 70 school days later on January 8, 2019, at which time testing results were shared with them by the school psychologist.

Investigative Findings

The parents made a written request for a special education gifted evaluation on September 11, 2018 indicating that they believed the student was “in need of academic services above and beyond that of students in his or her respective grade level.” Written consent for an initial evaluation was signed by the parents on September 12, 2018. The consent form was returned to the district by the student who gave the document to her general education teacher on September 13, 2018. The document was first seen by the school psychologist on September 20, 2018.

According to the school psychologist, school was not in session on October 8 because of teacher inservice. There was no school on October 9 and 10, 2018 due to flooding. There was a snow day on November 26, 2018, and students were not in school. School was not in session on January 2, 2019 because of teacher inservice.

The school psychologist administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) on October 30, 2018. An evaluation team meeting was held on January 8, 2019, 64 school days after parental consent for the evaluation was returned to the district.

Because the district failed to complete the special education evaluation of the student within 60 school days, a violation of special education laws and regulations is substantiated on this issue.

<u>Issue Two:</u> The school psychologist did not provide the parents with a copy of an evaluation report until more than 6 weeks following the team meeting to review that evaluation. Additionally, the parents allege that the evaluation report provided to them was not legally compliant because it did not include the signatures of all evaluation team members and did not reflect whether or not the conclusion documented in the report reflected the conclusion of each team member.

Parents are to be provided with a copy of the Evaluation/Eligibility Report within a reasonable period of time following the eligibility team meeting (K.S.A.72-3428(e)(2)). The Kansas State Department of Education (KSDE) has determined that, unless there is an unusual circumstance, 15 school days is a reasonable time to respond to a parent's request for evaluation (See KSDE Memo, "Reasonable Time" to respond to parent request for evaluation, January 8, 2002). KSDE also applies that same standard with regard to other elements of the identification, evaluation, or placement process where a timeline is not already established by law.

State regulations, at K.A.R. 91-40-10(a)(2), state that each evaluation team member, other than the parent, must certify in writing whether the evaluation report reflects the member's conclusion. If the report does not reflect a member's conclusion, that team member must submit a separate statement presenting the member's conclusion.

The parents allege that while the results of testing by the school psychologist were shared with them verbally on January 8, 2019, they did not receive a copy of the eligibility report until February 21, 2019, after they had made a written request for that report.

<u>Investigative Findings</u>

The district acknowledges that the parents were not given a copy of the January 8, 2019 evaluation report until at least February 19, 2019, twenty-seven school days after the evaluation team meeting. Further, the evaluation report which was provided to the parents did not certify that the report reflected the conclusions of all members of the evaluation team and was not signed by any team member.

Under these circumstances, a violation of special education laws and regulations is substantiated on the issue of the provision of the evaluation report to the parents. A second violation is also established with regard to the absence of team member signatures on the evaluation report.

<u>Issue Three:</u> Members of the student's IEP team did not play a role in determining the student's eligibility for gifted services.

The State of Kansas requires that "the determination of whether a child is an exceptional child shall be made by a ***team*** (emphasis added) of qualified professionals and the parents of the child." (See K.S.A. 72-3428(e)(1).)

The parents assert that although they and others, including the student's general education teacher, provided input regarding decisions regarding the student's eligibility for gifted services, that input was not considered in the eligibility determination.

Investigative Findings

A meeting to review evaluation results with the parents was held on January 8, 2019 and was scheduled as a part of the building's regularly scheduled KIDS Team process. Individuals who routinely participate in KIDS Team meetings were therefore present, including the student's classroom teacher, the school psychologist, the principal, the special education teacher for the building, the gifted facilitator, the school social worker and the reading specialist for the building. These attendees had previously met to review the results of the cognitive testing conducted by the school psychologist on December 4, 2018 in preparation for the evaluation meeting with the parents.

The Gifted Evaluation report provided by the district was developed solely by the school psychologist. That report shows that the following "Eligibility Factors" were considered:

- "Question 1: Does the child exhibit an exceptionality?
- Question 2: Does the child need special education?"

In answering Question 1, academic and cognitive factors were noted. The student showed a grade equivalency in reading of 9.7 placing her at the 99th percentile on STAR, a measure of reading skills. According to the report, the student scored at the 98th percentile on district-wide AIMSweb testing in the area of math and at the 99th percentile on composite reading. The report also states that the student did "not meet the 98th percentile requirement on an individually administered IQ test."

The report included the following in response to Question 2: "At this time, [the student] has a documented Enrichment Plan followed by the classroom teacher and the district gifted facilitator. Interventions will continue with the gifted teacher. At this time, the examiner feels this plan is fitting her needs. The team may need to meet for the 2019-20 school year to reevaluate this plan for [the student's] fourth grade year."

The report does not reflect input from any team member other than the school psychologist. Although both the school psychologist and the student's father report that other individuals spoke about the student's need for services and shared work samples as evidence of need, none of that information is included in the Gifted Evaluation report.

The district has provided no evidence to show that the input of any team member other than the school psychologist was considered when making the decision regarding the student's eligibility for gifted services. The Gifted Evaluation specifically states that it is the opinion of the ***school psychologist*** that the support that the student is receiving from the gifted facilitator and the services outlined in her Enrichment Plan are meeting her needs. There is no indication in the report as to whether the other individuals

present at the meeting agreed or disagreed with that opinion.

The district has provided no evidence to show that decisions regarding the student's eligibility for gifted services were made by a team of people. Under these circumstances, a violation of special education laws and regulations is substantiated.

Issue Four: [Coop.] procedures for the identification of students for gifted services excluded relevant data.

State regulations, at K.A.R. 91-40-9(a), state that when determining eligibility for special education services, a district must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as any relevant information about the child's physical condition, social or cultural background, and adaptive behavior, and must ensure that information obtained from all of these sources is documented and carefully considered.

There is not a uniform standard across Kansas school districts for determining the criteria to be used to determine if a child meets the definition of "gifted." However, each school district is required to have local policies, practices and procedures in place that describe how district services are determined and delivered. The process and criteria used to determine eligibility to receive individualized gifted services through special education needs to support a two-pronged test to determine if:

1) the child meets the definition of gifted; and
2) if the child needs special education services to address the unique needs that result from the child's giftedness to ensure access to and progress in the general education curriculum.

The Kansas State Department of Education has established "Eligibility Indicators" with regard to the provision of special education services. The purpose of establishing these indicators was to provide guidance to evaluation teams as they seek to address the two-pronged test of eligibility. In determining whether a student meets the definition of "gifted," teams are asked to seek evidence in three areas:

1) Evidence of performing or demonstrating the potential for performing at significantly higher levels of accomplishment in one or more academic fields
2) Evidence with regard to intellectual ability
3) Evidence comparing the student's performance to others of similar age, experience and environment

The parents assert that there was little discussion of what they considered to be "relevant data" until after the school psychologist had stated that the student was not eligible for gifted services. They further contend that the student's high achievement scores were not considered and that the concerns of the parents and the student's teachers with regard to the student being denied gifted services went unheard.

Investigative Findings

According to the Director of Special Education for [Coop.], eligibility for gifted services is established as follows:

- The student must score on or about 2 standard deviations from the mean on an individually administered IQ test (128-130);
- The student must attain a score on an achievement assessment commensurate with the IQ score;
- The student must have work samples that are at a higher level than age peers; and
- The student must demonstrate the need for additional services that are not available in the general education classroom.

The district requires that convergent data from all four areas must be present for a student to be considered for placement in gifted education.

The Gifted Evaluation form dated January 8, 2019 shows that the district considered data from a variety of sources in determining the student's eligibility for Gifted services including the following:

- Intelligence testing completed by the school psychologist
- District academic assessments in the areas of reading and math

The report made note of the fact that the student had an Enrichment Plan and that interventions were being provided by the gifted facilitator. However, while the report contains a statement by the school psychologist that these interventions were meeting the student's needs, there is no indication that the team discussed this topic.
The evaluation report does not document that consideration was given to any input from the parents, the general education teacher, or the gifted facilitator as a part of the evaluation. There is no evidence that the district considered work samples provided by the general education teacher at the time of the meeting. There is also no evidence to reflect that the team discussed the district's criteria with regard to whether or not the student demonstrated a need for additional services that were unavailable in the regular education classroom.

Both the parents and the district agree that a group of individuals met on January 8, 2019 and both parties agree that the topic of that meeting was the student's eligibility for gifted services. However, there is no evidence to support that the decision not to provide gifted services was made by a team of individuals who considered not only the student's test scores but also work samples or any other evidence of the student's need for services unavailable in the general education classroom.

While the district has established criteria for teams to use when making decisions regarding a student's eligibility for gifted service, there is no evidence to show that the decision not to provide gifted services was based on a thorough consideration of each

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

Additional Comments

In support of their allegations related to this issue, the parents point to federal regulations at 34 C.F.R. 300. 310 which require that a classroom observation be conducted when considering a student for special education eligibility under the category of Specific Learning Disabilities (SLD). Because the student was being considered for special education eligibility under the category of Gifted, and not a category of disability, this requirement does not apply. The category of "gifted" is not a category in the federal law. Gifted is a category of exceptionality only in state law. Therefore, no federal regulation applies to the evaluation or eligibility determination of a child who is being evaluated based on the exceptionality of gifted.

Issue Five: The use of IQ scores in the determination of a student's eligibility for gifted services is unduly limiting.

Kansas regulations, at K.A.R. 91-40-9(a)(8), state that a district may not use any single procedure as the sole criterion for determining whether a child is a child with an exceptionality or for determining an appropriate educational program for the child. If, however, a district considers multiple criteria when determining eligibility, and the student meets all but one, that student may be deemed ineligible.

Through a document entitled "Eligibility Indicators," the Kansas State Department of Education (KSDE) has provided guidance to districts with regard to determining the initial eligibility of a student for special education services. When determining whether or not a student is eligible to receive Gifted services, KSDE directs districts to answer two questions:

1: Does the child exhibit an exceptionality, and

2: Does the child need special education [specially designed instruction] and related services?

In answering question 1, districts are guided to look at three categories:

- Evidence of performing or demonstrating the potential for performing at significantly higher levels of accomplishment in one or more academic fields;
- Evidence of intellectual ability; and
- Evidence when compared to others of similar age, experience, and environment of
    - Multiple characteristics of giftedness exhibited when interventions provide adaptations, enrichment, or acceleration as compared to peers, with consideration given to cultural or linguistic differences.

- Persistence to task and generalization of knowledge gained indicate a remarkably high level of accomplishment.
- Coursework analysis indicates a significantly high level of intellectual ability and excellence in academics when provided with interventions.
- Performance significantly higher than peers in one or more areas on benchmark assessments, curricular objectives, or state assessments, with consideration given to cultural or linguistic differences.

In listing evidence a district could use to demonstrate that a student is performing at significantly higher levels of accomplishment in one or more academic fields, KSDE has included "a rank of not less than the 95th percentile on national norms on a standardized, norm referenced achievement test in one or more of the academic fields [mathematics, language arts (including reading), science, and social science), or evidence that such test scores do not adequately reflect the child's excellence in academics."

Included among the listing of evidence of intellectual ability which KSDE has established that a district could use to address eligibility for Gifted services is the following: "a composite rank of not less than the 97th percentile on an individually administered, standardized, norm-referenced test of intellectual ability, or evidence that the child's standardized, intelligence test score does not adequately reflect the child's high intellectual potential. Consider things such as proficiency in English and in the child's native language, amount of time in the country, level of education in the child's native country, etc."

The parents assert that the implementation of an IQ cutoff score when determining eligibility for Gifted services has resulted in the district making decisions based upon a single criterion. They further assert that the IQ score used by the district (a Full Scale Score on the WISC-V) unfairly excluded the student from placement in the Gifted program. They contend that another measure (the General Ability Index [GAI] of the WISC-V) would have provided a better indication of the student's ability.

Investigative Findings

As stated above under Issue Four, the district has established four criteria related to eligibility for Gifted services:

- The student must score on or about 2 standard deviations from the mean on an individually administered IQ test (128-130);
- The student must attain a score on an achievement assessment commensurate with the IQ score;
- The student must have work samples that are at a higher level than age peers; and
- The student must demonstrate the need for additional services that are not available in the general education classroom.

The Gifted Evaluation form dated January 8, 2019 provided by the district shows that a number of criteria were considered in determining the student's eligibility for Gifted services:

- The student's Full Scale IQ score on the WISC-V of 119 placing her at the 90th percentile (The student's GAI score on the WISC-V was 120.)
- The student's grade equivalency on the STAR reading assessment of 9.7 placing her at the 99th percentile
- Performance on district-wide AIMSweb reading placing the student at the 99th percentile in math
- Performance on district-wide AIMSweb math placing the student at the 98 percentile
- The student's Enrichment Plan which has been facilitated by the student's classroom teacher and the gifted facilitator

This data provides evidence that can be used to answer the question of whether or not the student exhibits an exceptionality and address the first two elements of the district criteria.

As noted above under Issue Four, there is no evidence to show that the district collected any specific data to answer the question of whether or not the student needed special education services or to address the third and fourth elements of the district-established criteria.

The parents argue that the use of an IQ score cutoff allowed the district to find the student ineligible based on a single criterion. That argument has merit because the student's eligibility determination came down to a single criterion. But, the regulation does not prohibit that result. While the district may not use any single measure or assessment or other procedure as the ***sole*** criterion when making eligibility decisions, the district did consider multiple factors when determining the eligibility of this student.

The evaluation team failed to properly implement the district's established criteria in determining the eligibility of this student. The failure of the team to follow district process was noncompliant, as determined in Issue Four. However, because the district ***process*** has established multiple criteria to be used in determining eligibility (any one of which may be exclusionary), the district cannot be said to use a single measure or assessment or other procedure as the "sole criteria." Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Additional Findings

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.

Prior Written Notice is also required when the school refuses a parent's request to initiate or change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services (FAPE) to the child. (See K.S.A. 72-3430(b)(2).)

The district provided no prior written notice to these parents regarding the decision not to provide gifted services to the student. A violation of special education laws and regulations is therefore identified.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Two additional violations were identified during the course of this investigation. Specifically, violations were substantiated/identified with regard to:

- K.A.R. 91-40-8(f), which requires a district to complete the initial evaluation of a student within 60 school days;
- K.S.A.72-3428(e)(2), which requires a district to provide parents with a copy of an Evaluation/Eligibility report within a reasonable time after the eligibility meeting;
- K.A.R. 91-40-10(a)(2), which requires evaluation team members to certify in writing whether the evaluation report reflects his or her conclusion;
- K.S.A. 72-3428(e)(1), which requires that decisions regarding the determination of whether or not a child is exceptional be made by a team of qualified professionals and the parents of the child;
- K.A.R. 91-40-10(d)(1), which requires that information from a variety of sources must be drawn on when making eligibility decisions, and
- K.S.A. 72-3430(b)(2), which requires a district to provide parents with prior written notice of the proposal not to provide special education services.

Therefore, USD #___, in conjunction with the [Coop.], is directed to take the following actions:

1) Submit, within 15 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

    - K.A.R. 91-408(f), by completing the initial evaluations of students within 60 school days;

- K.S.A.72-3428(e)(2), by providing the parents of all students, including those being considered for gifted services, with a copy of an Evaluation/Eligibility report within a reasonable time after the eligibility meeting;
- K.A.R. 91-40-10(a)(2), by requiring evaluation team members to certify in writing whether the evaluation report reflects his or her conclusion for all students being considered for gifted services;
- K.S.A. 72-3428(e)(1), by requiring that decisions regarding the determination of whether or not a child is exceptional be made by a team of qualified professionals and the parents of the child;
- K.A.R. 91-40-10(d), by requiring that information from a variety of sources must be drawn on when making eligibility decisions regarding exceptional students, and
- K.S.A. 72-3430(b)(2), by providing all parents with prior written notice of any proposal not to provide special education services.

2) Submit, within 20 days of the date of this report, a written plan for the delivery of training to all staff involved in the evaluation of students to determine eligibility for gifted services on each of the six identified areas identified above under Item 1. This training should be completed by no later than September 1, 2019.

3) Within 5 days of the completion of the training specified above under Item 2, submit to SETS evidence to document that the training has been completed.

4) Within 20 days of the date of this report, submit to SETS a template for an Evaluation Report to be used by teams who are determining eligibility for gifted services. That report template should include sections which specifically address each of the district's four eligibility criteria and sections which direct teams to specify

    - whether or not the student exhibits an exceptionality, and
    - whether or not the student needs special education.

5) Within 10 days of the date of this report, schedule an eligibility team meeting with the parents of this student for the purpose of involving the entire team in reconsidering this student's eligibility for gifted services. That meeting is to be held no later than September 15, 2019.

6) Within 5 days of the meeting specified above under Item 5, submit to SETS a copy of the prior written notice of the eligibility determination made by the team.

Further, USD #___ and the [Coop.] 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

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
_____, USD #___
ON APRIL 22, 2019

DATE OF REPORT: MAY 22, 2019

This report is in response to a complaint filed with our office by _____ on behalf of his son, _____. _____ will be referred to as "the student" in 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 the _____ Special Education Cooperative, on April 30, 2019. The investigator spoke by telephone with the parent on May 10, 2019.

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

- Notice of Meeting dated August 24, 2017
- IEP Meeting Attendance Signature Page dated September 21, 2017
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 21, 2017
- Notice of Meeting dated December 13, 2017
- IEP Meeting Attendance Signature Page dated December 13, 2017
- IEP Amendment Between Annual IEP Meetings dated December 13, 2017
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent related to a meeting on December 13, 2017
- Notice of Meeting dated February 13, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated September 17, 2018
- IEP for this student dated September 21, 2017 and amended on February 14, 2018
- IEP Amendment Between Annual IEP Meetings dated February 13, 2018
- IEP Meeting Attendance Signature Page dated February 13, 2018

- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated February 13, 2018
- Email correspondence covering the period of September 6-12, 2018 between the student's mother and his special education teacher regarding the scheduling of an IEP Team meeting
- Notice of Meeting dated September 17, 2018
- IEP for this student dated September 17, 2018
- IEP Team Member Participation page dated September 17, 2018
- Notice of Meeting dated October 29, 2018
- IEP Team Member Participation page dated October 29, 2018
- IEP for this student dated November 1, 2018
- IEP Team Member Participation page dated November 1, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Changes in Services, Change of Placement, and Request for Consent dated March 7, 2019
- IEP Team Member Participation page dated March 7, 2019
- Documentation of IEP Delivery/Access for the student for the 2018-19 school year
- Log Entries for the student covering the period from September 15, 2015 through April 18, 2019
- Google spreadsheet for the student

Background Information

This investigation involves a 15-year-old boy who is enrolled in 9th grade at his Junior/Senior High School. The student receives special education services under the disability category of Autism.

According to the student's September 17, 2018 IEP, he is "college and career ready in the areas of reading and math…loves technology and the weather and plans to become a meteorologist or a computer programmer." He does, however, demonstrate a "lack of focus and is easily distracted in class…has difficulty maintaining focus and completing work that he starts." His parents are concerned with his organizational skills and with his ability to turn work in on time so that he maintains grades that are commensurate with his abilities.

Issues

It is noted the IDEA allows state formal complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 22, 2018. In his complaint, the parent outlined eight issues. Per a letter from Tiffany Hester, Legal Consultant for Special Education and Title Services, dated April 22, 2019, the eighth concern raised by the parent in his complaint was not investigated as the issues specified under that concern are not addressed in special education laws and regulations. Further, the parent withdrew issue seven (regarding the absence of a

general education teacher at an IEP meeting) and intends to file a new complaint on that issue at a later time.

The majority of the remaining six issues relate to the alleged failure of the district to follow the student's 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.

Issue One: The district has failed to follow the student's IEP because the student has not consistently been provided the opportunity to close out his day with his special education teacher.

Parent's Position

According to the parent, the student has difficulty with follow-through as a function of being on the Asperger/Autism spectrum. The parent asserts that a check-in period at the end of each day was established to ensure that the student was taking home what he needed in order to complete his homework. The parent contends that the check-in period often does not occur. The parent states that the student's special education teacher has reported that he often does not report to her classroom for check-in because he does not have enough time. According to the parent, the loss of check-in time has caused the student's grades to suffer, specifically in the area of physical science. It is the position of the parent that the student and his last hour instructor need to be fully aware of the end-of-day check-in requirement.

District's Position

It is the position of the district that the student has met consistently with his special education teacher at the beginning of each school day. According to the district he had inconsistently met with the special education teacher at the end of the school day, refusing to leave his 7th hour class. However, since an IEP Team meeting held at the request of the parents on March 7, 2019, the student has been meeting with the special education teacher at both the beginning and the end of the school day.

Investigative Findings

The student's September 21, 2017 IEP specified that he was to receive 20 minutes per day of special education services in a special education setting for "Resource Room check in" through September 20, 2018.

An annual IEP review was conducted on September 21, 2018. The Special Education section of the revised IEP states that the student would "check in before and after

school with special education teacher" for "10 minutes 5 times each week" for a total of 20 minutes per day.

The district provided the investigator with access to a Google Sheet used by the student and school staff. The formatting of that spreadsheet was modified beginning on September 11, 2018. A section of the revised spreadsheet was established to reflect the student's participation in "morning" and "after-school" check-ins.

Based upon the information provided in the spreadsheet, it appears that the student participated in morning check-ins approximately 72% of the time between September 11, 2018 and April 22, 2019. The special education teacher was unavailable for 2 morning check-ins during this period (less than 2% of the total number of missed morning check-ins).

The student participated in far fewer afternoon check-ins during these same blocks of time. From September 11, 2018 to April 22, 2019, he was present for only 29% of afternoon check-ins. The special education teacher was reported as unavailable for 4 afternoon check-ins (approximately 3.5% of the time).

The parents requested an IEP Team meeting on March 7, 2019 to discuss their concerns regarding the student. The principal and the director of special education for the cooperative met with all of the student's teachers on March 8, 2019 to review the student's needs. Subsequent to these meetings, the student's participation in both before and after-school check-ins increased. Between March 7 and April 22, 2019, the student was present for 95% of morning check-ins. The student's participation rate for afternoon check-ins between March 7, 2019 and April 22, 2019 was 77%.

Summary and Conclusions

Records provided by the district show that the student failed to participate in morning check-ins 28% of the time between September 11, 2018 and April 22, 2019 and failed to participate in after-school check-ins 71% of the time during that same period. It was not until a meeting on March 7, 2019 that the student's participation rate improved resulting in dramatic improvements in his participation rate for both morning and after-school check-in sessions. Certainly, the reluctance of the student to leave his 7th hour class contributed to his missing afternoon check-in opportunities. However, the pattern of missed check-ins – particularly after-school check-ins – began as early as September 11, 2018 and continued at an egregious level until the March 7, 2019 team meeting. The student participated in only 16 afternoon check-ins during that 6-month period.

There is no record of the district convening an IEP Team meeting to discuss the student's unwillingness to leave his 7th hour class in order to report for his afternoon check-ins, nor did the district provide any documentation to show that any changes were made to the student's IEP to increase his participation rate. The district failed on

more than 100 days during the period of September 11, 2018 to April 22, 2019 to provide the student with morning ***and/or*** afternoon check-ins as specified in the student's September 2017 and September 2018 IEPs. Under these circumstances, a violation of special education laws and regulations is established on this issue.

Issue Two: The parents were not afforded 10 day prior written notice of an IEP Team meeting held at the beginning of the 2018-19 school year.

The school must take steps to ensure that one or both parents are present at each Individualized Education Program (IEP) team meeting or are otherwise afforded the opportunity to participate in the IEP team meeting (34 C.F.R. 300.322(a)). 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)). That notice must be provided in writing at least 10 calendar days prior to the meeting (K.A.R. 91-40-17(a)(2)).

Schools must ensure that the IEP team reviews the child's IEP at least annually and there is no exception to that requirement 34 C.F.R. 300.324(b)(1)(i)). If the school and the parents arrive at a mutually agreed upon time for the IEP meeting that does not make it possible to provide a 10 calendar-day prior written notice, the parents may waive their right to that 10-day period, and the meeting may proceed. This situation should not be a common practice, however, and to avoid this issue it is best to schedule IEP meetings far enough in advance of the annual review date to allow for rescheduling if necessary. When schools schedule IEP team meetings close to the annual review deadline, schools must balance the obligation to meet the annual review deadline with giving the parent required notice of the IEP team meeting and working with the parent to reach an amicable agreement about scheduling the meeting.

Parent's Position

According to the parent, the special education teacher made no contact to set up an annual IEP team meeting until well into the school year, forcing the parents to agree to meet on a shortened timeframe so that the annual IEP review could be completed before the 12-month period covered by the student's September 21, 2017 IEP lapsed.

District's Position

The district contends that the special education teacher contacted the student's mother via email on the morning of September 6, 2018 to schedule an annual IEP review meeting. Correspondence between the special education teacher and the student's mother continued until September 12, 2018 when the two parties established a meeting date for September 17, 2018. The district asserts that the student's mother waived the 10-day prior written notice requirement.

Investigative Findings

The district provided a copy of an email dated September 6, 2018 from the student's special education teacher to the student's mother wherein the special education teacher proposed an annual IEP review 15 days later on September 21, 2019 at 9:15 AM. The teacher notes that "we had discussed setting it up after Labor Day." The special education teacher indicated that, as an option, the meeting could be held before school at 7:30 AM. The student's mother responded via email on September 6, 2018 stating that she was "not at work today…as soon as I get back to work tomorrow I will look at my work calendar and get back with you on a day."

On September 10, 2018, the student's mother sent an email to the special education teacher stating the next two weeks were "booked solid," but she was available "everyday [sic] the week of September 24." The special education teacher wrote back on September 10 saying "our only issue is that the IEP is due by the 20th" and again offered to hold a meeting before school. On September 11, 2018, the student's mother sent an email asking the teacher if she had "time available on the 17th." The special education teacher responded, writing "7:30 am or 9:15 am or after school works best but I'll make any time work if there is some time that you need." The special education teacher also offered to have the parent "participate by phone if that would be more convenient." The student's mother responded on September 12, 2018 that "9:15 on Monday [September 17th]" would be "fine."

The IEP team meeting was held on September 17, 2018, and on that date the student's mother signed off on a Notice of Team Meeting form dated September 17, 2018 to show that she consented to waive her right to a 10-day prior written notice of the meeting.

Summary and Conclusions

The special education teacher for the student first contacted the student's mother 15 days prior to a proposed annual IEP review date of September 21, 2018. Through email, the parent and the special education teacher considered various options and on September 12, 2018 arrived at a mutually agreed upon time for the annual review. The scheduled date for the IEP team meeting (September 17, 2018) did not allow for 10-day notice of the meeting, but the parent waived her right to that 10-day notice on September 17, 2018. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Three: The district failed to follow the student's IEP because the student's teachers are not utilizing a communication tool specified in the student's IEP.

Parent's Position

The parent asserts that the student's IEP describes a shared Google Document to which all of the student's general education teachers, his special education teachers, the parents, and the student have access. The parent contends that most of the student's general education teachers are not filling out the Google Document and states that the student's special education teacher has told him that "they just don't do it" despite her reminders. When the Google Document is not completed, the parent asserts there is no way to know the student's homework requirements, and as a result, the student's grades have suffered. The parent believes, based upon the document history, that the special education teacher – not the student's general education teachers –have been completing the sheet.

District's Position

The district stipulates that general education teachers were inconsistently using the online planner (Google Sheet) prior to an IEP team meeting on March 7, 2019. Following that meeting, the building principal and the director of special education met with high school staff on March 8, 2019 and reminded them that a goal related to the online planner had been added to the student's IEP at his September 17, 2018 IEP team meeting because the student was not using the online planner independently. The district asserts that December 18, 2018 progress monitoring showed that the student was making progress on this goal, but that progress had dropped off between January and March 2019.

Investigative Findings

The student's IEP Team amended the September 21, 2017 IEP on December 13, 2017. According to a prior notice and consent form associated with that amendment, the decision was made to move the student's planner online instead of keeping it on paper because the student had been struggling to fill out his planner. The team felt that "completing the forms online will better allow him to remember and help the IEP team be better aware of progress."

The student's September 2017 IEP was amended again in February 2018. According to a form entitled "IEP Amendment Between Annual IEP Meetings" dated February 13, 2018, a change was made to the "accommodations/modification" section of the student's September 21, 2017 IEP because the student had been struggling with organization. As stated on the amendment form, "'Planner Checks' will be changed to online planner as (the student) will be responsible for filling out his planner but being online will allow the IEP team to see and note class behaviors." Per a prior written notice and consent form related to this change also dated February 13, 2018, "(The student) is using an online planner which he is to fill out. Being online will allow teachers to make notes as well."

The "Supplementary Aids and Services" section of the student's September 21, 2018 IEP states the he "will have an online planner shared with all his teachers."

A Google Sheet provided by the district includes sections designed for the student to record a description of daily classroom activities as well as due dates for assignments and to note whether assignments have been completed. The Google Sheet also includes a section where the student's teachers can comment as to whether the student "followed directions," "completed tasks," and "completed previous assignments."

A review of entries into the Google Sheet between September 11, 2018 and April 22, 2019 confirms that on average half or fewer of the student's teachers completed the sheet on any given day. Some teachers were quite consistent in providing information; others rarely gave any feedback until after the March 8, 2019 meeting.

Summary and Conclusions

Both the student's amended September 21, 2017 IEP and his September 21, 2018 IEP reference the move to an online planner for the student. The majority of the student's teachers did not consistently provide any information regarding the student's behavior or assignments until after an IEP Team meeting on March 7, 2019, and one teacher provided little or no information even after that meeting. However, neither amendments to the student's September 2017 IEP nor his September 2018 IEP spell out any specific expectations regarding the role of general educators with regard to planner entries. In a prior written notice form associated with the February 18, 2018 amendment to the student's September 21, 2017 IEP, it is noted that the ***student*** is responsible for completing the planner.

Certainly, it appears to the investigator that the intent of setting up a system of shared access to an online planner and establishing specific sections in that planner that require teacher input was to enable everyone – including the student's parents – to have a better picture of the student's performance in areas of concern. However, the student's current IEP does not specifically ***require*** all general education teachers to enter information into the Google Sheet. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Four: The district failed to follow the student's IEP because he was not allowed to take advantage of the resource room to deescalate.

Parent's Position

According to the parent, on one occasion during the latter part of the 2018-19 school year, the student attempted to leave a classroom using a visual cue when he was having a difficult time with a lesson and another student. After turning over a block by

the door to signal his departure, the student was stopped in the hallway by a teacher and given a detention. The parent states that the detention was later rescinded but only after parents intervened. The parent contends that general education teachers do not see or understand students' IEPs, and the special education department does not encourage staff members to be compliant with IEP requirements.

District's Position

The district asserts that all of the student's teachers have been provided with a copy of the student's IEP and are aware of his special education identification. Between April 29 and May 7, 2019, the director of special education and the building principal met with each of the student's general and special education teachers. All of the teachers reported that they allow the student to leave their classrooms as needed to deescalate or noted that there has been no need for de-escalation in their classroom.

Investigative Findings

The district provided "Log Entries" for the student which detail a record of disciplinary issues. None of the incidents recorded during either this school year or last relate to the student leaving class without permission. During a telephone call on May 10, 2019, the investigator asked the parent to provide additional specific information that would enable the investigator to look into this issue, but the parent made no further information available. Under these circumstances, the investigator was unable to further consider this issue. Therefore, a violation of special education laws and regulations is not established.

Issue Five: The district failed to follow the student's IEP because checkout meetings are not being used for their intended purpose, and are not providing the anticipated benefit.

Parent's Position

The parent asserts that the afternoon check-in time with the student is not being effectively utilized. Rather than reviewing the evening's assigned homework and ensuring that the student has all materials needed to complete his assignments, the parent claims the special education teacher spends time having the student relay from memory what was assigned in each class.

District's Position

The district stipulates that the student has not met consistently with the special education teacher for his afternoon check-ins because he has been unwilling to leave his 7th hour class.

Investigative Findings

According to the student's September 21, 2017 IEP the student would receive 20 minutes per day of special education services in a special education setting for "Resource Room check in" through September 20, 2018. An annual IEP review was conducted on September 21, 2018. The Special Education section of the revised IEP states that the student would "check in before and after school with special education teacher" for "10 minutes 5 times each week…" Neither IEP specifically details the purpose of these check-in periods or outlines how they are to be utilized.

Summary and Conclusions

The findings under issue one already noted that the district has not provided the student with all of the check-in services called for in his IEPs. However, neither the student's September 21, 2017 IEP and subsequent amendments nor his September 21, 2018 IEP specify the ***purpose*** of check-in or note how check-in time is to be spent. Under these circumstances, a violation of special education laws and regulations related to the ***use*** of check-in time is not substantiated.

Issue Six: The district failed to follow the student's IEP because his Academic Enrichment Period (AEP) time is not being used for "tool-kit development" and is instead being used to complete homework.

Parent's Position

According to the parent, the student is not using his AEP time to work on his "tool kit development" and is instead spending time completing homework that was assigned the previous day but not accounted for during check-in.

District's Position

The district asserts that the student's current IEP goals focus on grades, homework completion, and the reduction of behavior-related out-of-class time. The term "tool kit" was used during an IEP team meeting as a way to describe those skills needed to be a successful student. By accomplishing established goals, the student is building his "tool kit."

Investigative Findings

According to the school handbook, "the focus of an AEP class is to provide opportunities for Social Emotional Character Development (SECD) enhancement, extra academic assistance and skills intervention, assist in development of Individual Plans of Study (IPS) and occasional assemblies/organizational meetings."

According to a form entitled "IEP Amendment Between Annual IEP Meetings" dated February 13, 2018, the decision was made for the student to "move to a self-contained AEP to receive support with organizing materials/homework." A prior notice and consent form signed by the student's mother states that the decision to add 32 minutes per day, 5 days per week of AEP-based special education services was made because the student "has struggled organizing and completing assignments. Working in self-contained AEP will allow (the student) the support needed to keep organized."

The student's September 21, 2018 IEP states that he "will be enrolled in a special education AEP class" for 32 minutes per day, 5 days per week. There are two annual goals in the student's September 21, 2018 IEP:

- "By the end of the IEP period to increase academic grades and homework completion, (the student) will turn in 90% of his work on time in all core classes and graphic design (math, English, social studies and science) as recorded in the grade book."
- "By the end of the IEP period to increase organizational skills, (the student) will fill out his online spreadsheet planner for assignments 5 out of 5 days for all classes, as shown in the online spreadsheet."

Neither the student's September 2017 IEP nor his September 2018 IEP make any reference to building a "tool kit."

Summary and Conclusions

Neither the student's September 21, 2017 IEP and associated amendments nor his September 21, 2018 IEP specifically state that AEP time is to be used for "tool-kit development." The student's move to a special education AEP class for 32 minutes per day was made in February 2018 to provide the student with support in managing his materials and homework and was intended to help him with keeping organized. One of the goals in the student's September 21, 2018 IEP focuses on homework completion with the aim of submitting assignments on time. The use of AEP time to complete homework is not contraindicated by the student's IEP. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

It is clear to the investigator that the student's September 2017 and September 2018 IEPs have lacked the specificity necessary to ensure that all parties had a clear and common understanding of the commitment of the district regarding the online communication tool, check-in periods for the student, and the use of AEP time.

Therefore, the investigator strongly encourages the parties to convene an IEP Team meeting to discuss and clarify expectations regarding the areas covered by this

complaint and any other areas of the IEP where there is not an explicit understanding of expectations.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, a violation has occurred with regard to 34 C.F.R. 300.101 and K.A.R. 91-40-2(b)(1), which require school districts to make a FAPE available to all children with disabilities residing in their jurisdiction and 34 C.F.R. 300.17 which defines FAPE, in part, as special education and related services provided in conformity with an IEP.

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

1) Submit, within 15 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. 300.101 and K.A.R. 91-40-2(b)(1) by making a FAPE (free appropriate public education) available to all children with disabilities residing in its jurisdiction and with 34 C.F.R. 300.17 by providing services in conformity with students' IEPs.

2) Within 20 days of the date of this report, the district shall submit to the parent and SETS a written plan for the delivery of not less than 15 hours of compensatory special education services to make up for the special education services that were not provided when check-in services were missed. The parent may accept all, part of, or none of the offered compensatory services and has 15 business days from the date the district makes the offer to notify the district of his decision. Within 15 business days of making this written offer to the parent, the district shall notify SETS, in writing, of the parent's decision regarding the offer. If the parent accepts all or part of the offered compensatory services, the district shall schedule those services to begin and be completed as soon as reasonably possible. The district must provide the parent and SETS with a copy of that schedule within 5 business days of receiving the parent's acceptance of the offer of compensatory services. The district shall notify the parent and SETS in writing when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the completion of the accepted compensatory services, the district must notify SETS in writing of the reason and propose a schedule to SETS and the parent to finish the accepted compensatory services.

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
_____ PUBLIC SCHOOLS, USD #___
ON MAY 22, 2019

DATE OF REPORT: JUNE 20, 2019

This report is in response to a complaint filed with our office by _____ on behalf of his son, _____. _____ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. _____ will be referred to as "the parents." Mrs. _____ was the parent who throughout the period covered by this complaint was singularly involved in all meetings with the district. She will be referred to throughout the report as "the student's mother" or "the parent."

Investigation of Complaint

On May 30, 2019, the complaint investigator spoke by telephone with DH, School Psychologist for USD #___. The investigator spoke by telephone with the student's mother on May 29 and June 17, 2019. The complaint Investigator, spoke by telephone with CG, Director of Special Education for the _____ County Special Education Cooperative, on June 18, 2019. The investigator spoke by telephone with the special education teacher for the student on June 19, 2019.

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

- Summary of Student Needs form completed during the 2017-18 school year
- Student Post-Secondary Transition Interview dated September 7, 2018
- Email correspondence covering the period of September 6-12, 2018 between the student's mother and his special education teacher regarding the scheduling of an IEP Team meeting
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated September 14, 2018
- Notice of Meeting dated September 17, 2018
- IEP for this student dated September 17, 2018
- IEP Team Member Participation page dated September 17, 2018
- Signature page for Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent signed by the student's mother on September 17, 2018

- Notice of Meeting dated October 29, 2018
- IEP Team Member Participation page dated October 29, 2018
- Kansas State Board of Education license for the school psychologist

Background Information

This investigation involves a 15-year-old boy who has just completed the 9th grade at his local Junior/Senior High School. The student receives special education services under the disability category of Autism.

Issues

In his complaint, the parent outlined three areas of concern related to an IEP team meeting on September 17, 2018. Per a letter from Tiffany Hester, Legal Consultant for Special Education and Title Services, dated May 22, 2019, the area of the complaint related to 10-day prior notice of an IEP team meeting was not investigated because it had been addressed in a previous complaint. The report of that investigation was sent to the parent on May 22, 2019.

The remaining two areas of concern are as follows:

Concern One: Required IEP team members were absent from some or all of the annual IEP team meeting of September 17, 2018.

The Individualized Education Program (IEP) team is a group of people, knowledgeable about the child, who come together at an IEP meeting in order to develop or review and revise a child's IEP. Collaboration among IEP team members is essential to ensure that each child's educational experience is appropriate and meaningful. All members of the IEP team are equal partners in IEP discussions. Because of their long-term perspective and unique relationship, parents bring a valuable understanding of their child to the table. Children also can express their own needs, strengths, and interests. Educators, on the other hand, bring an educational focus to the meeting, an understanding of the curriculum, the challenging educational standards for the child, and the relationship to the general education environment. With this in mind, parents and educators must continue to recognize their responsibility to maintain and enhance partnerships with each other and the child throughout the school year in order to create a collaborative environment at each IEP team meeting.

Federal regulations, at 34 C.F.R. 320 through 34 C.F.R. 324, describe the composition of an IEP team and how that team is to develop and review IEPs for students receiving special education services.

The required members of the IEP team are specifically identified and described in state and federal statutes and regulations. (See K.S.A. 72-3404(u); K.A.R. 91-40-17(d); 34 C.F.R. 300.322(e); 34 CRF 300.321.)

1) ***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. If the student elects not to participate, the IEP team must take other steps to ensure that the student's preferences and interests are considered in developing the IEP (K.S.A. 72- 3429(c)(8); K.A.R. 91-40-17(f); 34 C.F.R. 300.321(b)(2)).

2) ***The parents*** must be members of the IEP team. The parents are equal partners and play an active role in providing critical information about their child's abilities, interests, performance, and history. They are involved in the decision-making process throughout the development of the IEP (K.A.R. 91-40-17(a)).

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

4) ***Not less than one general education teacher of the child*** must be present 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 curriculum and implement portions of the IEP. The general education teacher is knowledgeable about the curriculum, appropriate activities of typically developing peers, and how the child's exceptionality affects the child's participation (involvement and progress) in the curriculum or those appropriate activities. General education teachers assist in the development, review and revision of the IEP including determining appropriate positive behavioral interventions and supports and other strategies for the child, as well as supplementary aids and services, program modifications and supports to enable general education teachers to work with the child (K.A.R. 91-40-17(h)).

   If the child has several general education teachers, at least one must attend the IEP meeting. However, it may be appropriate for more to attend. The school may designate which teacher or teachers will serve as IEP team member(s), considering the best interests of the child. The general education teacher who serves as a member of the child's IEP team should be one who is, or may be, responsible for implementing a portion of the IEP. The school is strongly encouraged to seek input from the teachers who will not be attending the IEP team meeting.

5) ***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. Therefore, the person acting as 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).

6) ***A person who can interpret instructional implications*** of any evaluation or assessment results must also be a member of the IEP team. This may include individuals who participated on the evaluation team. Certainly, a school psychologist, a special education teacher, general education teacher, speech/language pathologist, or other related service provider might have evaluation results that need to be interpreted and provide instructional implications.

7) ***Representatives of any other agencies*** may be required. For a child with a disability who is age 14 or older, the IEP team will consider the transition services of the child, and the IEP team must determine, to the extent appropriate, any other public agency that must be invited to the IEP meeting because they are likely to be responsible for providing or paying for transition services. (See K.A.R. 91-40-17(g) and 34 C.F.R. 300.321(b)(3).)

A required member of the IEP team is not mandated to attend an IEP team meeting, in whole or in part, ***only if*** the parent of a child with an exceptionality and the school agree, in writing, that the attendance of the IEP team member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (See 34 C.F.R. 300.321(e).)

A required member of the IEP team may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if:

- The parent and the school district agree in writing that the attendance of a required member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.
- The parent, in writing, and the school consent to the excusal; and
- The IEP team member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting (K.S.A. 72-3429(b)(2), (3); 34 C.F.R. 300.321(e)).

Informed parental consent means that the school must provide the parent with appropriate and sufficient information to ensure that the parent fully understands that the parent is consenting to excuse a required IEP team member from attending an IEP team meeting in which the member's area of the curriculum or related services is being changed or discussed and that, if the parent does not consent, the IEP team meeting

must be held with that IEP team member in attendance (Federal Register, August 14, 2006, p 46674).

If a required member, whose area of the curriculum or related services is being discussed or modified, has not been excused from the IEP team meeting, by consent of the parent and the school, and has not provided input into the development of the IEP in writing prior to the meeting, the school shall reschedule the meeting for a time when all required members can be present or can be officially excused, and, if necessary, provide written input into the meeting. To conduct an IEP meeting without all of the required IEP team members present or having the appropriate excusals is not legally compliant.

Excusals through written agreement or consent apply only to the required IEP team members. Other members of the team, who have been invited by the school district or the parent, may be excused from attending the meeting without agreement or consent.

There is no requirement for excusal of an individual who is not a required IEP team member but was invited to attend a meeting and included on the notice of meeting (Federal Register, August 14, 2006, p. 46675).

Schools are encouraged to carefully consider, based on the individual needs of the child and the issues that need to be addressed at the IEP team meeting, whether it makes sense to hold the IEP team meeting without a particular IEP team member in attendance (even with the written consent of the parent) or whether it would be better to reschedule the meeting so that person could attend and participate in the discussion (Federal Register, August 14, 2006, p. 46674).

If an originally-named required member is unavailable, another individual with the same qualifications as the originally-identified required member may substitute for that person at the meeting.

The law allows for individuals to represent more than one of the membership roles on the IEP team. If a person is representing more than one role, that person must meet the individual qualifications for each role at the IEP team meeting. Individuals assuming more than one role at an IEP team meeting should document their roles on the signature page of the IEP.

Although there is no legal minimum number of participants at IEP team meetings, the number of participants should be reasonable and appropriate to address the needs of the child and to carry out the intent of the law (K.A.R. 91-40-17(i)).

Parent's Position

The parent asserts that a general education teacher of the student was present for only a small portion of an IEP team meeting on September 17, 2018 and further contends that no administrator was present for any portion of the meeting.

The parents provided the following description of the September 17, 2018 IEP team meeting:

The student's mother arrived at the IEP team meeting at the scheduled 9:15 AM time to find that the only other person present was the student's special education teacher. According to the student's mother, she and the special education teacher began reviewing the student's September 2017 IEP and discussing how that IEP might need to be revised for the upcoming year. After the student's mother indicated that she wanted the student to have paraprofessional support, the special education teacher left the room to seek out other IEP team members. According to the student's mother, the student's special education teacher asked another special education teacher to find the principal or another administrator to participate. After a 10-minute delay, the special education teacher returned and told the student's mother that all administrators were in a meeting at the Superintendent's office. After another delay, the school psychologist joined the meeting. The student's mother reiterated her interest in securing paraprofessional support for the student, and the school psychologist, special education teacher, and parent discussed the parent's request. After another delay, one of the student's general education teachers joined the meeting. The general education teacher was asked to sign the IEP Team Member Participation page showing he was present for the meeting and was asked whether he felt the student would benefit from paraprofessional support in his classroom. After providing his response to that question, he was excused to return to his classroom which was being covered by another teacher in his absence. After limited additional discussion, and after the parent was given paperwork to sign with the understanding that services to the student would end unless she did so, the meeting concluded.

District's Position

It is the position of the district that all required participants were present for the September 17, 2018 IEP team meeting. The district asserts that the student's annual IEP review meeting was delayed to allow time for a general education teacher to arrive and asserts that the student's Physical Science teacher filled the required position. The district also contends that the school psychologist assumed the role of LEA representative for the meeting.

Investigative Findings

According to the Notice of Team Meeting form for the September 17, 2018 IEP team meeting, the following individuals would be in attendance:

- the building principal
- the special education teacher of the student who would also assume the role of "an individual to interpret the instructional implications of evaluation results,"
- the student
- the school counselor

The notice of meeting form also indicated that a regular education teacher of the student would be a "mandatory" attendee at the IEP team meeting, but the form did not specify which of the student's general education teachers would be present.

The IEP Team Member Participation page for the student's September 17, 2018 IEP shows that the following individuals were present:

- the special education teacher of the student, who also assumed the role of "an individual who can interpret evaluation results"
- the school psychologist who acted as the agency representative
- the student's physical science teacher
- the student's mother

The notice of meeting form indicated that one purpose of the meeting was to "develop post secondary transition services." The notice of meeting form states that the student, who was age 14 at the time of the meeting, would be in attendance. The parent was presented with and signed the notice of meeting form at the meeting on September 17, 2018 and waived her right to 10-day prior written notice regarding the scheduling of the meeting.

According to the district, the student was formally invited to the meeting by the special education teacher. In a telephone conversation with the investigator on June 17, 2018, the parent indicated that she had not wanted the student to be involved in the IEP team meeting fearing that it would be contentious. However, the student did complete a "Student Post-Secondary Transition Interview" which provided input for the annual review of his IEP.

At no time during the meeting or prior to the meeting was the parent asked to waive participation of any IEP team member.

The school psychologist who participated in the September 17, 2018 IEP team meeting is licensed by the Kansas State Board of Education in the following areas:

- Adaptive Special Education PRK-12
- Physical Education PRK-12
- School Psychologist PRK-12

The school psychologist is, according to the district, contracted to serve as a school representative in the absence of the principal or other administrator and has the authority to commit resources.

The investigator spoke with the school psychologist who confirmed that she was asked to participate in the IEP team meeting and serve as the agency representative when it was determined that the building principal was not in the building and could not attend

the meeting. The school psychologist also stated that, while he arrived late and the start of the actual IEP team meeting was delayed, the student's Physical Science teacher was present and provided input regarding the student's progress in his classroom. The Physical Science teacher also offered his opinion regarding the provision of paraeducator support for the student noting that the student would "benefit" from that service. The school psychologist has no recollection of any review of input from any of the student's other general education teachers at the meeting although the district asserts that the special education teacher had contacted each of the student's teachers by email or telephone prior to the meeting. The school psychologist also stated that she did not hear the special education teacher tell the parent that services to the student would cease if the parent did not "sign off on" the IEP but acknowledges that she was not present for all discussion between the parent and the special education teacher.

Summary and Conclusions

The district asserts that all required IEP team participants were present for the September 17, 2018 IEP annual review meeting. Two of the attendees listed on the Notice of Meeting form, which was first provided to the parent on the day of the meeting, were ***not*** present. One, the counselor was not a required team member and therefore did not have to be present. The notice of meeting form indicated that the principal would attend, but his position was filled by another qualified individual.

At no time prior to or during the annual IEP review was the parent asked to waive participation of any IEP team member.

There ***was*** a period of time on September 17, 2018 when all required positions were filled. The student's mother was in attendance. The student's special education teacher was present at the meeting; she also assumed the role of "an individual to interpret the instructional implications of evaluation results." The school psychologist took on the role of school representative and met the individual qualifications necessary to do so including having the ability to commit district resources. The student's Physical Science teacher arrived at the meeting approximately 25 minutes after the scheduled start time and provided information regarding the student's classroom performance and need for paraeducator support before returning to his classroom. While the student was not present at the meeting, there is evidence to indicate that he provided input with regard to transition planning.

However, not all roles were filled when, at the designated meeting start time of 9:15 AM, the student's mother and his special education teacher waited for other required team members to arrive. While waiting, a discussion of possible changes to the IEP was initiated by the special education teacher. When the parent indicated that she was seeking paraeducator support for the student, the special education teacher stopped discussion and attempted to locate other required participants. The school psychologist

arrived and assumed the role of school representative when it became clear the principal was unavailable, but the parent was not informed that the school psychologist would be assuming the role of district representative in lieu of the principal. The school psychologist had been given no advance notice that she would be attending the student's IEP team meeting in the role of district representative and had no opportunity to prepare for participation.

Further discussion of the parent's request for paraeducator support for the student was conducted with only three people present, and one of those individuals – the school psychologist – acknowledged to the parent that she had not worked with the student for two years.

According to the district the annual review meeting officially started once a general education teacher joined the group. He attended briefly, offering his opinion on the student's need for paraeducator support, and then left to return to his classroom. The team did not review the student's IEP or discuss goals while the general education teacher was present, and discussion of the need for paraeducator support continued after the general education teacher returned to his classroom.

There is no evidence to support the district's contention that input from the student's other general education teachers regarding the student's overall performance was considered. Certainly, none of the student's 7 general education teachers except the student's Physical Science teacher provided input regarding the student's need for paraeducator support since the topic had not been raised by the parent until she arrived at the meeting. The parent was not asked to waive the participation of the student's general education teachers for all or part of the IEP annual review meeting.

The decision to reject the parent's request for paraeducator support was made by two district staff members – the special education teacher and the school psychologist (who had not worked with the student for two years). The one general education teacher who provided input into the question stated that he thought that the student would benefit from paraeducator support.

The drafters of the federal laws envisioned a process wherein decisions about services to special education students are made by a group of individuals who meet at an appointed time, who are familiar with the student, who carefully consider and value the input of multiple sources, and who are committed to developing a plan that truly addresses the needs demonstrated by the student. The meeting in question does not, in the opinion of the investigator, meet the drafters' expectations of a collaborative, considered process.

The parent had a reasonable expectation that her son's IEP annual review meeting would begin at the time scheduled, that the participants listed on the notice of meeting would be in attendance, that a general education teacher would be present for more

than a brief portion of the meeting, that decisions would be made based on input from multiple sources familiar with the needs of the student, and that district staff would give thoughtful consideration to her request with no pressure to make decisions under threat that all services to her child would be stopped unless she agreed to the district's proposal for services.

When it first became apparent to the special education teacher that not all the required participants were available at the scheduled time for the IEP team meeting, and after the student's mother asserted her intent to ask for paraeducator support for the student, the district had the option to reschedule the meeting to ensure that meaningful discussion of that request could occur. Nothing prohibited the district from discussing the option of extending the student's current IEP until another meeting could be scheduled or from seeking consensus on some portions of the IEP while tabling discussion of other elements until additional information could be brought to the table. In the opinion of the investigator, any of these options would have given the parents a better sense that the student's mother's request had been given appropriate consideration.

All of the required IEP team participants were assembled for only a brief time on September 17, 2018. Not all required participants were present for discussion of changes to the student's IEP, and not all were present when final decisions regarding services to the student were made. The parent was never asked for nor did she give consent to excuse any required participant from all or a portion of the meeting. Because the IEP annual review meeting of September 17, 2018 was not conducted by a properly constituted IEP team, and because the parent did not agree in writing that any team member's presence at the meeting was not necessary because that member's area of the curriculum or related services was not being discussed, and did not give written consent for any required team member (specifically a general education teacher) to be excused from a portion of the meeting, a violation of special education laws and regulations is established on this issue.

Issue Two: The district failed to appropriately consider the parent's request for paraprofessional support for the student and did not afford the parent proper notice as to why the requested service was not provided.

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.

Prior Written Notice is also required when the school refuses a parent's request to initiate or change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services (FAPE) to the child. (See K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a)(2).)

The Kansas State Department of Education (KSDE) has determined that, unless there is an unusual circumstance, 15 school days is a reasonable time for providing parents with a Prior Written Notice of the district's proposal to conduct an evaluation or the district's refusal to conduct an evaluation. (See KSDE Memo, "Reasonable Time" to respond to parent request for evaluation, January 8, 2002.) KSDE also applies this same standard with regard to any parent request related to identification, evaluation, placement, or the provision of FAPE. Accordingly, unless there is an unusual circumstance, districts must provide parents with a Prior Written Notice within 15 school days in response to any parent request regarding identification, evaluation, placement or the provision of FAPE.

Parent's Position

According to the parent, she had decided to ask for paraprofessional support for the student at the beginning of a scheduled IEP review meeting on September 17, 2018.

The parents provided the following summary of that meeting:

The student's mother states that she told the special education teacher that she wanted to request paraprofessional support for the student in those classes where he seemed to be struggling most. The special education teacher stated that the student was not currently receiving support from a paraprofessional, and the student's mother asserts that she then reiterated her request for paraprofessional support for the upcoming IEP period.

According to the student's mother, the special education teacher pulled up the student's class schedule on her laptop and told the parent that no paraprofessionals were currently assigned to support any of the student's classes. The student's mother asserts that she again indicated that she wanted paraprofessional support for the student, and the special education teacher stopped the meeting in order to seek other IEP team members.

When the school psychologist (who was serving as the agency representative at the meeting) arrived, the special education teacher reportedly told the school psychologist that the student's mother was requesting paraprofessional support for the student. At the request of the school psychologist, the student's mother explained her reasons for the request. When the student's Physical Science teacher arrived, the special education teacher asked him if he felt the student would benefit from paraprofessional support. According to the student's mother, the general education teacher stated that

the student lacked focus and indicated that a paraprofessional would probably be beneficial.

The parent asserts that there was no further discussion regarding the provision of paraprofessional support, and states that the special education teacher told the student's mother that unless she "signed the IEP," then all support for the student would be ended. The student's mother contends that she felt that she had no option but to sign the IEP, but the following day she wrote an email to the Superintendent to request a follow up meeting. According to the parent, the Superintendent referred her to the Director of Special Education.

The parent contends that the district neither provided paraprofessional support to the student after the September 17, 2018 IEP team meeting nor provided the parents with prior written notice of the district's refusal to provide that support.

District's Position

The district asserts that the IEP team considered the student's mother's request for paraeducator services for the student but opted to make no changes to the services that were being provided under the student's previous IEP. The district further contends that the student's mother was provided with prior written notice which reflected the team consideration.

Investigative Findings

A form outlining a "Summary of Student Needs" was completed at the end of the 2017-18 school year. That form shows that over half of the student's general education teachers had stated that there were a number of situations where there were things the "student cannot do and needs para assistance with." The student's teachers had provided feedback indicating that the student would benefit from support from a paraprofessional to help keep him on task, to maintain focus, and to keep him safe when angry. The district provided no evidence to show that these comments were considered at the September 17, 2018 annual IEP team meeting.

The school psychologist confirmed in a telephone conversation with the investigator on May 30, 2019 that when she arrived at the meeting she learned that the parent was requesting paraeducator support for the student. According to the school psychologist, the official start of the IEP meeting was delayed pending the arrival of the student's Physical Science teacher. Once he was present, he was asked whether the student was making progress in his classroom and whether the student would "benefit" from paraeducator support. According to the school psychologist, the general education teacher indicated that the student was making progress but could probably benefit from paraeducator support. It is the recollection of the school psychologist that there was discussion about the necessity of adding paraeducator support at the time of the meeting, but ultimately it was determined that the student's progress would be

monitored and the need for additional support would be reconsidered at a later time if the student did not continue to progress.

According to a Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent form provided by the district, "Adding para support was discussed but rejected. The team discussed the option of adding para support at a later time if academic progress is affected by off task behavior." The prior written notice form stated that IEP goals were updated "based on current data." The district proposed providing the student with "the same services as on his previous IEP. He will continue to check in and out with a special education person 10 min per day (sic) before and after school. He will continue to be enrolled in a special education AEP Class." At the end of the meeting on September 17, 2018, the student's mother gave her written consent for the actions proposed by the district by signing a prior written notice form.

In the May 30, 2019 telephone conference with the investigator, the school psychologist stated that she believed that the student's mother was satisfied with the outcome of the meeting and in agreement with the team decision to monitor the student's progress before determining whether paraeducator support in his general education classrooms was necessary.

However, the student's mother was clearly not comfortable with the outcome of the meeting as evidenced by an email she sent to the Superintendent of Schools on September 18, 2018 requesting a meeting with him to discuss her concerns regarding the special education services that were being provided to the student. The superintendent responded via email on September 18, 2018, indicating he would be "glad to meet" with the parent but would likely refer her to "the teacher or our Special Services Director." The parent sent a follow-up email to the superintendent on the same date stating that the IEP team meeting of the previous day "did not go well. I ended up signing the papers just so his services could continue but, I am not happy with the circumstances of how the meeting was ran (sic)." On October 1, 2018, the superintendent sent an email to the student's mother to verify that the Director of Special Education had contacted her to address her concerns. The student's mother responded on October 1, 2018, confirming that the Director of Special Education had contacted her.

An IEP team meeting was held on October 29, 2018 with the student's mother, the director, the student's special education teacher, the building principal, and three of the student's general education teachers present. Another IEP team meeting was held on November 1, 2018. The student, his mother, his special education teacher, the building principal, the director, a representative from Project Stay, and the student's Physical Science teacher were present at that meeting.

In preparation for the November 1, 2018 IEP team meeting, two of the student's general education teachers completed a form providing information regarding the student's performance. According to the report completed by the student's PE teacher dated October 31, 2018, "without para support in the class I struggle to meet the needs of the entire class" because the student "starts class refusing to do activities each day."

Summary and Conclusions

The student's mother was, on the day of the September 17, 2018 IEP team meeting, provided with prior written notice stating that the team had considered and rejected the provision of paraeducator support for the student and had decided to monitor the student's progress while continuing to provide the same special education services to the student that he had been receiving under his previous IEP. Although parent consent is not required when an IEP team refuses to adopt a parent's proposal, this prior written notice did request that the parent give consent. While the student's mother subsequently contacted the district superintendent to express her displeasure with the conduct of the meeting, she gave her written consent for the district's proposed action thereby acknowledging that the provision of paraeducator support for the student had been considered and rejected, and that she had received notice of that rejection. While the parent asserts that she signed the prior notice form under duress believing that services to the student would otherwise be discontinued, the investigator was unable to confirm that the district had made that assertion. Additional meetings were held to address the concerns expressed by the student's mother including the student's need for paraeducator support. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

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

- 34 CRF 300.321, which specifies required participants in an IEP team meeting, and
- 34 C.F.R. 300.321(e), which requires, that if a required member of the IEP team is to be excused from all or part of an IEP team meeting, districts must first obtain: (1) the informed written consent of the parent if a required member of an IEP team is to be excused from all or part of an IEP team meeting when the member's area of the curriculum or related services is being discussed, and a written statement from the required member providing input into the development of the IEP prior to the meeting.; or (2) the written agreement of the parent that the team member's attendance is not necessary because the members area of the curriculum or related services is not being modified or discussed

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

1) Submit, within 15 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 34 C.F.R. 321(e) by requiring all required IEP team members to participate in the entirety of every IEP team meeting unless the parent has either: (1) agreed in writing that the required member's attendance at the meeting is not necessary because that member' area of the curriculum or related services is not being modified or discussed, or given informed written consent for a required team member to be absent for all or part of the meeting, and that member has submitted, in writing to the parent and to the IEP team, input into the development of the IEP prior to the meeting.

2) Within 20 days of the date of this report, USD #___ shall provide to SETS a plan for the training of all district special education staff regarding the requirements of 34 C.F.R. 320 and 34 C.F.R. 320(e) specified above.

3) Within 5 days of the training specified above under Item 2, USD #___ shall provide to SETS evidence that the training has been completed.

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 APRIL 10, 2019

DATE OF REPORT: May 10, 2019

This report is in response to a complaint filed with our office by _____, mother, and _____, grandparent, on behalf of _____. In the remainder of this report, _____ will be referred to as "the student", _____ will be referred to as "the parent", and _____ will be referred to as the "grandparent." When referring to both the parent and grandparent, the term "the family" will be used. The complaint was received by the Kansas State Department of Education on April 10, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint which ends on May 10, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent and the grandparent by telephone on April 29, 2019 as part of the investigation process.

USD #___ staff were interviewed by telephone on April 30, 2019. The following staff participated in the interview:

_____, Director of Special Education
_____, _____ High School (_HS) Principal
_____, Intellectual Disability Teacher at _HS
_____, Interrelated Special Education Teacher at _HS

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by both parties:

- Individualized Education Program (IEP) dated February 1, 2018
- IEP dated January 25, 2019
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated January 25, 2019
- IEP Goal Progress Report for school year 2018-19

- 2018-19 School Calendar for USD #___
- Reevaluation Not Needed Agreement Form dated February 7, 2017
- Speech Language for the Day dated April 1, 2019 written by _____, Speech/Language Pathologist (SLP)
- Speech-Language Daily Summary dated February 18 – March 15, 2019
- Medicaid Service Log Records for _____ dated February 11 – April 15, 2019
- Letter to Parent dated January 2019 written by _____, Assistant Director of Special Education
- Response to the allegations written by _____ to the Complaint Investigator dated April 23, 2019
- Response to the allegations written by _____ to the Kansas Department of Education dated April 29, 2019

Background Information

This investigation involves a 15-year-old male who is enrolled in the 9th grade at _____ High School in USD #___ during the 2018-19 school year. The student has received special education and related services in USD #___ since kindergarten. The student's most recent reevaluation for special education was waived through a mutual agreement between the parent and USD #___ on October 10, 2017. The student is eligible for special education and related services due to the exceptionality of Autism

Issues

The complainant raised three issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 10, 2018.

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 services to the student during the 2018-19 school year.

Findings:

The family reported the student did not receive the speech and language therapy services required by the student's IEP during the 2018-19 school year. The parent reported the district did not make her aware that the services were not being provided until she received a letter from Ms. _____ in January 2019.

Ms. _____ reported USD #___ was unable to fill all of the SLP openings for the 2018-19 school year. In January 2019, parents were informed of the shortage of SLPs in the district and the lack of services from September 2018 through January 2019. The letter indicated an outside agency was being contracted to provide the speech and language services and that compensatory services were going to be offered. Parents were instructed to contact the Special Education Office to request compensatory services; however, no deadline date to make this request was specified in the letter.

The February 1, 2018 IEP required direct speech language services for 20-minutes for one-day per week. The services in this IEP had a start date of August 17, 2018 for the 2018-19 school year. The January 25, 2019 IEP increased the amount of speech and language services and requires direct speech language services for 20-minutes for two-days per week. The services in this IEP had an initiation date of January 25, 2019.

Mr. _____ indicated the addition of the extra speech language services in January 25, 2019 was to offer the student compensatory services for the services missed earlier in the school year; however, that rationale is not found in either the IEP or the PWN which showed parental consent was obtained on January 25, 2019.

The Medicaid Service Log Records showed that Ms. _____ was the SLP who worked with the student. Between February 22, 2019 and April 15, 2019, Ms. _____ provided a total of 170 minutes of speech and language services to the student.

The 2018-19 school year calendar showed the first day of classes as August 16, 2018 and the last day of classes as May 21, 2019.

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 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. 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.

In this case, the student's IEP dated February 1, 2018 required 20-minutes one-day per week of speech language services beginning on August 17, 2018. On January 25, 2019, the student's IEP was reviewed and revised to include 20-minutes two-times per week of speech language services. USD #___ acknowledged that speech language services were not provided to the student for the period of time beginning on August 17, 2018 and ending on February 22, 2019 when Ms. _____ began working with the student. Documentation shows a total of 170 minutes of speech language services were provided to the student between February 22, 2019 and April 15, 2019.

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

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide receive the speech and language services in accordance with the IEPs of multiple students in the district due to the lack of qualified staff during the 2018-19 school year.

> **ISSUE TWO:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide IEP goal progress reports during the 2018-19 school year.

Findings:

The family reported USD #___ has not provided IEP goal progress reports during the 2018-19 school year. The parent indicated she remembers receiving copies of IEP Progress Reports in the past; however, she does not remember receiving them at all during the 2018-19 school year until she requested them just prior to filing this complaint.

The 2018-19 School Year Calendar for USD #___ shows first quarter ended on October 11, 2018. Second quarter ended on December 19, 2018 and third quarter ended on March 7, 2019.

The student had two IEPs in effect during the 2018-19 school year. The first IEP was dated February 1, 2018 and was in effect during first quarter, second

quarter, and a portion of third quarter. The second IEP was dated January 25, 2019 and was in effect during a portion of third quarter. Both IEPs require IEP Goal Progress Reports be provided to the parent at least one time each quarter.

The February 1, 2018 IEP showed IEP Goal Progress Reports written on March 7, May 15, and December 20, 2018. The January 25, 2019 IEP showed IEP Goal Progress Reports written on March 21, 2019. No IEP Goal Progress Reports were provided for Goal 3 which address communication skills during first, second, or third quarters of the 2018-19 school year.

Mr. _____ acknowledged that multiple students in his classroom were not provided with IEP Goal Progress Report for the first quarter of the 2018-19 school year. Mr. _____ reported that subsequent IEP Goal Progress reports were sent home with students and perhaps the students lost the reports and that was the reason the parents did not remember getting the reports.

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. Federal regulations at 34 C.F.R. 300.17 define the term “free appropriate public education” in part as special education and related services that are provided in conformity with the IEP. Federal regulations, at C.F.R. 34 300.320(a)(3), further require that the IEP must include a description of when periodic reports of the progress the student is making towards the annual goals will be provided. Thus, a school district must provide to the parent periodic reports on the annual goals in conformity with the reporting schedule in the IEP.

In this case, documentation and interviews found IEP Goal Progress Reports were required to be provided to the parent at least quarterly as required by the IEP. In this case, USD #___ acknowledged and documentation shows IEP Goal Progress Reports were not provided for first quarter of the 2018-19 school year. In addition, IEP Goal Progress Reports were not provided at all for Goal 3 in both of the student’s IEPs in effect during the time period covered by the complaint investigation. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to provide the parent with periodic reviews of the student’s progress towards annual goals in conformity with the IEP is substantiated.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs.

> **ISSUE THREE:** 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 enable the student to make progress during the past 12 months.

Findings:

The family indicated the student has made little to no progress this school year. The present levels of performance remained essentially the same from last year to this year and the student's IEP goals have not changed substantially. The family believes this is because the student is spending the majority of his school day coloring worksheets or doing "chores" around the school such as recycling, cleaning tables and picking up pine cones.

The findings of Issue One and Two are incorporated herein by reference.

Documentation found the triennial reevaluation of the student was waived through a mutual agreement between the parent and USD #___ in 2017 when the student was in 8th grade. No documentation was provided to indicate the last time the student was reevaluated.

A comparison of the Present Level of Academic Achievement and Functional Performance (PLAAFP) statements from the February 1, 2018 and January 25, 2019 IEPs found the description of all areas except communication had been updated to reflect current information. The description of communication was copied word for word from last year's IEP to the current IEP.

The February 1, 2018 IEP reflects weaknesses in reading, math and communication. This IEP included the following three goals:

- Goal 1 was to read a first grade passage independently with 80% accuracy and answer questions related to the central idea with 80% accuracy. The baseline showed the student was reading at the kindergarten grade level with 87% accuracy and able to answer questions with 89% accuracy.

- Goal 2 was to score 80% accuracy on 1st grade level math concepts. The baseline showed the student could add and subtract two-digit numbers with and without decimals using a calculator with 93% accuracy. The baseline showed the student had completed SRA Math Level A, Book 1 with 85% accuracy and scored 80% accuracy on the Placement Test for Level B.
- Goals 3 was to use 3-5 word phrases or sentences in structured activities with 80% accuracy using minimal visual, verbal, or tactile cues. The baseline showed the student was using 4-5 word phrases 80% of the time with minimal visual cues and modeling.

The January 25, 2019 IEP reflects weaknesses in reading, math and communication skills. The IEP includes the following three goals:

- Goal 1 is copied from the previous IEP with the only difference being increasing the accuracy from 80% to 90%. The baseline was copied from the previous IEP.
- Goal 2 is copied from the previous IEP with the only difference increasing the accuracy level to from 80% to 90% and increasing the grade level from 1st to 2nd grade level math concepts. The baseline showed the student could add and subtract two digit numbers without decimals with 90% accuracy which is lower than his previous baseline.
- Goal 3 is copied word for word from the previous IEP.

Mr. _____ reported that the parent attended the student's IEP team meeting on January 25, 2019 and participated in the review and revision of the IEP. Mr. _____ acknowledged that the classroom schedule does include time for students to participate in work experiences but reported math and reading are taught daily.

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.

In this case, it appears that the annual goals for the student in the January 25, 2019 IEP are essentially the same as in the previous IEP. The baseline data either does not exist or, in the case of math, shows regression and does not support the minor changes in the annual goals in the January 25, 2019 IEP and thus provide the student with the opportunity to meet challenging objectives. With the most recent reevaluation being waived, it is also incredibly difficult to determine if the student's IEP is reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances*.

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

It is noted that three other parents of students with disabilities have filed complaints against USD #___ for this same issue. During the investigations of each of these allegations, a pattern of repeatedly waiving the triennial reevaluations of the student and a practice of essentially copying the PLAAFP and IEP goals from year to year was found. Based on the foregoing, a systemic violation of special education laws and regulations by failing to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. 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 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. 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.

The findings of this investigation show USD #___ failed to provide the speech and language services required by the student's IEPs during the 2018-19 school year.

The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide speech and language services in accordance with the IEPs of multiple students in the district due to the lack of qualified staff during the 2018-19 school year.

B. Federal regulations, at C.F.R. 34 300.320(a)(3), require public agencies to include in the IEP a description of when periodic progress reports will be provided, and the public agency must provide such progress reports in conformity with the IEP.

The findings of this investigation show the parent was not provided IEP Goal Progress Reports at least quarterly, as required by the reporting schedule in the IEP, during the 2018-19 school year.

The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs during the 2018-19 school year.

C. 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 reading, math, and communication skills with the most recent evaluation in these areas

being at least 6 years old. In addition, the PLAAFP and goals during the past 12 months have remained essentially the same over time.

The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to use current information to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

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 and Kansas regulations at 34 C.F.R. 300.101,34 C.F.R. 300.17, and K.A.R. 91-40-2(b)(1) by ensuring a free appropriate public education (FAPE) is made available to each child with a disability residing in its jurisdiction and by ensuring that special education and related services are provided in conformity with each child's IEP.

   b) Comply with C.F.R. 34 300.320(a)(3), by ensuring that periodic reports on progress towards annual goals will be provided to all parents of children with disabilities in conformity with each child's IEP.

   c) 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.

2. No later than May 30, 2019, USD #___ shall make a written offer of compensatory speech and language services to the parent, which shall consist of no less than 830 minutes of services as the student was only provided with 170 minutes of speech and language services. The school calendar shows the student should have been provided speech language services for 400 minutes (20-minutes per week for a total of 20 weeks) between the beginning of the school year and the January 25, 2019 IEP team meeting and should have been provided another 600 minutes (40-minutes per week for a total of 15 weeks) between January 25 and the

end of the school year. USD #___ shall send a copy of this offer to SETS on the same day it is sent to the parent. The parent can accept all, part, or none of the compensatory services offered and has 15 school days from the date she receives the offer to notify the district of her decision. Within 15 school days of making this written offer to the parent, USD #___ shall notify SETS, in writing, of the parent's decision regarding the offer of compensatory services. If the parent accepts all or some of the compensatory services, USD #___ shall schedule those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS. USD #___ shall notify the parent and SETS when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, USD #___ must notify SETS in writing of the reason and propose a schedule to SETS and the parent to finish the compensatory services.

3. No later than May 30, 2019, USD #___ will identify all students in the district who did not receive the speech and language services required by their IEPs during the 2018-19 school year. USD #___ will then provide a written offer of compensatory speech and language 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 school year. USD #___ shall send a copy of this offer to SETS on the same day it is sent to each parent. The parents can accept all, part, or none of the compensatory services offered and has 15 school days from the date they receive 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 parents accept all or some of the compensatory services, USD #___ shall schedule those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS. When scheduling those services, USD #___ must consider whether the services need to be provided during the summer in order for the student to receive FAPE. USD #___ shall notify the parent and SETS when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, USD #___ must notify SETS in writing of the reason and propose a schedule to SETS and the parents to finish the compensatory services.

4. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices in regards to providing coverage for required IEP services due to staff absences or shortages. As a result of this review, USD #___ will create new written policies and procedures to ensure that steps are taken to 1) identify and resolve the lack of appropriate staff, 2) determine the amount of compensatory services that are owed to each student in order to provide FAPE, and 3) inform parents in a timely manner of the lack of services and the plan for compensating for these missed services. This new procedure will include active administrative oversight and monitoring. No later than August 30, 2019, 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 teachers and administrators in the district and implement the procedure for the 2019-20 school year. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

5. It is noted that correction of the previous individual and systemic noncompliance related to reporting progress towards IEP goals cannot be achieved for this student or any of the other students in Mr. _____ classroom. However, the IEP goal progress for 1st Quarter of the 2018-19 school year as well as for any missing quarters of the 2018–19 school year for annual goals must still be documented for the student's educational record. No later than May 30, 2019, USD #___ will provide IEP Goal Progress Reports for each quarter for all annual goals for the 2018-19 school year for all students in Mr. _____ classroom to their parents and SETS.

6. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to IEP Goal Progress Reports. As a result of this review, USD #___ will create new written policies and procedures to ensure that special education and general education staff are a) measuring progress toward meeting annual IEP goals in conformity with each IEP, and b) providing periodic IEP Goal Progress Reports to parents in conformity with each IEP. This new procedure will describe the responsibilities of all special education and general education teachers and include active administrative oversight and monitoring. No later than August 30, 2019, 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 and general education teachers in the district as well as the

relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-20 school year. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

7. No later than September 30, 2019, USD #___ will follow appropriate procedures to conduct a 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 this reevaluation to SETS.

8. No later than October 4, 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 11, 2019, USD #___ will provide appropriate documentation of this IEP team meeting to SETS.

9. No later than September 30, 2019, USD #___ shall administratively review all students' special education records to identify those students whose triennial reevaluation was waived twice consecutively. USD #___ shall then administratively review the two most recent IEPs of those identified students to determine if their IEPs contain PLAAFP statements and IEP goals that have remained essentially the same over time. For any student identified, USD #___ shall then reconvene the IEP team no later than October 30, 2019 to conduct a reevaluation of the student following compliance requirements in 34 C.F.R. 300.304 through 34 C.F.R. 300.311. No later than 60 school days, the IEP team of each student who was evaluated shall review and revise the IEP in light of the reevaluation results. USD #___ shall provide appropriate documentation of the reevaluation and IEP team meetings to SETS within one week of the IEP team meeting for each student.

10. No later than October 1, 2019, USD #___ will provide training to any staff member at _____ High School who may serve as an IEP team member regarding their roles and responsibilities in conducting a triennial reevaluation and developing an IEP in compliance with all requirements of the IDEA. 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 October 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

11. No later than October 1, 2019, USD #___ will offer training on parent's rights and responsibilities, the IEP process, and IEP development to all

parents of students with exceptionalities in the district. USD#___ will contact Families Together, the Parent Information and Training Center for Kansas, to request a Families Together staff member conduct the training. No later than October 7, 2019, USD #___ will provide to SETS documentation of the notice of training sent to parents, the date of the training, the person(s) who conducted the training, the content of the training as well as the person(s) who attended the training.

12. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to waiving the triennial reevaluations of students with disabilities. As a result of this review, USD #___ will create new written policies and procedures to ensure that IEP teams have current information regarding the student when reviewing and revising the IEP. This new procedure will include guidance on when a triennial reevaluation can be waived and include active administrative oversight and monitoring of reevaluations and annual IEPs. No later than August 30, 2019, 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 and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-20 school year which will ensure that all students with disabilities in USD #___ will have IEPs reasonably calculated to enable the student to make progress within one year of the identified systemic noncompliance. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

13. 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.

_____

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 10, 2019

DATE OF REPORT: May 10, 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 was received by the Kansas State Department of Education on April 10, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint which ends on May 10, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 28, 2019 as part of the investigation process.

USD #___ staff were interviewed by telephone on April 30, 2019. The following staff participated in the interview:

_____, Director of Special Education
_____, _____ High School (_HS) Principal
_____ _____, Intellectual Disability Teacher at _HS
_____, Interrelated Special Education Teacher at _HS

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by both parties:

- Staffing Notes dated May 2, 2017 written by school staff
- Individualized Education Program (IEP) Amendment Between Annual IEP Meetings dated May 2, 2019
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated May 2, 2019
- IEP dated September 26, 2017
- IEP dated September 21, 2018

- PWN dated September 21, 2018
- Reevaluation Not Needed Agreement Form dated September 21, 2018
- Evaluation/Reevaluation Eligibility Report dated September 24, 2012
- IEP Goal Progress Report for school year 2018-19
- 2018-19 School Calendar for USD #___
- 2018-19 AIMSweb Progress Improvement Report for Grade 2: Math Concepts and Applications
- 2018-19 AIMSweb Progress Improvement Report for Grade 2: Math Computation
- 2018-19 AIMSweb Progress Improvement Report for Grade 2: Reading – Standard Progress Monitor Passages
- 2017-18 MyLEXIA Reading Progress Reports for Core5 Level 1 through Core5 Level 6
- 2018-19 MyLEXIA Reading Progress Reports for Core5 Level 6 through Core5 Level 9
- Job Postings for Paraprofessionals on Frontline Education dated March 6, 2018, , July 23, 2018, and October 31, 2018
- Email dated September 19, 2018 written by Ms. _____ to _____, Executive Director of the _____ County Community Development Disability Organization (CDDO)
- Response to the allegations written by Ms. _____ to the Complaint Investigator dated April 23, 2019
- Response to the allegations written by Ms. _____ to the Kansas Department of Education dated April 29, 2019
- Email dated April 29, 2019 written by the parent to the Complaint Investigator
- Email dated May 6, 2019 written by the parent to the Complaint Investigator

Background Information

This investigation involves a 15-year-old male who is enrolled in the 10th grade at _____ High School in USD #___ during the 2018-19 school year. The student has received special education and related services in USD #___ since the age of three. The student's most recent reevaluation for special education was waived by mutual agreement between the parent and USD #___ on September 21, 2018. The student is eligible for special education and related services due to the exceptionality of Intellectual Disability.

Issues

The complainant raised six issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 10, 2018.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to provide the student the opportunity to participate in assemblies due to a lack of school personnel during the 2018-19 school year.

Findings:

The parent reported the student and his classmates in Mr. _____'s classroom were excluded from the _HS Pep Assembly on September 28, 2018 because one of the paraprofessionals was absent. The parent noted this was particularly troubling because the student and his classmates in the special education classroom had folded the programs for the football game that was celebrated at that pep assembly. The parent also reported that when the student and his classmates do have the opportunity to attend assemblies, they are seated at the back and out of the way of the other students.

Ms. _____ and Ms. _____ acknowledge the student did not attend the September 28, 2018 NHS pep assembly because there was a substitute teacher in the special education classroom and one of the paraprofessionals was absent that day. The substitute teacher was aware of the assembly but chose to keep all of her assigned students in the classroom because one of the classroom paraprofessionals was absent. However, both Ms. _____ and Ms. _____ emphasized that the administrative expectation is for all of the students in the special education classrooms at _HS to attend all assemblies.

Ms. _____ reported there were Pep Assemblies held on September 7, 2018, September 28, 2018, December 14, 2018, February 14, 2019, and March 15, 2019. The students in Mr. _____'s classroom, including the student, attended all of the pep assemblies with the exception of the one held on September 28, 2018.

Mr. _____ reported that the students in his class have direct support during assemblies. In the auditorium, the class is seated towards the back two rows of the room in case any of the students with sensory concerns gets overstimulated

and needs to leave to calm down. In the gym, the class sits together on the front row for the same reason.

The IEP in effect on September 28, 2019 is dated September 21, 2018. That IEP showed that the student has the opportunity to participate in field trips, assemblies, special events, etc. Contrary to Mr. _____'s statement that the students in his class have direct support during assemblies, this student's IEP does not provide any supplementary aids or supports to enable the student to participate in extracurricular and other nonacademic activities.

Federal regulations, at 34 C.F.R. 300.107, require public agencies 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. Federal regulations further provide, at 34 C.F.R. 300.117:

> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency 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 participate in nonacademic settings.

In this case, the student and the other students in Mr. _____'s classroom were not allowed to participate in the _HS pep assembly with their peers on September 28, 2018 due to a lack of staff. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to ensure the student had the opportunity to participate in the assembly is substantiated.

> **ISSUE TWO:** 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 special education support in the general education math and elective classes due to a lack of school personnel during the 2018-19 school year.

Findings:

The parent reported the student is supposed to attend a cooking class and math class in a different classroom but often misses these classes because a paraprofessional is not available to support him in those classes. The parent indicated there are paraprofessional positions that remain unfilled and this is compounded when one of the paraprofessionals is absent and no substitute is provided.

The findings from Issue One are incorporated herein by reference.

Ms. _____ reported USD #___ was unable to fill all of the paraprofessional openings for the 2018-19 school year. Documentation shows employment ads were placed on the web-based Frontline Education system on March 6, 2018, July 23, 2018, and October 31, 2018. In addition, Ms. _____ emailed job posting information to _____, Executive Director of the _____ County Community Development Disability Organization (CDDO), in an effort to make a larger audience aware of the opening.

The September 26, 2017 IEP was in effect at the beginning of the 2018-19 school year. In the Anticipated Services section of this IEP it states the student will have an art class in the general education setting with paraprofessional support. However, in the Supplementary Aids section of this IEP, no supplementary aids or supports are shown as being required for the student. All of his other classes are in the special education setting with the math and reading classes taught in the interrelated special education classroom and the remaining classes, aside from adaptive PE and related services, are taught in the IDD classroom.

Mr. _____, Ms. _____, and Ms. _____ reported that at the beginning of the 2018-19 school year, the student was enrolled in a general education cooking class with paraprofessional support, a math and reading class in the interrelated classroom, with the rest of the classes taught in the IDD classroom with the exception of adaptive PE and related services.

The September 21, 2018 IEP shows all of his classes are taught in the special education setting and does not require supplementary aids or supports. The IEP does note the student will be enrolled in special education math and reading classes. In addition, the student will receive related services for therapy needs. The transition plan in this IEP notes the student will take a cooking class.

USD #___ staff reported the student receives his math instruction through the Consumer Math course which is taught first period in the interrelated special education classroom by _____, Interrelated Special Education Teacher. According to the special education teachers and the student's attendance record, the student has been in attendance in first period with Ms. _____ every day this school year and in attendance in sixth period Culinary Essential Arts class with _____, Family and Consumer Science Teacher, with the exception of two class periods when the student was excused for an activity during the 2018-19 school year.

It is noted that the parent believes the attendance records kept by _HS are not always an accurate reflection of the student's attendance in his assigned classes. Ms. _____ reported that the special education teachers made agreements for Mr. _____ to mark all of the student's attendance for the school day despite his actually being in another special education teacher's classroom for a class period. While this practice is questionable, it does not fall under the jurisdiction of the IDEA and therefore cannot be investigated in an IDEA formal state complaint.

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 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. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as special education and related services that are provided in conformity with the IEP.

In this case, the student's IEPs dated September 26, 2017 and September 21, 2018 both required the student to attend one class in the general education setting with all other classes and related services provided in the special education setting. While USD #___ acknowledged a shortage of paraprofessionals being hired in the district, neither of the student's IEPs requires supplementary aids or services for the student. Attendance records show the student was in attendance in the math and general education classes as required by the IEP during the 2018-19 school year.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to provide special education and related services in accordance with the student's IEP is not substantiated.

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to include the required IEP team members when developing the student's IEPs during the past 12 months.

Findings:

The parent reported the student's reading teacher was not present at the IEP team meeting held on September 21, 2018. The parent indicated she "barely had anyone present." The parent believes that all teachers and staff who work with the student should participate in the development of the IEP.

The findings of Issues One and Two are incorporated herein by reference.

The September 21, 2018 IEP includes a signature page showing who participated in the IEP team meeting. The persons who attended the meeting included the student; _____, _HS Assistant Principal; _____, OT; _____, Adaptive PE Teacher; Mr. _____, Special Education Teacher; and the parents of the student. In addition, _____, the student's general education Family and Consumer Science Teacher, was in attendance.

Federal regulations, at 34 C.F.R. 300.321, require the IEP team for each student with a disability to include 1) the parents of the child; 2) not less than one regular education teacher of the child; 3) not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; 4) a representative of the public agency; 5) an individual who can interpret the instructional implications of evaluation results; 6) anyone else deemed by the parent or the school district to have knowledge or special expertise regarding the child; and, as appropriate, 7) the child with a disability.

In this case, the IEP team that met on September 21, 2018 to develop the student's annual IEP included the parents of the student; a general education teacher of the student (Ms. _____); a special education teacher of the student (Ms. _____ and Ms. _____); a representative of the school (Mr. _____); a person who can interpret instructional implications of evaluation data (Mr. _____); and the student. These persons comprise all of the required IEP team members. While the addition of the student's reading teacher to the team might have been helpful, it is not required by the IDEA. Based upon the foregoing, the allegation of a violation of state and federal regulations related IEP team membership 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 Individual Education Program (IEP), specifically by not providing specialized instruction for reading to the student during the 2018-19 school year.

Findings:

The parent reported the student has not received reading instruction as required by the IEP in order to achieve his reading goal. The student was taught reading in an interrelated reading class during 9th grade but the teacher had expressed the student did not read fast enough to keep up in that class. The parent reported the student was again assigned to this class in 10th grade but began to dislike school because he reported the teacher was mean to him and another student from Mr. _____'s class. The parent discussed this concern with Mr. _____ who suggested moving the student to his reading class in the IDD classroom. The parent indicated the student was moved to Mr. _____'s classroom and the student is now only getting 15 – 20 minutes of reading instruction daily which consists of reading the same Oklahoma Joe book over and over.

The findings of Issues One, and Two are incorporated herein by reference.

Ms. _____ reported the student received his special education reading instruction through a reading class in the interrelated special education classroom. The student received instruction using the curriculum of Multi-Sensory Reading. At the end of February / beginning of March, 2019, the student was moved from the interrelated special education classroom to the IDD classroom for reading instruction due to parent request as the parent reported that the teacher "was mean to the students."

Mr. _____ reported his reading class consists of 30 minutes of instruction using MyLEXIA and another 30 minutes of students reading in leveled books such as Oklahoma Joe which are appropriate for their instructional reading level.

The AIMSweb Progress Monitoring Improvement Report for Grade 2: Reading – Standard Progress Monitoring Passages shows probes conducted eleven times between October 1, 2018 and March 4, 2019. In addition, MyLEXIA Progress Reports for the student show the student completed Core5 Level 6 on October 1, 2018; Core4 Level 7 on December 7, 2018; Core5 Level 8 on March 19, 2019; and is currently working on Core5 Level 9 skills.

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 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. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as special education and related services that are provided in conformity with the IEP.

In this case, the student's IEP includes the frequency, location, and duration of specialized instruction to be provided to the student; however the IEP does not specify a specific amount of time that the specialized instruction will be focused on reading. Documentation and interviews found the student is receiving reading instruction in the special education setting as required by the student's IEP. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to provide special education and related services in accordance with the student's IEP is not substantiated.

> **ISSUE FIVE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately monitor IEP goal progress and provide IEP goal progress reports during the 2018-19 school year.

Findings

The parent reported USD #___ has not provided IEP goal progress reports during the 2018-19 school year. The parent indicated she remembers receiving copies of IEP Progress Reports in the past; however, she does not remember receiving them at all during the 2018-19 school year until she requested them just prior to filing this complaint. The parent believes the IEP goals for reading and math are not being monitored through any type of testing to see if progress is being made.

The findings of Issues One, Two, and Four are incorporated herein by reference

The 2018-19 School Year Calendar for USD #___ shows first quarter ended on October 11, 2018. Second quarter ended on December 19, 2018 and third quarter ended on March 7, 2019.

The student had two IEPs in effect during the 2018-19 school year. The first IEP was dated September 26, 2017 and was in effect for a portion of first quarter. The second IEP was dated September 21, 2018 and was in effect during a

portion of first quarter and all of second and third quarter. Both IEPs require IEP Goal Progress Reports be provided to the parent at least one time each quarter.

Documentation shows that no progress report for IEP goals was made for first quarter of the 2018-19 school year. The IEP Goal Progress Report for second quarter was written on December 20, 2018 and was written for third quarter on March 21, 2019. During the first, second and third quarters of the 2018-19 school year, no IEP Goal Progress Reports were provided for Goal 3 which addresses communication skills.

Goal 1 and Goal 2 on the student's IEPs address reading and math respectively. Both goals show that progress will be measured through daily assignments/quizzes and academic content probes.

The AIMSweb Progress Monitoring Improvement Report for Grade 2: Math Concepts and Applications shows probes conducted eight times between September 17, 2018, and April 15, 2019. The AIMSweb Progress Monitoring Improvement Report for Grade 2: Math Computation shows eight probes were conducted between September 17, 2018, and February 18, 2019.

Mr. _____ and Ms. _____ both indicated that math and reading instruction includes daily assignments being completed by the students in these classes.

Mr. _____ acknowledged that multiple students in his classroom were not provided with IEP Goal Progress Report for the first quarter of the 2018-19 school year. Mr. _____ reported that subsequent IEP Goal Progress reports were sent home with students and perhaps the students lost the reports and that was the reason the parents did not remember getting the reports.

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. Federal regulations at 34 C.F.R. 300.17 define the term "free appropriate public education" in part as special education and related services that are provided in conformity with the IEP. Federal regulations, at 34 C.F.R. 300.320(a)(3), further require that the IEP must include a description of how progress towards meeting the annual goals will be measured and when periodic reports of the progress will be provided. Thus, a school district must measure progress towards meeting annual goals and provide

to the parent periodic reports on that progress in conformity with the reporting schedule in the IEP.

In this case, the IEP goal progress for reading and math goals was to be measured through daily assignments/quizzes and academic skill probes. The teachers reported daily assignments for reading and math were completed and there was documentation showing both math and reading probes were done on a regular basis throughout the school year. Documentation and interviews found IEP Goal Progress Reports were required to be provided to the parent at least quarterly as required by the IEP. In this case, USD #___ acknowledged and documentation shows IEP Goal Progress Reports were not provided for first quarter of the 2018-19 school year. In addition, IEP Goal Progress Reports were not provided at all for Goal 3 in both of the student's IEPs in effect during the time period covered by the complaint investigation. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to monitor IEP goal progress and failing to provide the parent with periodic reviews of the student's progress towards annual goals in conformity with the IEP is substantiated.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs.

> **ISSUE SIX:** 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 enable the student to make progress during the past 12 months.

Findings:

The parent indicated the student has made little to no progress this school year. The present levels of performance remained essentially the same from last year to this year and the student's IEP goals have not changed substantially.

The findings of Issues One, Two, Four, and Five are incorporated herein by reference.

Documentation found the triennial reevaluation of the student was waived through a mutual agreement between the parent and USD #___ on September

21, 2018 when the student was in 10th grade. Documentation shows the previous triennial reevaluation was also waived on September 22, 2015 when the student was in 7th grade. The most recent reevaluation that addressed academic skills was conducted on September 24, 2012 when the student was in 4th grade. That evaluation showed the student was reading at the beginning 1st grade level and could complete addition problems to 18 with 80% accuracy. It is noted this skill is generally taught in 1st grade.

The Present Level of Academic Achievement and Functional Performance (PLAAFP) statements for reading, math, and communication in the September 21, 2018 IEP were copied word for word from the September 26, 2017 IEP. The only difference was the addition of a summary statement for math dated 9/18 from the current special education math teacher, _____.

The September 26, 2017 IEP reflects weaknesses in reading, math, communication, and physical endurance. This IEP included the following four goals:

- Goal 1 was to read a 2nd grade passage with 75% accuracy and answer questions related to the central idea with 85% accuracy.
- Goal 2 was to add and subtract multiple digit numbers with and without decimals with 100% accuracy using a calculator or manipulatives.
- Goal 3 was to stay on task with appropriate pragmatic skills using appropriate grade level vocabulary with adequate articulation.
- Goal 4 was to swim 25 yards with an average time of 25 seconds.

The September 21, 2018 IEP reflects weaknesses in the same four areas. The IEP included the same four goals which were copied word for word from the previous IEP.

Mr. _____ reported that the parent attended the student's IEP team meeting on September 21, 2018 and participated in the review and revision of the IEP.

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.

In this case, the annual goals for the student in the September 21, 2018 IEP are the same as in the previous IEP and thus do not provide the student with the opportunity to meet challenging objectives. It is noted that the most recent reevaluation was waived, and the most recent assessment of academic, communication, and motor occurred 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 by failing to develop an IEP reasonably calculated to enable the student to make progress during the past 12 months is substantiated.

It is noted that three other parents of students with disabilities have filed complaints against USD #___ for this same issue. During the investigations of each of these allegations, a pattern of repeatedly waiving the triennial reevaluations of the student and a practice of essentially copying the PLAAFP and IEP goals from year to year was found. Based on the foregoing, a systemic violation of special education laws and regulations by failing to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.107 and 300.117, require public agencies to 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.

   The findings of this investigation show USD #___ failed to provide the student as well as the other students in Mr. _____'s classroom with the opportunity to participate in nonacademic activities along with his nondisabled peers on September 28, 2018 due to a lack of school staff.

B. Federal regulations, at 34 C.F.R. 300.320(a)(3), require public agencies to include in the IEP a description of how IEP goal progress will be measured and when periodic progress reports will be provided, and the public agency must monitor the IEP goal progress and provide such progress reports in conformity with the IEP.

   The findings of this investigation show IEP goal progress in reading was not conducted and that the parent was not provided IEP Goal Progress Reports at least quarterly, as required by the reporting schedule in the IEP, during the 2018-19 school year.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs during the 2018-19 school year.

C. 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 reading, math, motor, communication and social skills with the most recent evaluation in

these areas being at least 6 years old. In addition, the PLAAFP statement and goals have remained essentially the same over time.

The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to use current information to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

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

1. Within 10 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. 300.107 and 300.117, by taking steps, including the provision of supplementary aids and services determined appropriate and necessary by each 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, and by ensuring that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.

   b) Comply with 34 C.F.R. 300.320(a)(3), by ensuring that IEP goals will be measured and periodic reports on progress towards annual goals will be provided to all parents of children with disabilities in conformity with each child's IEP.

   c) 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.

2. It is noted that correction of the previous individual noncompliance related to attendance at the _HS Pep Assembly on September 28, 2018 cannot be achieved for the student and the other students in Mr. _____'s classroom; however, USD #___ will review their practice of obtaining substitutes for paraprofessional absences and seek to increase the

number of possible paraprofessional substitutes available. USD #383 will also create a written procedure that outlines the steps administration and staff must take in instances of staff shortage to ensure that, despite the staff shortage, all children with disabilities still participate in nonacademic and extracurricular services and activities determined appropriate by their IEP teams. Once this procedure is created, USD #___ will inform all administration and staff of their responsibilities in carrying out this procedure. No later than August 30, 2019, USD #___ will provide SETS with documentation of the efforts to increase paraprofessional substitutes, the written procedure for ensuring participation in nonacademic and extracurricular services and activities, and evidence that the administration and staff were informed of their responsibilities in carrying out the procedure.

3. It is noted that correction of the previous individual and systemic noncompliance related to reporting progress towards IEP goals cannot be achieved for this student or any of the other students in Mr. _____'s classroom. However, the IEP goal progress for 1st Quarter of the 2018-19 school year as well as for any missing quarters of the 2018–19 school year for annual goals must still be documented for the student's educational record. No later than May 30, 2019, USD #___ will provide IEP Goal Progress Reports for each quarter for all annual goals for the 2018-19 school year for all students in Mr. _____'s classroom to their parents and SETS.

4. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to IEP Goal Progress Reports. As a result of this review, USD #___ will create new written policies and procedures to ensure that all special education and general education staff are a) measuring progress toward meeting annual IEP goals in conformity with each IEP, and b) providing periodic IEP Goal Progress Reports to parents in conformity with each IEP. This new procedure will describe the responsibilities of all special education and general education teachers and include active administrative oversight and monitoring. No later than August 30, 2019, 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 and general education teachers in the district, as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-

20 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

5. No later than September 30, 2019, USD #___ will follow appropriate procedures to conduct a 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 this reevaluation to SETS.

6. No later than October 4, 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 11, 2019, USD #___ will provide appropriate documentation of this IEP team meeting to SETS.

7. No later than September 30, 2019, USD #___ shall administratively review all students' special education records to identify those students whose triennial reevaluation was waived twice consecutively. USD #___ shall then administratively review the two most recent IEPs of those identified students to determine if their IEPs contain PLAAFP statements and IEP goals that have remained essentially the same over time. For any student identified, USD #___ shall then reconvene the IEP team no later than October 30, 2019 to conduct a reevaluation of the student following compliance requirements in 34 C.F.R. 300.304 through 34 C.F.R. 300.311. No later than 60 school days, the IEP team of each student who was evaluated shall review and revise the IEP in light of the reevaluation results. USD #___ shall provide appropriate documentation of the reevaluation and IEP team meetings to SETS within one week of the IEP team meeting for each student.

8. No later than October 1, 2019, USD #___ will provide training to any staff member at _____ High School who may serve as an IEP team member regarding their roles and responsibilities in conducting a triennial reevaluation and developing an IEP in compliance with all requirements of the IDEA. 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 October 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

9. No later than October 1, 2019, USD #___ will offer training about the IEP process and the requirements for developing an IEP to all parents of students with exceptionalities in the district. USD #___ will contact Families Together, the Parent Information and Training Center for Kansas,

to request a Families Together staff member conduct the training. No later than October 7, 2019, USD #___ will provide to Special Education and Title Services documentation of the notice of training sent to parents, the date of the training, the person(s) who conducted the training, the content of the training as well as the person(s) who attended the training.

10. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to waiving the triennial reevaluations of students with disabilities. As a result of this review, USD #___ will create new written policies and procedures to ensure that IEP teams have current information regarding the student when reviewing and revising the IEP. This new procedure will include guidance on when a triennial reevaluation can be waived and include active administrative oversight and monitoring of reevaluations and annual IEPs. No later than August 30, 2019, 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 and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-20 school year. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

11. 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.

_____

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 10, 2019

DATE OF REPORT: May 10, 2019

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 was received by the Department on April 10, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on May 10, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 27, 2019 as part of the investigation process.

USD #___ staff were interviewed by telephone on April 30, 2019. The following staff participated in the interview:

_____, Director of Special Education
_____, _____ High (_HS) School Principal
_____, Intellectual Disability Teacher at _HS
_____, Interrelated Special Education Teacher at _HS

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by both parties:

- Individualized Education Program (IEP) dated October 4, 2017
- IEP dated October 4, 2018
- Student's Weekly Lesson Plan
- Splash Math Summary Report
- Core Reading Maze Comprehension Test dated February 21, 2019
- Core Reading Maze Comprehension Test dated October 31, 2018
- Four undated Dibels Oral Reading Fluency records
- Core Reading Progress Reports dated between November 27, 2018 and March 27, 2019

- IEP Goal Progress Report for school year 2018-19
- IEP Goal Progress Report for school year 2016-17
- 2018-19 School Calendar for USD #___
- Reevaluation Report dated October10, 2017
- Response to the allegations written by Ms. _____ to the Complaint Investigator dated April 23, 2019
- Response to the allegations written by Ms. _____ to the Kansas Department of Education dated April 29, 2019

Background Information

This investigation involves a 17-year-old female who is enrolled in the 11th grade at _____ High School in USD #___ during the 2018-19 school year. The student has received special education and related services in USD #___ since the age of three. The student's most recent reevaluation for special education was conducted on October 11, 2011 and a reevaluation for special education was most recently waived through a mutual agreement between the parent and USD #___ on October 10, 2017. The student was eligible for special education and related services due to the exceptionality of Intellectual Disability.

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 10, 2018.

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 monitoring IEP goals and not providing IEP goal progress reports during the 2018-19 school year.

Findings:

The parent reported USD #___ has not provided IEP goal progress reports during the 2018-19 school year. She indicated she remembers receiving copies of IEP Progress Reports in the past; however, she does not remember receiving them at all during the 2018-19 school year until she requested them just prior to filing this complaint.

The 2018-19 School Year Calendar for USD #___ shows first quarter ended on October 11, 2018. Second quarter ended on December 19, 2018 and third quarter ended on March 7, 2019.

The student had two IEPs in effect during the 2018-19 school year. The first IEP was dated October 4, 2017 and was in effect during a portion of first quarter. The second IEP was dated October 4, 2018 and was in effect during a portion of first quarter and during all of second and third quarters. Both IEPs require IEP Goal Progress Reports be provided to the parent at least one time each quarter.

The October 4, 2017 IEP showed IEP Goal Progress Reports written on December 21, 2017, March 14, 2018, and May 23, 2018. The October 4, 2018 IEP showed IEP Goal Progress Reports written on December 20, 2018 and March 21, 2019.

Mr. _____ acknowledged that multiple students in his classroom were not provided with IEP Goal Progress Report for the first quarter of the 2018-19 school year. Mr. _____ reported that subsequent IEP Goal Progress reports were sent home with students and perhaps the students lost the reports and that was the reason the parents did not remember getting the reports.

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. Federal regulations at 34 C.F.R. 300.17 define the term “free appropriate public education” in part as special education and related services that are provided in conformity with the IEP. Federal regulations, at 34 C.F.R. 300.320(a)(3), further require that the IEP must include a description of when periodic reports of the progress the student is making towards the annual goals will be provided. Thus, a school district must provide to the parent periodic reports on the annual goals in conformity with the reporting schedule in the IEP.

In this case, documentation and interviews found IEP Goal Progress Reports were required to be provided to the parent at least quarterly. USD #___ acknowledged and documentation shows IEP Goal Progress Reports were not provided at least quarterly during the 2018-19 school year. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to provide the parent with periodic reviews of the student’s progress towards annual goals in conformity with the IEP is substantiated.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs.

> **ISSUE TWO:** 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 enable the student to make progress during the past 12 months.

Findings:

The parent indicated the student has made little to no progress while in high school. The present levels of performance remain essentially the same from year to year and the student's IEPs have not changed substantially.

The findings of Issue One are incorporated herein by reference.

Documentation found the triennial reevaluations of the student were waived in 2014 when the student was in 7th grade and again in 2017 when the student was in 10th grade. A reevaluation with assessment in the areas of cognitive and adaptive behavior was conducted in 2011 when the student was in 4th grade. That reevaluation contained no information about current academic skills, motor skills, or communication skills.

A comparison of the Present Level of Academic Achievement and Functional Performance (PLAAFP) from the October 4, 2017 and October 4, 2018 IEPs found the description of motor skills was exactly the same with only one sentence added to the 2018 description. In academic skills, the description of writing skills was copied word for word between the IEPs. The reading description showed the student reading at the same grade level from year to year but did differentiate, describing reading decoding in the 2017 IEP and reading fluency in the 2018 IEP. The description of math skills focused on math calculation skills in the 2017 IEP and on money skills in the 2018 IEP. The description of communication skills in both IEPs was substantially the same in both IEPs.

The October 4, 2017 IEP reflects weaknesses in academic skills, communication skills, and physical endurance. This IEP included the following three goals:

- Goal 1 was to read 60 of 60 survival signs with picture cards on one attempt. The baseline showed the student could read 36 of 50 survival signs with picture cards on two attempts.
- Goal 2 was to recognize the value of all coins and bills with 85% accuracy. The baseline showed the student could recognize the value of coins and bills with 60% accuracy.
- Goals 3 was to swim a distance of 15 yards in three trials with an average time of 20 seconds using a modified swim stroke. The baseline showed the student was able to swim a distance of 15 yards in three trials with an average time of 24 seconds.

The IEP did not include a goal addressing communication skills, but notes receptive language skills will be addressed by supporting the academic goals.

The October 4, 2018 IEP reflects weaknesses in academic skills, receptive language, and physical endurance. The IEP includes the following three goals:

- Goal 1 is to increase reading fluency to 60 words correct per minute (WCPM). The baseline was reading 45 WCPM.
- Goal 2 was to identify the least combination of coins and bills needed to make a purchase 9 of 10 times. The baseline showed the student can now successfully identify all coins and bills and their dominations. She is able to determine the least amount of bill and coin combination 40% of the time.
- Goal 3 is to swim a distance of 15 yards in three trials with an average time of 35 seconds using a modified swim stroke. The baseline showed the student was able to swim a distance of 15 yards in three trials with an average time of 39 seconds.

The IEP did not include a goal addressing communication skills, but notes receptive language skills will be addressed by supporting the academic goals.

Mr. _____ reported that the parent attended the student's IEP team meeting on October 4, 2018 and participated in the review and revision of the IEP.

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.

In this case, it appears the reading goals for the student changed over the course of the last two IEPs. In addition, the baseline data showed the student made some progress over the past two school years. The math goals for the student also appear to have changed focus over the last two IEPs and baseline data shows the student made some progress over that same time period. However, the physical endurance goals have remained essentially the same and have even documented regression over time in the targeted skill. It is also noted that the student has not been assessed in the areas of academics, motor skills, and communication skills since in at least 2008 when the student was in 1st grade. Not having current information about the child's functioning makes it incredibly difficult to determine if the student's IEP is reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances*.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to develop an IEP that includes a statement of measurable annual goals, including academic and functional goals designed to meet the student's educational needs resulting from the child's disability is substantiated.

It is noted that three other parents of students with disabilities have filed complaints against USD #___ for this same issue. During the investigations of each of these allegations, a pattern of repeatedly waiving the triennial reevaluations of the student and a practice of essentially copying the PLAAFP and IEP goals from year to year was found. Based on the foregoing, a systemic violation of special education laws and regulations by failing to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at C.F.R. 34 300.320(a)(3), require public agencies to include in the IEP a description of when periodic progress reports will be provided, and the public agency must provide such progress reports in conformity with the IEP.

   The findings of this investigation show the parent was not provided IEP Goal Progress Reports at least quarterly, as required by the reporting schedule in the IEP, during the 2018-19 school year.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs during the 2018-19 school year.

B. 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, motor, and communication skills with the most recent evaluation in these areas being at least 10 years old. In addition, the PLAAFP statement and annual goals have remained essentially the same over time.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to use current information to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

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

1. Within 10 calendar days of the date of this report, submit a written statement of assurance to Special Education and Title Services stating that it will:

   a) Comply with C.F.R. 34 300.320(a)(3), by ensuring that periodic reports on progress towards annual goals will be provided to all parents of children with disabilities in conformity with each child's IEP.

   b) 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.

2. It is noted that correction of the previous individual and systemic noncompliance related to reporting progress towards IEP goals cannot be achieved for this student or any of the other students in Mr. _____'s classroom. However, the IEP goal progress for 1st Quarter of the 2018-19 school year as well as for any missing quarters of the 2018–19 school year for annual goals must still be documented for the student's educational record. No later than May 30, 2019, USD #___ will provide IEP Goal Progress Reports for each quarter for all annual goals for the 2018-19 school year for all students in Mr. _____'s classroom to their parents and SETS.

3. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to IEP Goal Progress Reports. As a result of this review, USD #___ will create new written policies and procedures to ensure that all special education and general education staff are a) measuring progress toward meeting annual IEP goals in conformity with each IEP, and b) providing periodic IEP Goal Progress Reports to parents in conformity with each IEP. This new procedure will describe the responsibilities of all special education and general education teachers and include active administrative oversight and monitoring. No later than August 30, 2019, USD #___ will provide a copy of this new procedure to Special Education and Title Services for review. No later than 10 school days after Special Education and Title Services approves this new procedure, USD #___ will share this new procedure with all

special education and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure for the 2019-20 school year. USD #___ will provide to Special Education and Title Services with documentation of when and with whom the procedure was shared.

4. No later than September 30, 2019, USD #___ will follow appropriate procedures to conduct a 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 this reevaluation to Special Education and Title Services.

5. No later than October 4, 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 11, 2019, USD #___ will provide appropriate documentation of this IEP team meeting to Special Education and Title Services.

6. No later than September 30, 2019, USD #___ shall administratively review all students' special education records to identify those students whose triennial reevaluation was waived twice consecutively. USD #___ shall then administratively review the two most recent IEPs of those identified students to determine if their IEPs contain PLAAFP statements and IEP goals that have remained essentially the same over time. For any student identified, USD #___ shall then reconvene the IEP team no later than October 30, 2019 to conduct a reevaluation of the student following compliance requirements in 34 C.F.R. 300.304 through 34 C.F.R. 300.311. No later than 60 school days, the IEP team of each student who was evaluated shall review and revise the IEP in light of the reevaluation results. USD #___ shall provide appropriate documentation of the reevaluation and IEP team meetings to SETS within one week of the IEP team meeting for each student.

7. No later than October 1, 2019, USD #___ will provide training to any staff member at _____ High School who may serve as an IEP team member regarding their roles and responsibilities in conducting a triennial reevaluation and developing an IEP in compliance with all requirements of the IDEA. 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 October 2, 2019, USD #___ will provide

documentation of the date and content of the training as well as who attended the training to SETS.

8. No later than October 1, 2019, USD #___ will offer training about the IEP process and the requirements for developing an IEP to all parents of students with exceptionalities in the district. USD #___ will contact Families Together, the Parent Information and Training Center for Kansas, to request a Families Together staff member conduct the training. No later than October 7, 2019, USD #___ will provide to Special Education and Title Services documentation of the notice of training sent to parents, the date of the training, the person(s) who conducted the training, the content of the training as well as the person(s) who attended the training.

9. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to waiving the triennial reevaluations of students with disabilities. As a result of this review, USD #___ will create new written policies and procedures to ensure that IEP teams have current information regarding the student when reviewing and revising the IEP. This new procedure will include guidance on when a triennial reevaluation can be waived and include active administrative oversight and monitoring of reevaluations and annual IEPs. No later than August 30, 2019, 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 and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-20 school year. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

10. 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.

_____

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 10, 2019

DATE OF REPORT: May 10, 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 was received by the Kansas State Department of Education on April 10, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint which ends on May 10, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 26, 2019 as part of the investigation process.

USD #___ staff were interviewed by telephone on April 30, 2019. The following staff participated in the interview:

_____, Director of Special Education
_____, _____ High School (_HS) Principal
_____, Intellectual Disability Teacher at _HS
_____, Interrelated Special Education Teacher at _HS

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by both parties:

- Meeting Notes dated August 24, 2018 written by parent
- Individualized Education Program (IEP) dated October 17, 2917
- IEP dated October 15, 2018
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated October 15, 2018
- IEP Goal Progress Report for school year 2018-19
- 2018-19 School Calendar for USD #___

- Emails dated August 16, 2018 between the parent and Ms. _____
- Emails dated January 14, 2019 from the parent to Mr. _____
- Email dated January 17, 2019 from Mr. _____ to the parent
- Email dated February 11, 2019 from Mr. _____ to the parent
- Reevaluation Not Needed Agreement Form dated October 15, 2018
- Evaluation/Reevaluation Eligibility Report dated December 17, 2012
- Student Attendance Record for the 2018-19 school year
- Medicaid Service Log Records for Ms. _____ dated August 27, 2018 – April 8, 2019
- Letter to Parent dated January 2019 written by _____, Assistant Director of Special Education
- 2018-19 AIMSweb Progress Improvement Report for Grade 2: Math Concepts and Applications
- 2018-19 AIMSweb Progress Improvement Report for Grade 2: Math Computation
- Response to the allegations written by Ms. _____ to the Complaint Investigator dated April 23, 2019
- Response to the allegations written by Ms. _____ to the Kansas Department of Education dated April 29, 2019

Background Information

This investigation involves a 15-year-old male who is enrolled in the 10th grade at _____ High School in USD #___ during the 2018-19 school year. The student has received special education and related services in USD #___ since the age of three. The student's most recent reevaluation for special education was waived through a mutual agreement between the parent and USD #___ on October 15, 2018. The student is eligible for special education and related services due to the exceptionality of Intellectual Disability.

Issues

The complainant raised five issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 10, 2018.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the student the opportunity to participate in lunch and assemblies due to a lack of school personnel during the 2018-19 school year.

Findings:

The parent reported that the student was not allowed to eat in the cafeteria at the beginning of the school year due to too many students in the lunch shift and not enough lunch tables. The parent acknowledged this only happened at the beginning of the school year and that the student is eating lunch with his peers in the lunchroom at this time.

Ms. _____ and Ms. _____ both reported the lunch schedule during the first few days of the school year was not balanced resulting in overcrowding in some lunch periods. However, this was quickly resolved by reassigning certain students to a different lunch shift. USD #___ all reported the student has been eating lunch in the lunchroom since the first full week of the school year.

The parent specifically noted the student was excluded from the _HS Pep Assembly on September 28, 2018. The parent believes this was the result of not having enough paraprofessionals assigned to the special education classroom and no one being able to supervise the student at the assembly.

Ms. _____ and Ms. _____ acknowledge the student did not attend the September 28, 2018 _HS pep assembly because there was a substitute teacher in the special education classroom and one of the paraprofessionals was absent that day. The substitute teacher was aware of the assembly but chose to keep all of her assigned students in the classroom because one of the classroom paraprofessionals was absent. However, both Ms. _____ and Ms. _____ emphasized that the administrative expectation is for all of the students in the special education classrooms at _HS to attend all assemblies.

The IEP in effect on September 28, 2019 was dated October 15, 2018. That IEP showed that the student has the opportunity to participate in field trips, assemblies, special events, etc. That IEP does not include any supplementary aids or supports for the student.

Federal regulations, at 34 C.F.R. 300.107, require public agencies to provide nonacademic and extracurriculuar services and activities in the manner

necessary to afford children with disabilities an equal opportunity for participation in those services and activities. Federal regulations further provide, at 34 C.F.R. 300.117:

> In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency 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 participate in nonacademic settings.

In this case, the student and the other students in Mr. _____'s classroom were not allowed to eat lunch with their nondisabled peers during the first few days of the 2018-19 school year and were not allowed to participate in the _HS pep assembly with their peers on September 28, 2018 due to a lack of staff. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to ensure the student had the opportunity to participate in the assembly is substantiated.

> **ISSUE TWO:** 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 services and specialized instruction for math to the student during the 2018-19 school year.

Findings:

The parent reported the student did not receive the speech and language therapy services required by the student's IEP during the 2018-19 school year. The parent reported the district did not make her aware that the services were not being provided until she received a letter from Ms. _____ in January 2019.

The parent also reported the student is supposed to attend a math class in a different classroom but has often missed this class because a paraprofessional is not available to support him in that class

The findings of Issue One are incorporated herein by reference.

Ms. _____ reported USD #___ was unable to fill all of the SLP openings for the 2018-19 school year. In January 2019, parents were informed of the shortage of SLPs in the district and the lack of services from September 2018 through January 2019. The letter indicated an outside agency was being contracted to provide the speech and language services and that compensatory services were going to be offered. Parents were instructed to contact the Special Education Office to request compensatory services; however, no deadline date to make this request was specified in the letter.

The October 17, 2017 IEP required direct speech language services for 20-minutes for one-day per week. The IEP indicates the student will receive his special education instruction for "academic and life skills instruction" in the special education setting and does not reflect the need for paraprofessional support. The services in this IEP do not show a different start date from the first day of school for the 2018-19 school year.

The October 15, 2018 IEP also requires direct speech language services for 20-minutes for one-day per week. And again, the IEP indicates the student will receive his special education instruction for "academic and life skills instruction" in the special education setting and does not reflect the need for paraprofessional support. The services in this IEP had an initiation date of October 15, 2018.

USD #___ staff reported the student receives his math instruction through the Consumer Math course which is taught first period in the interrelated special education classroom by Ms. _____. According to the special education teachers and the student's attendance record, the student has been in attendance in first period with Ms. _____ with the exception of four class periods during the 2018-19 school year. Ms. _____ and Mr. _____ reported these four instances were caused by the student being absent from school rather than a lack of school personnel.

The Medicaid Service Log Records showed that Ms. _____ was the SLP who worked with the student. On August 27, 2018, the student received 15 minutes of speech and language services. Between February 11, 2019 and April 8, 2019, Ms. _____ provided a total of 120 minutes of speech and language services to the student.

The 2018-19 school year calendar showed the first day of classes as August 16, 2018 and the last day of classes as May 21, 2019.

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 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. 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.

In this case, the student's IEPs dated October 17, 2017 and October 15, 2018 both required 20-minutes one-day per week of speech language services beginning on August 16, 2018. USD #___ acknowledged that speech language services were not provided to the student beginning on August 16, 2018. Documentation shows a total of 135 minutes of speech language services were provided to the student from the beginning of the school year through April 8, 2019.

Both of the student's IEPs required the student to receive special education instruction in the special education setting for academics and life skills. However, neither of the IEPs required paraprofessional support or described the math instruction separate from "academic and life skills instruction." Documentation shows the student did receive specialized instruction through the Consumer Math course taught in the interrelated special education classroom during the 2018-19 school year.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to provide special education and related services, specifically speech and language services, in accordance with the student's IEP is substantiated.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide receive the speech and language services in accordance with the IEPs of multiple students in the district due to the lack of qualified staff during the 2018-19 school year.

> **ISSUE THREE:** 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 monitoring IEP goals and not providing IEP goal progress reports during the 2018-19 school year.

Findings:

The parent reported USD #___ has not provided IEP goal progress reports during the 2018-19 school year. The parent indicated she remembers receiving copies of IEP Progress Reports in the past; however, she does not remember receiving them at all during the 2018-19 school year until she requested them just prior to filing this complaint. The parent believes the IEP goals for reading and math are not being monitored through any type of testing to see if progress is being made.

The findings of Issues One and Two are incorporated herein by reference

The 2018-19 School Year Calendar for USD #___ shows first quarter ended on October 11, 2018. Second quarter ended on December 19, 2018 and third quarter ended on March 7, 2019.

The student had two IEPs in effect during the 2018-19 school year. The first IEP was dated October 17, 2017 and was in effect during first quarter. The second IEP was dated October 15, 2018 and was in effect during second and third quarter. Both IEPs require IEP Goal Progress Reports be provided to the parent at least one time each quarter.

The October 17, 2017 IEP showed IEP Goal Progress Reports written on December 20, 2017, March 14 and May 23, 2018. No progress report was made for first quarter of the 2018-19 school year. The October 15, 2018 IEP showed IEP Goal Progress Reports written on December 20, 2018 and March 21, 2019. During the first, second and third quarters of the 2018-19 school year, no IEP Goal Progress Reports were provided for Goal 3 which addresses communication skills or Goal 5 which addresses social skills.

Goal 1 and Goal 2 on the student's IEPs address reading and math respectively. Both goals show that progress will be measured through daily assignments/quizzes and academic content probes. The AIMSweb Progress Monitoring Improvement Report for Grade 2: Math Concepts and Applications shows probes conducted on September 17, November 12, 2018, as well as January 21 and February 4, 2019. The AIMSweb Progress Monitoring Improvement Report for Grade 2: Math Computation shows probes conducted on September 17, October 1, October 15, October 29, November 26, December 10, 2018, as well as January 21, February 4, and February 8, 2019. No documentation of reading probes was provided.

Mr. _____ indicated that math and reading were taught in the classroom with daily assignments being completed by the students in these classes.

Mr. _____ acknowledged that multiple students in his classroom were not provided with IEP Goal Progress Report for the first quarter of the 2018-19 school year. Mr. _____ reported that subsequent IEP Goal Progress reports were sent home with students and perhaps the students lost the reports and that was the reason the parents did not remember getting the reports.

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. Federal regulations at 34 C.F.R. 300.17 define the term “free appropriate public education” in part as special education and related services that are provided in conformity with the IEP.

Federal regulations, at C.F.R. 34 300.320(a)(3), further require that the IEP must include a description of how progress towards meeting the annual goals and when periodic reports of the progress the student is making towards meeting the annual goals will be provided. Thus, a school district must measure progress towards meeting and annual goals and provide to the parent periodic reports on that progress in conformity with the reporting schedule in the IEP.

In this case, the IEP goal progress for reading and math goals was to be measured through daily assignments/quizzes and academic skill probes. While the teacher reported daily assignments for reading and math were completed and there was documentation showing math probes were done, no documentation was provided regarding reading probes. Documentation and interviews found IEP Goal Progress Reports were required to be provided to the parent at least quarterly as required by the IEP.

In this case, USD #___ acknowledged and documentation shows IEP Goal Progress Reports were not provided for first quarter of the 2018-19 school year. In addition, IEP Goal Progress Reports were not provided at all for Goal 3 and Goal 5 in both of the student’s IEPs in effect during the time period covered by the complaint investigation. Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to monitor IEP goal progress and failing to provide the parent with periodic reviews of the student’s progress towards annual goals in conformity with the IEP is substantiated.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs.

> **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 Individual Education Program (IEP), specifically by not providing the transition services during the past 12 months.

Findings:

The parent reported the student's transition plan in his IEP states that he will take a cooking class, learn to purchase food and meals, and learn to operate a washer and dryer. She indicated the student is enrolled in a cooking class but the other skills are not being worked on in the special education classroom. Instead, the parent believes the student is assigned to do tasks such as wipe tables, take out the trash, clean up the outside of the school building by picking up pine cones, or walking around the school building to pick up recycling. The parent expressed concern that the student has been learning how to wipe tables in the cafeteria for at least two school years and he doesn't need to learn this skill again.

The findings of Issue One, Two, and Three are incorporated herein by reference

The October 15, 2018 IEP includes a transition plan for the student with post-secondary goals for education/training, employment, and independent living skills. The student's plan states that he will receive on-the-job training in order to be employed as a worker in a supervised position and will either live at home or independently with support. The transition plan shows the student does not need transition service for independent and daily living skills but then includes taking a cooking class, learning to operate a washer and dryer, and purchasing food and preparing a meal as necessary daily living skills training to be provided at school by special education staff. The plan states the student will visit and explore careers options through Project Search and documents the student's course of study as "*He will attend Project Search or some type of vocational training 2020-2021 school year and graduate at 21*."

Mr. _____ reported that independent living skills are integrated into instruction in the classroom. There are a number of job rotations that students in the special education classroom participate in each day which include engaging in work

around the school such as wiping tables in the cafeteria, collecting the recycling items from around the building, washing and drying the cafeteria dish towels, etc. However, Mr. _____ reported the student no longer participates in the job rotation at parent request.

Federal regulations, at 34 C.F.R. 300.320(b), requires the IEPs of students with disabilities include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals.

In this case, the student's IEP does contain measurable post-secondary goals and transition services including a course of study. The parent's concerns are with independent living services. It is unclear whether the student requires transition services in the area of independent living because one place in the transition plan indicates no need for services while another place in the plan indicates services are needed and specifically lists the cooking class, the purchase of food and preparation of meals, and the operation of a washer and dryer. This discrepancy leads to confusion for parents and educators.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to list the independent living transition services needed for the student to achieve the measureable postsecondary goals in the IEP is substantiated.

> **ISSUE FIVE:** 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 enable the student to make progress during the past 12 months.

Findings:

The parent indicated the student has made little to no progress this school year. The present levels of performance remained essentially the same from last year to this year and the student's IEP goals have not changed substantially. The parent believes this is because the student is spending the majority of his school day coloring worksheets, doing the same activities and worksheets as all of the other students in the classroom regardless of their academic skills, or doing "chores" around the school such as recycling, cleaning tables and picking up pine cones.

The findings of Issue One, Two, Three, and Four are incorporated herein by reference.

Documentation found the triennial reevaluation of the student was waived through a mutual agreement between the parent and USD #___ on October 15, 2018 when the student was in 10th grade. Documentation shows the previous triennial reevaluation was also waived on December 7, 2015 when the student was in 7th grade. The most recent reevaluation that addressed academic skills was conducted on December 17, 2012 when the student was in 4th grade. That evaluation showed the student was reading at the beginning 1st grade level and could complete double digit addition and subtraction without regrouping with over 80% accuracy. It is noted this skill is generally taught in 2nd grade.

The Present Level of Academic Achievement and Functional Performance (PLAAFP) statements for reading, math, and communication in the October 15, 2018 IEP were copied word for word from the October 17, 2017 IEP.

The October 17, 2017 IEP reflects weaknesses in reading, math, communication, physical endurance, and social skills. This IEP included the following five goals:

- Goal 1 was to read a 2nd grade passage and answer questions related to the central idea with 85% accuracy. The baseline showed the student was reading at the 2nd grade level and able to answer questions with 65% accuracy.
- Goal 2 was to subtract 3-digit numbers with regrouping with 95% accuracy using a calculator or manipulatives. The baseline showed the student could subtract 3-digit numbers with regrouping with 65% accuracy using a calculator or manipulatives.
- Goal 3 was to produce initial phonation of words with 75% accuracy. The baseline showed this was a new goal to address Aphonia.
- Goal 4 was to swim 15 yards with an average time of 30 seconds. Baseline showed the student could swim 15 yards with an average time of 34 seconds.
- Goal 5 was to interact appropriately with peers 90% of the time in group sessions with the social worker. Baseline showed the student was interacting with peers in a positive manner on 4 out of 5 occasions.

The October 15, 2018 IEP reflects weaknesses in the same five areas. The IEP includes the following five goals:

- Goal 1 is copied from the previous IEP with the only difference being increasing the accuracy from 85% to 95%. The baseline showed the same reading level and improvement from 65% to 75% accuracy for recounting events of the main idea.
- Goal 2 is copied from the previous IEP with the only difference increasing the accuracy level to from 95% to 100%. The baseline showed the student had increased accuracy on the skills from 65% to 75%.
- Goal 3 is copied word for word from the previous IEP.
- Goal 4 had the student swimming 15 yards in an average of 36 seconds which shows regression from the previous baseline of an average of 34 seconds.
- Goal 5 is copied word for word from the previous IEP.

Mr. _____ reported that the parent attended the student's IEP team meeting on January 25, 2019 and participated in the review and revision of the IEP. Mr. _____ acknowledged that the classroom schedule does include time for students to participate in work experiences around the school but reported math and reading are taught daily.

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.

In this case, it appears that the annual goals for the student in the October 15, 2018 IEP are essentially the same as in the previous IEP. A comparison of the baseline data and annual goals in the two IEPs shows either minimal progress toward annual goals or, in the case of physical endurance, shows regression and does not support the minor changes in the annual goals in the October 15, 2015 IEP and thus does not provide the student with the opportunity to meet challenging objectives. Documentation shows that in the area of math the student has only progressed from subtracting double digits without regrouping to triple digits with regrouping over the past six years of specialized math instruction. It is noted that the most recent reevaluation was waived, and the most recent assessment of academic, communication, motor, and social 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 by failing to develop an IEP reasonably calculated to enable the student to make progress during the past 12 months is substantiated.

It is noted that three other parents of students with disabilities have filed complaints against USD #___ for this same issue. During the investigations of each of these allegations, a pattern of repeatedly waiving the triennial reevaluations of the student and a practice of essentially copying the PLAAFP and IEP goals from year to year was found. Based on the foregoing, a systemic violation of special education laws and regulations by failing to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.107 and 300.117, require public agencies to 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.

The findings of this investigation show USD #___ failed to provide the student as well as the other students in Mr. _____'s classroom with the opportunity to participate in nonacademic activities along with his nondisabled peers on September 28, 2018 due to a lack of school staff.

B. 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 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. Federal regulations, at 34 C.F.R. 300.17, define the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

   The findings of this investigation show USD #___ failed to provide the speech and language services required by the student's IEPs during the 2018-19 school year.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide speech and language services in accordance with the IEPs of multiple students in the district due to the lack of qualified staff during the 2018-19 school year.

C. Federal regulations, at 34 C.F.R. 300.320(a)(3), require public agencies to include in the IEP a description of how IEP goal progress will be measured and when periodic progress reports will be provided, and the public agency must monitor the IEP goal progress and provide such progress reports in conformity with the IEP.

   The findings of this investigation show IEP goal progress in reading was not conducted and that the parent was not provided IEP Goal Progress Reports at least quarterly, as required by the reporting schedule in the IEP, during the 2018-19 school year.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide parents of multiple students in this classroom with periodic reviews of student progress towards annual goals in conformity with the students' IEPs during the 2018-19 school year.

D. Federal regulations, at 34 C.F.R. 300.320(b), require public agencies to ensure the IEPs of students with disabilities include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills; and list the transition services (including courses of study) needed to assist the child in reaching those goals.

   The findings of this investigation show the student's IEP includes a discrepancy between the need for a postsecondary goal in the area of independent living and the transition services for independent living that are required to be provided.

E. 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 reading, math, motor, communication and social skills with the most recent evaluation in these areas being at least 6 years old. In addition, the PLAAFP statement and goals have remained essentially the same over time.

   The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to use current information to develop an IEP reasonably calculated to enable students to make progress during the past 12 months is also found.

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

1. Within 10 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. 300.107 and 300.117, by taking steps, including the provision of supplementary aids and services determined appropriate and necessary by each 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, and by ensuring that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.

b) Comply with Federal and Kansas regulations at 34 C.F.R. 300.101,34 C.F.R. 300.17, and K.A.R. 91-40-2(b)(1) by ensuring a free appropriate public education (FAPE) is made available to each child with a disability residing in its jurisdiction and by ensuring that special education and related services are provided in conformity with each child's IEP.

c) Comply with 34 C.F.R. 300.320(a)(3), by ensuring that IEP goals will be measured and periodic reports on progress towards annual goals will be provided to all parents of children with disabilities in conformity with each child's IEP.

d) Comply with 34 C.F.R. 300.320(b), by ensuring the IEPs of students with disabilities include appropriate measurable postsecondary goals related to training, education, employment, and, where appropriate, independent living skills; and list the transition services (including courses of study) needed to assist the child in reaching those goals.

e) 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.

2. It is noted that correction of the previous individual noncompliance related to participation in lunch at the beginning of the 2018-19 school year and attendance at the _HS Pep Assembly on September 28, 2018 cannot be achieved for the student and the other students in Mr. _____'s classroom; however, USD #___ will also create a written procedure that outlines the steps administration and staff must take in instances of staff shortage to ensure that, despite the staff shortage, all children with disabilities still participate in nonacademic and extracurricular services and activities determined appropriate by their IEP teams. Once this procedure

is created, USD #___ will inform all administration and staff of their responsibilities in carrying out this procedure. No later than August 30, 2019, USD #___ will provide SETS with documentation of the efforts to increase paraprofessional substitutes, the written procedure for ensuring participation in nonacademic and extracurricular services and activities, and evidence that the administration and staff were informed of their responsibilities in carrying out the procedure.

3. No later than May 30, 2019, USD #___ shall make a written offer of compensatory speech and language services to the parent, which shall consist of no less than 585 minutes of services as the student was only provided with 135 minutes of speech and language services. The school calendar shows the student should have been provided speech language services for 720 minutes (20-minutes per week for a total of 36 weeks). USD #___ shall send a copy of this offer to SETS on the same day it is sent to the parent. The parent can accept all, part, or none of the compensatory services offered and has 15 school days from the date she receives the offer to notify the district of her decision. Within 15 school days of making this written offer to the parent, USD #___ shall notify SETS, in writing, of the parent's decision regarding the offer of compensatory services. If the parent accepts all or some of the compensatory services, USD #___ shall schedule those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS. USD #___ shall notify the parent and SETS when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, USD #___ must notify SETS in writing of the reason and propose a schedule to SETS and the parent to finish the compensatory services.

4. No later than May 30, 2019, USD #___ will identify all students in the district who did not receive the speech and language services required by their IEPs during the 2018-19 school year. USD #___ will then provide a written offer of compensatory speech and language 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 school year. USD #___ shall send a copy of this offer to SETS on the same day it is sent to each parent. The parents can accept all, part, or none of the compensatory services offered and has 15 school days from the date they receive 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 parents accept all or some of the compensatory services, USD #___ shall schedule those services to begin and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parents and SETS. When scheduling those services, USD #___ must consider whether the services need to be provided during the summer in order for the student to receive FAPE. USD #___ shall notify the parents and SETS when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, USD #___ must notify SETS in writing of the reason and propose a schedule to SETS and the parents to finish the compensatory services.

5. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices in regards to providing coverage for required IEP services due to staff absences or shortages. As a result of this review, USD #___ will create new written policies and procedures to ensure that steps are taken to 1) identify and resolve the lack of appropriate staff, 2) determine the amount of compensatory services that are owed to each student in order to provide FAPE, and 3) inform parents in a timely manner of the lack of services and the plan for compensating for these missed services. This new procedure will include active administrative oversight and monitoring. No later than August 30, 2019, 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 teachers and administrators in the district and implement the procedure for the 2019-20 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

6. It is noted that correction of the previous individual and systemic noncompliance related to reporting progress towards IEP goals cannot be achieved for this student or any of the other students in Mr. _____'s classroom. However, the IEP goal progress for 1st Quarter of the 2018-19 school year as well as for any missing quarters of the 2018–19 school year for annual goals must still be documented for the student's educational record. No later than May 30, 2019, USD #___ will provide IEP Goal Progress Reports for each quarter for all annual goals for the

2018-19 school year for all students in Mr. _____'s classroom to their parents and SETS.

7. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to IEP Goal Progress Reports. As a result of this review, USD #___ will create new written policies and procedures to ensure that special education and general education staff are a) measuring progress toward meeting annual IEP goals in conformity with each IEP, and b) providing periodic IEP Goal Progress Reports to parents in conformity with each IEP. This new procedure will describe the responsibilities of all special education and general education teachers and include active administrative oversight and monitoring. No later than August 30, 2019, 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 and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___ will implement the procedure beginning with the 2019-20 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

8. No later than September 30, 2019, USD #___ will follow appropriate procedures to conduct a 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 this reevaluation to SETS.

9. No later than October 4, 2019, the student's IEP Team will review and revise the student's IEP based upon the most recent reevaluation of the student. The IEP team will also review and revise the student's transition plan to accurately reflect the student's postsecondary goals and the necessary services needed to help the student achieve those goals. No later than October 11, 2019, USD #___ will provide appropriate documentation of this IEP team meeting to SETS.

10. No later than September 30, 2019, USD #___ shall administratively review all students' special education records to identify those students whose triennial reevaluation was waived twice consecutively. USD #___ shall then administratively review the two most recent IEPs of those identified students to determine if their IEPs contain PLAAFP statements and IEP goals that have remained essentially the same over time. For any student identified, USD #___ shall then reconvene the IEP team no later than

October 30, 2019 to conduct a reevaluation of the student following compliance requirements in 34 C.F.R. 300.304 through 34 C.F.R. 300.311. No later than 60 school days, the IEP team of each student who was evaluated shall review and revise the IEP in light of the reevaluation results. USD #___ shall provide appropriate documentation of the reevaluation and IEP team meetings to SETS within one week of the IEP team meeting for each student.

11. No later than October 1, 2019, USD #___ will provide training to any staff member at _____ High School who may serve as an IEP team member regarding their roles and responsibilities in conducting a triennial reevaluation and developing an IEP in compliance with all requirements of the IDEA. 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 October 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

12. No later than October 1, 2019, USD #___ will offer training on parent's rights and responsibilities, the IEP process, and IEP development to all parents of students with exceptionalities in the district. USD#___ will contact Families Together, the Parent Information and Training Center for Kansas, to request a Families Together staff member conduct the training. No later than October 7, 2019, USD #___ will provide to SETS documentation of the notice of training sent to parents, the date of the training, the person(s) who conducted the training, the content of the training as well as the person(s) who attended the training.

13. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to waiving the triennial reevaluations of students with disabilities. As a result of this review, USD #___ will create new written policies and procedures to ensure that IEP teams have current information regarding the student when reviewing and revising the IEP. This new procedure will include guidance on when a triennial reevaluation can be waived and include active administrative oversight and monitoring of reevaluations and annual IEPs. No later than August 30, 2019, 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 and general education teachers in the district as well as the relevant school administrators who monitor these staff persons. USD #___

will implement the procedure beginning with the 2019-20 school year. USD #___ will provide to SETS with documentation of when and with whom the procedure was shared.

14. 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.

_____

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 5, 2019

DATE OF REPORT: May 4, 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 was received by the Department on April 5, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on May 5, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 19, 2019 as part of the investigation process.

USD #___ staff provided written responses to the interview questions on April 29, 2019. Brooke _____, Principal at _____ Virtual Academy, was interviewed on May 1, 2019.

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by the both parties:

- Individualized Education Program (IEP) dated April 5. 2018
- IEP Amendment Between Annual IEP Meetings dated February 1, 2019
- Email from _____, Office Professional to the parent dated February 1, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent (PWN) dated February 1, 2019
- IEP Amendment Meeting Notes dated February 1, 2019 written by _____, Gifted Facilitator
- Transfer IEP Meeting Notes dated February 1, 2019 written by _____, Special Education Teacher

- Email from Ms. _____ to the parent dated February 4, 2019
- Email from Ms. _____ to the parent dated February 25, 2019
- Email from Ms. _____ to the parent dated March 5, 2019
- IEP dated April 10, 2019
- Parent Notes from Audio Recording dated April 10, 2019 written by the parent
- Staffing Summary dated April 10, 2019 written by Ms. _____
- IEP Meeting Notes dated April 10, 2019 written by _____, LEA Representative
- IEP Meeting Notes dated April 10, 2019 written by Ms. _____
- PWN dated April 10, 2019
- PWN dated April 16, 2019
- Email dated April 16, 2019 from the parent to Dr. _____, Executive Director of Special Education
- PWN dated April 17, 2019
- Email dated April 18, 2019 from Dr. _____ to the parent
- PWN dated April 18, 2019
- Email dated April 22, 2019 at 12:41 PM from Dr. _____ to the parent
- Email dated April 22, 2019 at 1:48 PM from the parent to Dr. _____
- Email dated April 22, 2019 at 1:59 PM from Dr. _____ to the parent
- Email dated April 22, 2019 at 2:03 PM from the parent to Dr. _____
- Log of services provided virtually by Ms. _____
- Log of services provide virtually by Ms. _____
- Response to the allegations written by Dr. _____ dated April 23, 2019
- Response to written interview questions written by Dr. _____ dated April 29, 2019

Background Information

This investigation involves a 12-year-old male who enrolled in the 6th grade at USD #___ on January 3, 2019. The student lives within the attendance boundaries of USD #___'s _____ Middle School in _____, Kansas but is enrolled in the _____ Virtual Academy (_VA) for his education. The student previously was enrolled in the Kansas Virtual Academy

(KSVA) in USD #___ and had an IEP dated April 5, 2018. The student's most recent evaluation for special education was conducted on April 19, 2017 and the student was determined to be eligible for special education and related services due to the dual exceptionalities of Gifted and Autism.

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the receipt of the complaint. The time period for this complaint begins on April 5, 2018.

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 appropriate prior written notice for a material change in services following the February 1, 2019 IEP team meeting.

Findings:

The parent reported USD #___ wanted to change the student's special education and gifted services from a frequency of weekly to a frequency of monthly when the student transferred into the school district on January 3, 2019. The parent indicated that while she was initially in agreement with proposed changes, she later changed her mind and refused to provide consent for the changes to the student's special education services that were recommended at the February 1, 2019 IEP team meeting.

Documentation and interviews found the student transferred from KSVA in USD #___ to _VA in USD #___ on January 3, 2019.

The IEP in place at the time of the transfer was dated April 5, 2018 and required 30 minutes per week of explicit math instruction provided by a special education teacher in a home-based setting and 30 minutes per week of gifted services provided by a special education/gifted teacher in a home-based setting. In addition, this IEP required 10 minutes of behavior consult once every four weeks provided by a special education/gifted teacher as an indirect service. This IEP included three goals to address 1) diverse grade-level math problems, 2) the application of higher-level thinking skills and applied research skills, and 3) school appropriate behaviors including completing assignments, participating in live and virtual communication, and attending required classes and school sessions.

Ms. _____ reported she and the parent spoke on the phone during the week of December 17, 2018 regarding the student's transfer to _VA for the spring semester. Ms. _____ indicated the parent was seeking the transfer because of the amount of time being spent online and the many project-based assignments at KSVA. The parent also shared about the student's math anxiety.

On January 2, 2019, the student and parent participated in a face-to-face orientation for _VA. Ms. _____ reported she and the parent talked about the student's special needs and the parent did not want any extra time online beyond the core instruction classes for the student to receive the special education or gifted services. The parent once again expressed the concern that the school from which the student was transferring required too much time online. Ms. _____ indicated the school team would review the transfer documentation and get with her to discuss providing the special services.

Dr. _____ reported that a review of records indicated the student had strong math skills and it was not clear what support the student needed in math even though the parent reported the student has a lot of math anxiety. Dr. _____ indicated the school team at _VA needed time to work with the student to determine what support he actually needed in math. Between January 3 and February 1, the _VA math teacher, _____, assessed the student's skills and needs in math through her online math class.

Dr. _____ reported that *"On February 1, 2019, a Transfer IEP team meeting was held to accept, with amendments to services, an IEP for the student who enrolled in _____ Virtual Academy (_VA) for the spring semester. During the discussion of services and what they would look like, the parent was adamant that her son would not learn math online and that he needed face-to-face, in person support in math. She requested the student attend a brick and mortar building for his IEP math support. In order for a student to attend a _____ Public School building requires a part-time enrollment in that school, which would then mean a part-time enrollment in _VA. _VA cannot accept part-time enrollments."*

Dr. _____ explained that if the student attends _VA which cannot accept part-time enrollments, USD #___ could not provide brick and mortar support instruction for math; however, USD #___ could provide online face-to-face support in math to support the _VA program.

Dr. _____ reported the district recommended and the parent agreed that the student would receive Tier III math support from his current _VA general

education math teacher, Ms. _____, because she is the core content expert and because she and the student already had a good working relationship. This support was initially offered for 30 minutes per week; however, the parent believed that 30 minutes online would be too much for the student, so a compromise of 15 minutes weekly of online math support was decided upon to address the concerns with math instruction.

At the meeting, the parent again insisted the student not be online any more than was absolutely necessary for his core instruction. After a lengthy discussion documented in IEP team meeting notes, the district recommended and the parent agreed that both special education services and gifted services would be delivered through a consultative model. Dr. _____ indicated this service delivery model "*would better serve the student's needs, reduce online time, and prevent frustration. Each consultation service was to be conducted for 30 minutes monthly*."

An IEP amendment dated February 1, 2019 includes a description of the proposed changes as "*Transfer IEP with changes to accommodations, update to goal for gifted, no longer need a behavior goal, or behavior services."* The amendment lists new services as 30 minutes per month of indirect special education instruction to be provided by Ms. _____ at _VA and 30 minutes per month of indirect gifted instruction to be provided by Ms. _____ at _VA. The parent signed the amendment on February 1, 2019 which indicated that "*We agree to amend this student's IEP as described above."* A statement at the bottom of the amendment form says "*A prior written notice form accompanies this agreement, and includes information the school is required to give parents before implementing any proposed change to their child's IEP. If consent is needed for any proposed change, a parent must give consent by signing in the consent portion of the attached form before the change may be implemented."*

Dr. _____ reported that a PWN was not completed or signed at the February 1, 2019 IEP meeting because of clerical errors noted on the form. It was agreed that Ms. _____ would complete an accurate PWN and provide it to the parent to sign consent.

The corrected PWN dated February 1, 2019 proposed indirect services for gifted and special education for 30 minutes monthly between January 3 and April 5, 2019. The PWN refuses to provide direct services with a paraprofessional because the student is attending school virtually.

Dr. _____ acknowledged this PWN shows the proposed change of services as simply a change requiring no parental consent. Dr. _____ stated this was an error and USD #___ was aware that the proposed change in services was a material change which required parent consent to initiate the changes.

On February 4, 2019, Ms. _____ emailed the parent inquiring as to whether there was a day the parent would be in town so she could stop by and sign the form and also offering to email the PWN again if it would be more convenient. The parent did not reply to this email.

On February 25, 2019, Ms. _____ again emailed the parent indicating that she still needed to sign the PWN. The parent did not reply to this email.

On March 5, 2019, Ms. _____ emailed the parent again to remind her that she still needed to sign the PWN. Again, the parent did not reply to the email.

Dr. _____ stated "*At some point following the Feb. 1 2019 meeting, the parent became dissatisfied with 30 minutes monthly of each service. She began to insist the student should be getting 30 minutes of each service per week. She still wanted services to be delivered at one of our USD ___ buildings. During this time Ms. _____ was unable to get the parent to respond to her attempts to get the signature on the corrected PWN from the Feb. 1 IEP meeting as documented above. This created confusion among team members about whether or not they had any consent to provide any level of service at all. The confusion ultimately left the two providers uncertain as to what to do, so they stopped attempting to provide the consultative services and waited for the conflict to be settled.*"

It is noted the PWN dated February 4, 2019 did not address the proposed changes to accommodations, an updated goal for gifted, or the deletion of the behavior goal and behavior services described in the IEP amendment dated February 1, 2019. In addition, neither the IEP amendment nor the PWN dated February 1, 2019 included a description of the proposed deletion of the math goal and the explicit math services that were to be provided by a special education teacher as required by the April 5, 2018 IEP.

Federal regulations, at 34 C.F.R. 300.323(e), requires public agencies, in consultation with the parents, to provide a free appropriate public education (FAPE) to students with disabilities who transfer between one public agency to another public agency within a state during the same school year. FAPE must be provided to the student, including services comparable to those described in the

student's IEP from the previous public agency, until the new public agency either adopts the student's IEP from the previous public agency or develops, adopts, and implements a new IEP that meets the requirements of 34 C.F.R. 300.320 through 34 C.F.R. 300.324.

The Kansas Special Education Process Handbook in Chapter 4, section G.1, states:

> When a child with an exceptionality transfers to a new school district in Kansas, with a current IEP in a previous school district in Kansas, the new school district, in consultation with the parents, 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 district may adopt the child's IEP from the previous school district or develop and implement a new IEP. If the new district develops a new IEP, parent consent is required for any substantial change in placement or any material change in services proposed in the new IEP in accordance with K.S.A. 72-3430(b)(6).

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 statute and regulation, at K.S.A. 72-3430(b)(6) and K.A.R. 91-40-27(a)(3), require a public agency to obtain parent consent before making a material change in services and/or a substantial change in placement. K.S.A. 72-3404(bb) defines a material change in services as an increase or decrease of 25% or more of any one service and defines a substantial change of placement as movement to a less or a more restrictive environment for more than 25% of student's day.

State statute, at K.S.A. 72-3430(b)(6), requires districts to make reasonable attempts to obtain consent from the parents to conduct a reevaluation, or to make a material change in services or a substantial change in placement.

However, parent consent is not required for these actions if, after a reasonable time, the parent does not respond to the schools requests for consent and the school can document its attempts to obtain parental consent. Reasonable attempts are defined as at least two contacts by two different methods and documentation of such attempts should be kept including detailed records of telephone calls made or attempted and the results, copies of written correspondence sent to the parents and their response, if any, and visits made to the parents' home or place of employment, and the response, if any, from the parents.

In this case, documentation and interviews found the student enrolled at _VA located in USD #___ on January 3, 2019 with an IEP dated April 5, 2018 from USD #___ in effect. The district acknowledges no special education services were provided to the student between January 3 and February 1, 2019 when an IEP team meeting was held to amend the current IEP. At that meeting, an IEP Amendment was created that proposed to change the frequency of special education services, including gifted services, to be provided to the student from weekly to monthly and deleted behavior consultation services entirely. This agreement to amend the IEP was signed by the parent on February 1, 2019.

The PWN provided to the parent on February 4, 2019 failed to accurately describe all of the changes between the IEP dated April 5, 2018 and the February 1, 2019 IEP Amendment. Documentation showed the parent did not respond to multiple attempts by USD #___ to provide written consent for the material change of services. The conflict between the signed agreement to amend the IEP and the parent not responding to the requests to provide written consent for the changes described in the IEP amendment created confusion among providers about whether or not they had consent to provide any level of service at all. This confusion resulted in the providers stopping to provide the consultative services and waiting for the conflict to be settled.

USD #___ then failed to make reasonable efforts to obtain parent consent for the material change of services in order to allow the IEP amendment to be implemented. Even though USD #___ made three separate attempts to contact the parent to remind her to sign the PWN, these attempt were all made via the same method.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to failing to provide the parent with appropriate prior written notice is substantiated. In addition, the investigation found a violation of

special education statutes and regulations related to making reasonable attempts to obtain parent consent for a material change services.

ISSUE TWO: 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 30 minutes per week of math support services and 30 minutes per week of gifted services during the 2018-19 school year.

Findings:

The parent reports the student has not received the special education math services or the gifted services required by the IEP since the student enrolled at _VA in USD #___ on January 3, 2019. The parent indicated the district acknowledged these services were not provided at the April 10, 2019 IEP team meeting and discussed possible plans to provide compensatory services.

The findings of Issue One are incorporated herein by reference.

Documentation and interviews found an IEP team meeting was held to review and revise the student's IEP on April 10, 2019. The revised annual IEP includes four goals for the student including 1) analyzing text and writing an essay, 2) producing a video documentary, 3) using the order of operations to solve math problems, and 4) completing math quizzes and tests. This IEP requires 30 minutes per week of special education services and 30 minutes per week of gifted education services to be delivered in the home-based setting through the online _VA program. In addition, 10 minutes per grading period of teacher consultation services between the gifted, special education, and general education teachers is shown as a support for school personnel.

The April 10, 2019 IEP team meeting notes written by Ms. _____, Ms. _____, and Ms. _____ do not reflect any discussion of compensatory services for the student. However, the parent's notes reflect compensatory services being offered for extra hours per day or week during the school year. The parent's notes show the parent requested one hour per week during the summer through USD #___. Dr. _____ reported services through _VA were refused because _VA is not in session during the summer. Dr. _____ reported and the parent's notes confirm that the parent then requested the compensatory services be provided through Sylvan Learning Center during the summer.

USD #___ provided the parent with a PWN dated April 17, 2019 which proposed to add special education services 30 minutes weekly and 30 minutes weekly of gifted services. These two services would be provided through a home-based setting through the virtual platform throughout the duration of the IEP. The parent provided written consent for these services on April 18, 2019.

USD #___ provided the parent with a PWN dated April 18, 2019 which proposed a plan to provide compensatory services to the student for services not provided between January 3 and April 10, 2019. The parent does not agree with this plan and has not provided written consent for these services.

Documentation shows Ms. _____ provided regular services to the student on Monday, April 22, 2019. In an email to the parent that same day, Ms. _____ writes "*Just to recap our conversation, I am going to try to meet virtually with the student and Mrs. _____ next Monday at 11:30 to see how that goes so we are not adding "math" time to the student's day. We will not amend the IEP until we have tried this. Our session today was started, but lasted about 5 minutes and the student was frustrated before we started."*

Ms. _____'s compensatory services log shows services were offered on Tuesday, Wednesday, and Thursday on April 23 – 25, 2019; however, the student did not log into the virtual class.

Documentation shows Ms. _____ provided regular services to the student for 30 minutes on April 18 and again on April 25, 2019. Compensatory services were offered on April 24, 2019; however, the student did not log into the virtual class.

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 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. 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.

In this case, the student's transfer IEP dated April 5, 2018 required 30 minutes per week of special education services for math and 30 minutes per week of gifted services. In addition, this IEP required 10 minutes of behavior consult once every four weeks provided by a special education/gifted teacher as an

indirect service. Documentation and interviews found that these services were not provided to the student between January 3 and April 10, 2019 in the amounts of 7 hours of special education services for math, 7 hours of gifted services, and 30 minutes of indirect behavior consult services.

The April 10, 2019 IEP requires 30 minutes per week of special education services and 30 minutes per week of gifted education services to be delivered in the home-based setting through the online _VA program. Documentation shows the student was offered 30 minutes of the required 90 minutes of special education services and received 60 minutes of the required 90 minutes of gifted services that should have been provided between April 10 and April 26, 2019.

It is noted that USD #___ acknowledged services were not provided to the student between January 3 and April 10, 2019. However, this investigation found additional noncompliance due to services not being provided to the student in conformity with the IEP between April 10 and April 26, 2019. It is unclear if the required services are currently being provided to date. Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the IEP by not providing services as written is substantiated.

While both parties have expressed concerns and provided numerous documents related to the plan proposed by USD #___ for providing compensatory services, this was not the issue originally presented in the parent's allegations made on April 5, 2019. Therefore, no compliance findings can be made related to these subsequent allegations through this complaint investigation.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.323(e), require public agencies, in consultation with the parents, to provide a free appropriate public education (FAPE) to students with disabilities who transfer between one public agency to another public agency within a state during the same school year. FAPE must be provided to the student, including services comparable to those described in the student's IEP from the previous public agency, until the new public agency either adopts the

student's IEP from the previous public agency or develops, adopts, and implements a new IEP that meets the requirements in 34 C.F.R. 300.320 through 34 C.F.R. 300.324.

The findings of this investigation show the student enrolled at _VA located in USD #___ on January 3, 2019 with an IEP dated April 5, 2018 from USD #___ in effect. There is no documentation to show USD #___ consulted with the parent upon enrollment regarding the provision of FAPE including providing comparable services to the student until such time USD #___ either adopts the IEP or a new IEP is developed. The district acknowledged that no special education services were provided to the student between January 3 and February 1, 2019 when an IEP team meeting was held to amend the current IEP.

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 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.

   The findings of this investigation show USD #___ failed to provide the parent a PWN that accurately described all of the changes between the IEP dated April 5, 2018 and the February 1, 2019 IEP Amendment that were being proposed by the district.

C. Kansas regulation and statute, at K.A.R. 72-3430(b)(6) and K.A.R. 91-40-27(a)(3), require parent consent before making a material change in services and/or a substantial change in placement. K.S.A. 72-3404(bb) defines a material change in services as an increase or decrease of 25% or more of any one service and K.S.A. 72-3404(aa) defines a substantial change of placement as movement to a less or a more restrictive environment for more than 25% of student's day.

   The findings of this investigation show USD #___ proposed a material change of services to reduce the frequency of special education services, including gifted instruction, from weekly to monthly at the February 1, 2019 IEP team meeting and parental consent for these

changes was not obtained. Documentation found USD #___ staff were confused as to whether or not they had consent to provide services due to the conflict between the signed agreement to amend the IEP and the lack of consent for the PWN. This confusion ultimately resulted in USD #___ stopping the provision of the monthly services for the months of February and March, 2019.

D. State statute, at K.S.A. 72-3430(b)(6), requires districts to make reasonable attempts to obtain consent from the parents to conduct a reevaluation, or to make a material change in services or a substantial change in placement. However, parent consent is not required for these actions if, after a reasonable time, the parent does not respond to the schools requests for consent and the school can document its attempts to obtain parental consent. Reasonable attempts are defined as at least two contacts by two different methods and documentation of such attempts should be kept including detailed records of telephone calls made or attempted and the results, copies of written correspondence sent to the parents and their response, if any, and visits made to the parents' home or place of employment, and the response, if any, from the parents.

   The findings of this investigation show USD #___ failed to make reasonable attempts to obtain parent consent for material changes in services that were proposed at the February 1, 2019 IEP team meeting by only using one method to contact the parent.

E. 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 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. 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.

   The findings of this investigation show USD #___ did not implement the IEP dated April 5, 2018, specifically by failing to provide the special education services, the gifted services, and the behavior consult services. In addition, USD #___ has not provided all of the special

education and gifted services required by the April 10, 2019 IEP through at least April 26, 2019.

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. 300.323(e) by providing FAPE, including comparable services, to students who transfer between school districts within the state in consultation with the parents until such time the district either adopts the student's IEP from the previous district or develops, adopts, and implements a new IEP pursuant to 34 C.F.R. 300.___ through 34 C.F.R. 300.324.

   b) Comply with 34 C.F.R. 300.503 by providing parents with appropriate prior written notice 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.

   c) Comply with K.A.R. 72-3430(b)(6) and K.A.R. 91-40-27(a)(3) by obtaining parent consent before making a material change in services and/or a substantial change in placement.

   d) Comply with 34 C.F.R. 300.101, K.A.R. 91-40-2(b)(1), and 34 C.F.R. 300.17 by providing special education services in conformity with the IEP.

2. No later than August 30, 2019, USD #___ will provide training to the special education teachers and administrators who work with the student regarding how to appropriately provide prior written notice to parents when proposing or refusing changes to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The training will also cover when to obtain consent for a material change of services and/or a substantial change of placement and the requirements for making reasonable attempts to obtain parent consent. USD #___ will document who provided the training and the content of the

training as well as who attended the training and send that documentation to Special Education and Title Services.

3. No later than August 30, 2019, USD #___ will provide training to the staff at _VA and consulting special education teachers and administrators regarding appropriate transfer procedures. As a result of the training, _VA will develop a process for ensuring transfer procedures are followed. USD #___ will document who provided the training and the content of the training as well as who attended the training and send that documentation to Special Education and Title Services. In addition, USD #___ will provide a copy of the transfer procedure process that will be followed at _VA to Special Education and Title Services.

4. No later than June 15, 2019, USD #___ will reconvene the student's IEP team to discuss the deletion of the behavior goals and behavior services. USD #___ will provide the parent with appropriate PWN and request consent for this material change of services. USD #___ will provide to Special Education and Title Services documentation that the IEP team was reconvened and documentation of the PWN and request for consent.

5. Also no later than June 15, USD #___ will reconvene the IEP team to discuss whether FAPE was provided to the student between January 3 and April 10, 2019 and the amount of compensatory services that will be provided. A minimum of 8 hours of explicit math instruction provided by a special education teacher in a home-based setting and a minimum of 7.5 hours of gifted services provided by a special education / gifted teacher in a home-based setting will be offered by USD #___. USD #___ will provide the parent with appropriate PWN for the proposed compensatory services. The parent may accept all, part, or none of the services offered. USD #___ will provide the Special Education and Title Services documentation of the compensatory services offered and the PWN.

6. Further, USD # ___ shall, within 10 calendar days of receipt 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.

_____

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 MAY 8, 2019

DATE OF REPORT: JUNE 06, 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 _____, Director of Special Education for the _____ Special Education Cooperative (___SEC) on May 13, 2019. On May 14, 2019, the investigator spoke by telephone with _____, school psychologist for USD #___ (the district). On May 14 and 20, 2019, the investigator spoke by telephone with _____, building principal for the student's elementary school. The investigator spoke by telephone with the parent on May 14, 2019. The investigator spoke by telephone conference call with _____ and _____, Assistant Director for ___SEC, on May 21, 2019. Also on May 21, 2019, the investigator spoke with _____, Children's Services Coordinator for the _____ (ELC). The investigator spoke by telephone with _____, ELC Case Manager for the student, on May 22, 2019. On May 23, 2019, the investigator again spoke with the Assistant Director for ___SEC.

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

- Multi-disciplinary Re-Evaluation/Eligibility Team Report dated October 5, 2015
- Emails dated August 28, 2017 between the parent and the school psychologist regarding services for the student
- IEP for the student dated August 28, 2016
- Staffing Committee Report dated August 28, 2016
- IEP Amendment Between Annual IEP Meetings dated August 23, 2017
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated August 23, 2017
- Multidisciplinary Staffing Summary dated September 28, 2017

- Excusal From Attendance at IEP Meetings of Required IEP Team Members dated September 28, 2017
- IEP for the student dated September 28, 2017
- Notice of Meeting dated August 24, 2018
- IEP for the student dated September 12, 2018
- Multidisciplinary Staffing Summary dated September 12, 2018
- Email correspondence covering the period of January 16 through February 1, 2019 between the parent and the school psychologist
- Reevaluation Request dated February 2, 2019 from the parent to the district
- Report dated March 15, 2019 from the ELC
- Diagnostic summary dated April 5, 2019 from outside agency
- Notice of Meeting dated April 29, 2019
- Rehabilitation Services Progress Note dated May 1, 2019
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated May 6, 2019
- Email correspondence between the parent and school staff during the period of October 12, 2017 to May 1, 2019 provided by the parent
- Grade report for the student for the 2018-19 school year
- Progress Report regarding the student's September 12, 2018 IEP
- Draft of Multidisciplinary Team Report - Reevaluation

Background Information

This investigation involves a 10-year-old girl. The student has consistently performed on grade level in the areas of reading, math, and writing, but the parents have been concerned that mental health issues would cause her to drop academically and to isolate herself socially. The student has a history of self-harm.

The student was removed from the home of her biological parents at 9 months of age. After three foster home placements, the student was moved to her current home in June of 2012. Parental rights were terminated in April of 2013. According to the parent, she and her husband adopted the student, who is the biological niece of the complainant's husband, at age 3. The parent reports that the student has been receiving services through the ELC, a mental health facility serving _____ and _____ counties in Kansas. According to a letter from the "CBS Coordinator/Outpatient Therapist" from that agency dated April 5, 2019, the student has been diagnosed with Generalized Anxiety Disorder, Reactive Attachment Disorder, and Disruptive Mood Disorder. The parent reports that the student sees two therapists and attends weekly group therapy. She will have 18 hours of mental health services during the summer including group therapy and one hour of Reactive Attachment Disorder therapy and one hour of Anxiety CAT as well as one hour of case management services.

The parent also reports that the student has recently qualified for the Serious Emotional Disturbance (SED) waiver through the Kansas Department for Aging and Disability Services (KDADS). According to the KDADS website, an SED waiver

> "provides children, with some mental health conditions, special intensive support to help them remain in their homes and communities. The term 'serious emotional disturbance' refers to a diagnosed mental health condition that substantially disrupts a child's ability to function socially, academically, and/or emotionally. Parents and children are actively involved in planning for all services."

These services can include, among other things, parent support and training, short term respite care, and wraparound facilitation.

The student has just completed the 3rd grade. The student first entered the current school district in August of 2017 and previously received special education services for 20 minutes per day in another Kansas district. The student was enrolled in first grade in her neighborhood school, and the current district adopted the previous district's IEP. The parent subsequently gave written consent for the district to amend the former district's IEP in order to provide the student with "30 minutes of support in the resource room and 60 minutes of support in the general education setting through para support" each day.

On September 28, 2017, the current district proposed its own IEP for the student. At that time, the district recommended pulling the student from the general education setting for 20 minutes each day to participate in a "social group."

The district assigned the student to a different school for third grade because the student's previous school only houses grades kindergarten through 2nd. The IEP team conducted an annual review of the student's IEP on September 12, 2018.

On January 8, 2019, the parent sent an email to district staff stating that "[The student] needs an academic reevaluation." On February 2, 2019, the parent submitted a "formal request for a complete reevaluation" of the student. According to the parent's letter, she requested that the district conduct an assessment "in the areas of academic, psychological, speech, motor, and IQ." The school psychologist sent an email to the parent in early February 2019, attaching a copy of the district's request for parental consent for the reevaluation. Child Protective Services removed the student from the home shortly after the school psychologist sent the consent form to the parent and the student remained away from home for several weeks, returning to the district on March 18, 2019.

On April 18, 2019, the parent sent an email to the school psychologist stating that she was requesting an IEP team meeting before the reevaluation was conducted. That meeting took place on May 6, 2019. At the conclusion of the meeting, the school psychologist provided the parent with a reevaluation consent form. The parent then gave her written consent for the reevaluation she had requested in February. The district has completed formal assessments, has provided the parent with a draft report of the reevaluation, and has proposed dates for a reevaluation meeting. At the time of

the writing of this report, the date for that meeting had not yet been finalized.

Issues

In her complaint, the parent raised four concerns. Per a letter to the parent dated May 8, 2019 from Mark Ward, Attorney with Kansas State Department of Education Special Education and Title Services, the parent's first concern was not investigated. According to Mr. Ward:

> [F]ederal regulations permit investigation only of allegations that a school district is in violation of a legal requirement of special education. Even if the facts stated…are true and correct, those facts would not substantiate a violation of special education legal requirement because there is no legal requirement that a school district or IEP team adopt the findings and recommendations of outside therapists.

The remaining three concerns in the parent's complaint raise the following issues:

<u>Issue Two:</u> Following a request by the parents for an IEP Team meeting to discuss moving the student to an alternative school outside the district, the building principal reportedly told a mental health worker before the meeting that she would not consider such a change in placement.

Federal regulations, at 34 C.F.R. 300.116(a)(1) state that in determining the educational placement of a child with a disability, the public agency must ensure that the decision is made by a group of persons, including the parents, and other persons knowledgeable about the student, the meaning of evaluation data, and the placement options. (See also 34 C.F.R. 300.327 and 34 C.F.R. 300.501 (b) and (c).)

In an email to the school psychologist on April 18, 2019, the parent stated the following:

> "_____ [ELC] and ourselves would like to have an IEP meeting before you retest [the student]…We are really wanting to push for her to be sent to [a day school program] in _____ for school. ELC is getting her on the mental health SED waiver. They would really like to be a part of the meeting, and give information on the anxiety testing, etc. Additionally her RAD specialist believes she would benefit from the move as well."

The special program referenced by the parent is the _____ (ECKA). ECKA is a special day school for children with diagnosed behavioral and/or emotional disorders. The ECKA program provides educational, social/emotional, and behavioral support to children who are unable to succeed in a regular education setting. ECKA designs a customized, comprehensive educational plan for each student.

It is the parent's position that the principal has consistently minimized the student's inappropriate behaviors which have included bringing a pair of scissors to school in May

of 2018 and a knife to school in October of 2018. The parent asserts that during the 2017-18 school year, district staff had been so concerned about the student's behavior that they raised the issue of moving the student to _____. The parent contends that the district has, during the 2018-19 school year, failed to recognize the severity of the student's emotional issues and has been unwilling to consider a move of the student to another educational setting where, in the opinion of the parent, the student's needs can be better met.

The parent asserts that the building principal told the student's ELC Case Manager that she "would not entertain the idea" of moving the student to the ECKA program. In a telephone conversation with the investigator on May 22, 2019, the case manager provided the following information with regard to a conversation she had with the principal on May 1, 2019: The case manager met with the principal to discuss how attendant care services would be provided to the student at the elementary school. According to the case manager, the principal shared with her during their conversation that the student rarely had a need to engage in any cool down periods because of behavior and responded well to discussions with the principal about her behavior. The case manager stated that the principal told her that the student was doing well academically and had not displayed behaviors that were threatening to herself or others. According to the case manager, the principal did not rule out a placement at ECKA in the future if the need arose but did not feel that the student was currently demonstrating a need for such a placement. According to the case manager, the principal indicated that she was worried that at ECKA the student might be in a position to observe behaviors that were more inappropriate than any she was currently exhibiting.

The district convened an IEP team meeting as requested by the parent on May 6, 2019. District staff, the parents, and representatives from ELC attended. A Notice of Meeting form dated April 29, 2019 states that the purpose of the meeting was to "review present levels of performance and determine programming needs." According to the school psychologist, district staff shared information about the student's performance with the parent and ELC representatives and provided the parent with information about the ECKA program and the needs of students who are served there. The IEP team made no recommendations regarding a change of placement.

The Children's Services Coordinator for ELC attended the meeting and shared her impressions of the meeting with the investigator. According to the Coordinator, the building principal effectively explained that the needs of students who are referred to ECKA cannot be met in a less restrictive setting. The Coordinator reported that school staff shared their belief that the student's occasional inappropriate behavior was manageable and she was making good educational progress in her current placement. It was the opinion of the Coordinator that while the team felt the student's needs were currently being met by the district, the team did not give "a hard no" to considering alternative placement if the need arose at some point. The Coordinator stated that, based upon the information shared in the meeting, she would have been surprised if the district was considering a move to ECKA. She noted that in the case of other students

with whom she was acquainted who had been moved to the ECKA program by other districts, their educational/behavioral needs were far more severe than those exhibited by this student. It was her opinion that even if the student was to transfer to ECKA, she would quickly "stabilize" there and the ECKA team would be recommending a return to the home district.

The ELC case manager for the student also attended the May 6, 2019 meeting and told the investigator that the information and opinions shared by the principal at the IEP team meeting were similar to what she and the principal had discussed in their meeting on May 1, 2019. According to the case manager, other district team members spoke in support of the principal's position asserting that the student was not currently exhibiting behaviors that could not be adequately addressed in the elementary school setting. The case manager stated that she did not believe district staff were closed to future consideration of a placement in the ECKA program but believed that the student's current setting was meeting her needs.

According to the school psychologist, after discussion about the student's current performance and about ECKA, the team focused on how they might better communicate regarding the needs of the student. The IEP team made no decisions/recommendations regarding services or placement for the student. Following the meeting of May 6, 2019, the parent gave written permission for the district to conduct the reevaluation she had originally requested in writing on February 2, 2019.

While the principal did, on May 1, 2019, share with the student's ELC Case Manager her professional opinion regarding the student's needs as they related to the ECKA program, there is no indication that those opinions have unduly influenced other members of the IEP team or have led to a predetermination of placement. The IEP team discussed the student's performance and her needs at a May 6, 2019 IEP team meeting but made no decisions/recommendations regarding the student's placement or services pending completion of a reevaluation requested by the parent. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

It is the position of the parent that the district has failed to recognize the severity of the student's emotional and psychiatric needs and has minimized the student's behavioral issues. In the opinion of the investigator, it will be important for all parties to keep in mind the obligation of the district when, after a review of the results of the student's reevaluation, the IEP team convenes for an informed discussion about the student's placement and services. Before a district can place a child with a disability outside of the general education environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the general education classroom setting must be considered. Following that consideration, only if a determination is made that the child with a disability cannot be educated satisfactorily in the general educational environment, even with the provision of appropriate

supplementary aids and services, can a recommendation be made that the child be placed in a setting other than the general education classroom (34 C.F.R. 300.114(a)(2); K.S.A. 72-3420(a)).

Federal and state regulations preclude a district from removing a child from a general education class solely because of the category of disability, configuration of the delivery system, availability of special education and related services, availability of space or administrative convenience (K.A.R. 91-40-21(h); 34 C.F.R. 300.116(e)).

Issue Three: Information regarding the student's health history was deleted from the student's 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. 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.

It should be noted that federal regulations do no specifically require the IEP team to include a "Health" section in a student's IEP.

According to the parent, information regarding the student's health history was included in the student's September 28, 2017 IEP, but that same information was not present in the student's September 12, 2018 IEP.

The "Health Concerns" portion of the "Health" section of the Present Levels of Academic and Functional Perfomance element of the student's September 28, 2017 IEP contains the following statement:

> "[The student] is reported to self harm [sic] using a number of different things, mainly to cause blood or bruises to visible areas of her body. [The student] also picks at her nails and the area around her nails until there is blood."

The "Health Concerns" portion of the "Health" section of the Present Levels of Academic and Functional Performance subdivision of the student's September 12, 2018 IEP is blank.

The "Participants" portion of both the September 28, 2017 and September 12, 2018 IEPs shows that the parent was present during the development of both documents. Both the September 2017 and September 2018 IEPs contain handwritten comments initialed by the parents reflecting changes to various sections of the IEP made after the document was initially developed. No handwritten comments are included in the blank Health Concerns portion of the September 2018 IEP. The district asserts that the Health Concerns section of the September 2018 IEP was unintentionally omitted when

the IEP was developed.

Grade reports for the student show that she has earned grades of A or B in all subjects across all four quarters of the 2018-19 school year with the exception of second quarter when the student earned a C in math. The student also showed satisfactory effort in the majority of her subjects, earning a mark of "making progress" in only 2 of the 25 quarters where effort was reflected on the student's 2018-19 grade card. With regard to "Work Habits & Social Skills," the student has demonstrated satisfactory work with regard to working independently, using time efficiently, following rules, and beginning and completing work on time. She has consistently shown unsatisfactory work habits in the areas of accepting responsibility, completing and returning homework, and following directions.

With regard to the annual goals established in her September 12, 2018 IEP, the student's Progress Report shows that for the periods of October 12 and December 21, 2018 and thus far in May 2019, the student has made progress toward achieving her goals of complying with teacher direction/re-direction and implementing problems solving skills with peers.

In the opinion of the investigator, the omission of information from the Health Concerns portion of the student's September 12, 2018 IEP represents an oversight on the part of the IEP Team of which the parent was a member. This oversight has had no apparent impact on the provision of a free appropriate public education (FAPE) to the student who has continued to achieve her annual goals and to progress in the general education curriculum. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Four: A mental health diagnosis of "Disruptive Behavior Disorder" was incorrectly entered into the student's IEP.

As stated above under Issue Three, 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. 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.

According to the parent, there is no record of a diagnosis of "Disruptive Behavior Disorder" anywhere in the student's records, but the district included that term in two of her IEPs.

A Multi-disciplinary Re-evaluation/Eligibility Team Report dated October 5, 2015 from the student's previous school district notes that the student had, according to the parent, been "diagnosed with Failure to Thrive, Dermatillomania/Trichotillomania and ***Disruptive Behavior Disorder*** [emphasis added] from Dr. _____."

The “Health” section of the student’s September 28, 2017 IEP contains the statement “Disruptive Behavior Disorder.” The “Health” section of the student’s September 12, 2018 IEP also contains the statement “Disruptive Behavior Disorder.”

The district asserts that the diagnostic information included in the student’s September 28, 2017 IEP was drawn from information provided by the previous district. That information was then carried over into the student’s September 12, 2018 IEP.

The “Participants” portion of both the September 28, 2017 and September 12, 2018 IEPs shows that the parent was present during the development of both documents. As mentioned above under Issue Three, the September 2017 and September 2018 IEPs contain handwritten comments initialed by the parents reflecting changes to various sections of the IEP made after the document was initially developed. No comments are noted with regard to “Disruptive Behavior Disorder” on either the September 2017 or September 2018 IEP.

As noted above, grade and IEP progress reports show that the student is progressing in the general education curriculum and achieving her IEP goals.

In the opinion of the investigator, the inclusion of the diagnosis of “Disruptive Behavior Disorder” in the student’s September 28, 2017 and September 12, 2018 IEPs was based on information provided by the student’s previous school district. The IEP Team, of which the parent was a member, did not amend the term when reviewing and revising the student’s IEPs even though changes were made to other portions of the documents. The use of this diagnostic term has had no apparent negative impact on the provision of a free appropriate public education to the student. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

Federal regulations, at 34 C.F.R. 300.618 through 300.621 outline procedures which the parent may follow to request the amendment of educational records collected, maintained, or used by the district. If a request for amendment of records is made by the parent, the district must decide whether to amend the information in accordance with the request within a reasonable period of time of the receipt of the request. If the district decides to refuse to amend the information, it must inform the parent of the refusal, and advise the parent of the right to a hearing.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education laws 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 attached to this report.

_____
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 MAY 17, 2019

DATE OF REPORT: JUNE 15, 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 was received by the Kansas State Department of Education on May 17, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on June 16, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on June 6, 2019 as part of the investigation process.

USD #___ staff were interviewed by telephone on June 5, 2019. The following staff participated in the interview:

C, Director of Special Education
KL, Principal of _____ Elementary School
RV, Principal of Third Avenue School

In completing this investigation, the Complaint Investigator reviewed the following material that was provided by the parent:

- Email dated May 1, 2019 at 9:25 a.m. from the parent to Mr. L
- Email dated May 1, 2019 at 9:14 p.m. from the parent to Mr. L
- Email dated May 6, 2019 at 8:11 a.m. from the parent to MC, Administrative Assistant at _____ Elementary School
- Email dated May 6, 2019 at 8:45 a.m. from Ms. C to the parent
- Email dated May 6, 2019 at 1:16 p.m. from the parent to Mr. L
- Email dated May 6, 2019 at 3:13 p.m. from Mr. L to the parent
- Email dated May 7, 2019 at 10:27 a.m. from the parent to Mr. L
- Email dated May 7, 2019 at 2:12 p.m. from Mr. L to the parent
- Email dated May 7, 2019 at 2:30 p.m. from the parent to Mr. L

- Email dated June 9, 2019 from the parent to the Complaint Investigator

It is noted that USD #___ provided 253 pages of documentation related to this allegation. The Complaint Investigator reviewed all of the material but determined the following material to be pertinent to the allegation:

- Evaluation Team Report dated April 30, 2018
- Individualized Education Program (IEP) dated April 30, 2018
- Notice of Meeting (NOM) dated March 6, 2019 for an IEP team meeting to develop the IEP
- Prior Written Notice for Initial Services, Placement, Change in Services/Placement (PWN) dated March 19. 2019
- Notice of Meeting (NOM) dated March 6, 2019 for an IEP team meeting to develop the IEP
- NOM dated March 26, 2019
- PWN dated April 9, 2019
- Email dated April 15, 2019 from Ms. V to the parent
- Student Transfer Record from USD #___'s student information system
- Student Enrollment Record from USD #___'s student information system
- Email conversation dated May 31, 2019 between Deanne Bergman, Special Education Clerk at USD #___, to Christine Fluke, Data Operator at USD #233 (Olathe Public Schools)
- USD #___ School Board Policy JBC

Background Information

This investigation involves a 9-year-old male who was previously enrolled in the second grade at _____ Elementary School in USD #___ during the 2017-18 school year. The student was originally found eligible for special education at age three in USD #___ and he received special education and related services in USD #___ until he transferred out of the district on May 10, 2018. Records show for third grade the student attended the Claire Learning Center, a separate day school operated by USD #233, on the campus of KidsTLC located in Olathe, Kansas during the 2018-19 school year.

Issues

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 provide the student with a free appropriate public education (FAPE) as outlined in his current IEP dated April 16, 2019 by refusing to enroll the student on April 30, 2019 and then failing to follow the appropriate transfer procedures in order to provide the student with special education and related services.

Findings:

The parent reported USD #___ refused to enroll her son in school and then failed to follow the appropriate transfer procedures required by the IDEA so that he could receive a free appropriate public education (FAPE) as outlined in his April 16, 2019 IEP. The parent reported the student returned home on April 25, 2019 and that she attempted to enroll the student in USD #___ on April 30, 2019. The student has not received any special education or related services since moving back into USD #___.

USD #___ staff indicated they have tried to work with the parent to facilitate the student's return to the district. They held two IEP meetings at the parent's request while the student was still residing at KidsTLC, which is within the school district boundaries of USD #233.

These IEP team meetings were held on March 19, 2019 and April 9, 2019. The April 30, 2018 IEP was reviewed along with additional evaluation information provided by the parent. The parent was provided PWN on April 9, 2019 with the following description of the action proposed or refused:

> The team met on 4/9/19 as a follow-up to a team meeting held on 3/19/19. During the previous meeting (3/19/19), the parent stated she would like a small class with a para, speech services 15 minutes 3x/week, OT services 1 hour per week, and access to a weighted blanket/vest, fidgets, etc. Additionally, the parent did not want the student to attend a Public Day School Placement. During that meeting, the team refused to initiate these services and determined to meet again to discuss services once the team had a chance to review information provided by the parent and with a district representative.
>
> During the meeting held on 4/9/19, the team proposed that the student attend a Public Special Day School Placement as outlined

in his IEP dated April 30, 2018. At this time, the parent does not agree with this placement. The parent was offered to enter into Formal Mediation or Resolution, or she could wait until after his IEP meeting was held at TLC to determine what action she would like to take. The parent did not commit to either option at this time.

USD #___ reported they offered to attend the IEP team meeting for the student scheduled for April 16, 2019 at KidsTLC in USD #233 but never heard back from the parent. The parent stated she did not want to invite USD #___ staff to this IEP meeting with the USD #233 staff because she believed the USD #___ staff had "already made up their mind" about placement.

The parent reported USD #233 wrote the April 16, 2019 IEP to reflect the student's placement at the Claire Learning Center at KidsTLC. The parent reported and documentation shows the student was released from KidsTLC on April 25, 2019. At that time, the student returned to the family home located in USD #___. The parent started the enrollment process at USD #___ on April 30, 2019.

USD #___ reported the parent started to enroll the student in the district on April 30, 2019 but has not yet completed the enrollment process. USD #___ believes that without enrollment, there was no transfer into the school district, no IDEA transfer procedures to follow, and thus no obligation to provide FAPE to the student.

The parent stated she is well aware of the enrollment procedures in USD #___ having enrolled multiple foster children over a 13-year period. She explained the first step in the procedure is to take the child to the zoned school, request that the child be enrolled, provide proof of residency/proof of age/proof of guardianship, and fill out the needed paperwork. Then wait for a call from the school with classroom details and subsequently send the student to school.

USD #___ acknowledged this is an accurate description of the enrollment procedures when a student transfers into the school district after school has started for the school year. Prior to the start of each school year, a centralized enrollment is held at L High School. For the 2019-20 school year, this centralized enrollment is scheduled for July 25, 2019.

In order to enroll the student at USD #___, the parent reported she went to the zoned school, _____ Elementary School, on April 30, 2019 and spoke to

MC who is the administrative assistant in the school office. The parent indicated that Ms. C was unsure if the student "could be pulled back into the system" or if the student would need to re-enroll in the district using a snap code. Ms. C indicated she would get back to the parent with the correct information. Mr. L called the parent that same day to discuss the enrollment but did not speak to her.

The parent acknowledged Mr. L called and left a voicemail on April 30, 2019 asking the parent to return his phone call. The parent responded to Mr. L in an email on the morning of May 1, 2019 stating, "I received a voicemail regarding registration. I came in to register the student yesterday."
Mr. L reported that he again attempted to contact the parent on May 1, 2019, but was unable to reach her and left another voicemail.

The parent acknowledged Mr. L also called on May 1, 2019 and left another voicemail. That evening, the parent sent another email to Mr. L stating, "Is there something you need? If so, please respond letting me know."

On May 6, 2019, the parent sent an email at 8:11 a.m. to Ms. C stating, "I came in to register the student on Tuesday of last week. You were going to check to see if the tech guys could pull him back into the system or send me a snap code so that I could get him re-registered. I haven't heard back so I'm checking in."

Ms. C responded by email that same morning at 8:45 a.m. indicating that Mr. L had been trying to contact the parent and provided his phone number so she could return the phone call.

The parent responded by email on May 6, 2019 at 1:16 p.m. to Mr. L noting that she had sent him a few emails responding to his voicemails but that she had not heard back for almost a week.

Mr. L sent the parent an email that same day at 3:13 p.m. again asking the parent to contact him or Ms. V.

On May 7, 2019, the parent sent an email to Mr. L at 10:27 a.m. acknowledging the phone calls and voicemails. She noted that the voice mails did not provide any information and only asked her to return the call. The parent indicated that she had responded to each of the three phone calls via five email contacts trying to complete the enrollment of the student. In this email, the parent went on to say, "I would like to register my son in the district but it appears you have given

Ms. Monique instructions not to register him." The parent also stated, "Last Wednesday I emailed you after you left the first voicemail asking you to let me know what was needed to get him registered. Again, it has been a week and all I have received are voicemails asking me to return your call. If there is something needed, please let me know what that is."

Mr. L responded via email that same day at 2:12 p.m. stating, "Definitely Monique can help you with the enrollment process into the district. Please note that enrollment will be into the district, not necessarily _____. We will still need to meet as a team to discuss the IEP placement and plans moving forward."

The parent responded to Mr. L via email that same day at 2:30 p.m. stating, "Since April of last year you have made it very clear to me that you do not want my son back in school. As required, I'm attempting to get him enrolled. Your interference apparently indicates your fear that I'm trying to get him back in _____ Elementary School]. No worries. My desire is that he is never placed where he's unwanted or doesn't belong."

The parent reported that no one from the school district ever contacted her following the May 7, 2019 email. The parent also indicated that she did not contact the district again about enrollment after May 7, 2019 either. The parent acknowledged that she never provided the district with proof of residence or completed the online enrollment process. The parent indicated she never returned any of Mr.L's phone calls because she does not trust the school staff and she wanted to have her contacts with the school as well as the school's responses in writing.

Federal regulations at 34 C.F.R. 300.101(a) require that a free appropriate public education (FAPE) must be available to all children residing in the State between the ages of 3 and 21, inclusive. State regulations at K.A.R. 91-40-2(b)(1) require that each school district make FAPE available to each child with a disability residing in its jurisdiction beginning not later than the child's third birthday.

It is clear that the student resided within Kansas during the 2018-19 school year and was transferring between two school districts within the same state. He resided at KidsTLC within the USD #233 school district between August 15, 2018 and April 25, 2019. The student was dismissed from the residential placement at KidsTLC on April 25, 2019 and returned back home to live with his mother who resides in USD #___. The mother contacted USD #___ on April 30, 2019 in order to enroll the student following established district procedures. It is evident

that the student is residing within the boundaries of USD #___ and the school district was notified of this fact on April 30, 2019. Therefore, USD #___ is responsible for providing FAPE to the student as of April 30, 2019 regardless of whether or not the parent has completed the enrollment process.

Federal regulations at 34 C.F.R. 300.323(e) require school districts to follow specific procedures when a student with an IEP transfers between school districts within the same state. As noted previously, the student was clearly transferring between USD #233 and USD #___ and transfer procedures were required.

The first requirement in the IDEA transfer procedures is that the child with a disability must have an IEP that was in effect in a previous school district within the same state. In this case, it is clear that the student was enrolled in USD #233, another school district in Kansas, and attended the Claire Learning Center to receive special education and related services during the 2018-19 school year through IEPs dated April 30, 2018 and April 16, 2019.

Next, the IDEA transfer procedures require that the student must enroll in the new school district within the same school year. In this case it is clear that the parent wanted to enroll the student in USD #___ on April 30, 2019; however, this process has still not been completed despite multiple emails and phone calls made by both parties.

The IDEA does not include any requirements or guidance on school district enrollment procedures so school districts are free to adopt reasonable enrollment procedures. USD #___ District Policy JBC requires the superintendent to establish orderly procedures for enrolling all students. The description of these procedures was accurately described by the parent in her Interview and corresponded with the description provided by school staff. However, in this situation, it appears that miscommunication and mistrust between both parties have caused an unnecessary delay in completing the enrollment process for the student. But regardless of whether the student was officially enrolled in the district, USD #___ was certainly aware that the student was residing with the jurisdiction of #___. Consequently USD #___ became responsible for providing FAPE to the student as of April 30, 2019.

Finally, the IDEA transfer procedures require the new school, in consultation with the parents, to provide FAPE to the child including services comparable to those described in the child's IEP from the previous school district, until such time that

the school district either 1) adopts the child's IEP from the previous public agency; or 2) develops, adopts, and implements a new IEP that meets the applicable requirements in at 34 C.F.R. 300.320 through 34 C.F.R. 300.324.

In this case, Mr.L's email dated May 7, 2019 states, "We will still need to meet as a team to discuss the IEP placement and plans moving forward" indicating USD #___ was aware of the requirement to provide FAPE to the student. However, USD #___ never scheduled or held any consultation or IEP meeting with the parent.

It is noted that in an attempt to work with the parent and plan for the student returning to the district, USD #___ held the March 19 and April 9, 2019 IEP team meetings to review the April 30, 2018 IEP and provided PWN to the parent when the student was still enrolled in another district, USD #233. Under IDEA, these were not IEP meetings as USD #233 was the responsible public agency for providing FAPE to the student when these meetings were held. In addition, USD #___ did not have the authority to provide PWN or offer dispute resolution options because USD #233 was the responsible public agency required to provide FAPE to the student at that time. This appears to have contributed to the parent's perception that the district had "already made up their mind" in regards to the student's placement.

With parent consent, it would have been appropriate for USD #___ to attend the IEP team meeting held by USD #233 on April 16, 2019 in order to provide input in regards to the student's transition back into USD #___ at some future date. Regardless, had the district waited until the student was no longer enrolled in USD #233 and residing within the boundaries of USD #___, the transfer process would have been based on the current April 16, 2019 IEP not the outdated April 30, 2018 IEP and the perception of predetermination by the parent may have been avoided.

Based on the foregoing, the allegation of a violation of special education laws and regulations of failing to provide FAPE to the student and to follow appropriate transfer procedures is substantiated.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.101(a) require that a free appropriate public education (FAPE) must be available to all children residing in the State between the ages of 3 and 21, inclusive. 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 findings of this investigation show that the student was dismissed from the residential placement at KidsTLC on April 25, 2019 and returned back home to live with his mother who resides in USD #___. USD #___ became aware that the student was residing within its jurisdiction when the mother attempted to enroll the student into the district on April 30, 2019. While there has been a significant delay in the enrollment process, USD #___ is still responsible providing FAPE to the student; however, the student has not received any special education or related services necessary to provide the student with FAPE since April 30, 2019.

B. Federal regulations at 34 C.F.R. 300.323(e) require school districts to follow specific procedures when a student with an IEP transfers between school districts within the same state.

   The findings of this investigation show that the student transferred from USD #233 to USD #___ on April 30, 2019. Even though the student has not officially enrolled in the district, USD #___ was aware of the student and the fact that the student has an IEP. However, USD #___ failed to follow appropriate transfer procedures to ensure the student was receiving FAPE. In addition, USD #___ held IEP team meetings and provided the parent with PWN at a time when USD #233 was responsible for providing FAPE to the student outside of the IDEA transfer procedures.

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

1. Within 10 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 34 C.F.R. 300.101(a), K.A.R. 91-40-2(b)(1), and 34 C.F.R. 300.323(e) 7 by following appropriate transfer procedures in

order to provide FAPE to students with IEPs who transfer into the district.

2. No later than June 30, 2019, USD #___ will follow appropriate transfer procedures to ensure FAPE is provided to the student. As a result of this process, USD #___ shall make a written offer to provide the compensatory services owed to the student for the period between April 30, 2019 and the end of the 2018-19 school year. The parent can accept all, part, or none of the compensatory services offered and has 15 school days from the date she receives the offer to notify the district of her decision. Within 15 school days of making this written offer to the parent, USD #___ shall notify SETS, in writing, of the parent's decision regarding the offer of compensatory services. If the parent accepts all or some of the compensatory services, USD #___ shall schedule those services to begin during the summer and be completed as soon as reasonably possible and shall provide the schedule of compensatory services to the parent and SETS. USD #___ shall notify the parent and SETS when the compensatory services have been completed.

3. No later than October 1, 2019, USD #___ will provide training to all staff involved with the transfer of students at both _____ Elementary School and the Third Avenue School including, but not limited to, building and district administrators, building or district office administrative assistants, and any other staff member that is likely to receive enrollment questions from families. This training will focus on appropriate transfer procedures and the responsibility to provide FAPE to students who transfer into the school district. 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 October 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

4. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to enrollment and transfer procedures for students with IEPs to ensure these students are provided with FAPE. As a result of this review, USD #___ will create new written procedures to ensure that students with IEPs who transfer into the district are provided FAPE. No later than August 30, 2019, USD #___ will share this new procedure with all building and district administrators, building or district office administrative assistants, and any other staff member that is likely to receive enrollment questions from families. USD #___ will implement the

procedure beginning with the 2019-20 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

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.

_____

(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 16, 2019

DATE OF REPORT: MAY 15, 2019

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

Investigation of Complaint

The investigator spoke by telephone with the parent on April 17, 2019 to clarify the concerns stated in her formal complaint request form. The investigator has also reviewed the written response of the district, submitted on May 8, 2019, and communicated by e-mail with Mr. G, attorney for the district.

USD ____ staff, Dr. _____ (Director of Special Education) and Dr. ____ (Superintendent), declined the investigator's request for an interview which was communicated by Mr. G.

The parent agreed to a follow-up interview with the investigator, scheduled for May 1, 2019, but later communicated in an email dated April 30, 2019 that she would rather not participate in the phone interview because she did not have much more to say in regard to her concerns. Thus, the investigator canceled the May 1 interview.

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

- Text message sent from M.S., special education teacher of the student, to the parent on March 8, 2019 – submitted by the parent
- Email sent from the parent to Director of Special Education on March 8, 2019 – submitted by the parent
- Email sent from the parent to Superintendent on March 20, 2019 – submitted by the parent
- Email sent from the parent to both Director of Special Education and Superintendent on March 26, 2019 – submitted by both the parent and Mr. G.
- USD #___'s written response to the parent's complaint and the issues stated within this report – submitted by Mr. G.

- Office of Special Education Programs (OSEP) Letter to Clarke, 48 IDELR 77, 2007 – submitted by Mr. G.
- The student's IEP dated April 19, 2018 – submitted by Mr. G.
- Email sent from Director of Special Education to the parent on March 27, 2019 – submitted by Mr. G.
- USD #___ district calendar posted at _____

Background Information

This investigation involves a 10-year-old male enrolled in the 4th grade at _____ Elementary in USD #___. The student is eligible for special education and related services and his identified disability is learning disability. This investigation also involves an alleged systemic violation of special education laws, and thus includes all other students in USD #___ who are identified with disabilities and eligible for special education and related services under the IDEA.

Preliminary Matters

In the district's written response to this complaint, as a preliminary matter, it contends that all of the parent's complaints should be dismissed because guidance from the Office of Special Education Programs in Letter to Clarke, 48 IDELR 77 (OSEP 2007), states that the IDEA does not address whether missed services due to a provider's absence constitutes a denial of free appropriate public education (FAPE), and OSEP encourages public agencies to make individual determinations about a denial of FAPE in those instances. The district also contends that the parent's complaints should be dismissed because "regardless of whether the four (4) day absence of Complainant's son's regular special education teacher constituted a denial of FAPE, her son was provided compensatory educational services…which was **before** Complainant actually filed her Formal Complaint Request Form with the Kansas State Department of Education ("KSDE")." While Letter to Clarke does provide that whether missed services constitute a denial of FAPE should be an individual determination made on a case-by-case basis, nothing in that guidance, the IDEA, or its implementing regulations prohibits a state education agency (SEA) from investigating such matters when raised in a state complaint. The federal regulations at 34 C.F.R. 300.149(a) state "The SEA is responsible for ensuring that requirements of this part [Part B of the IDEA] are carried out; and that each educational program for children with disabilities administered within the State…is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA." Regarding the compensatory services provided to the student before the parent filed the complaint, compensatory services offered/provided before a complaint is filed do not render allegations of noncompliance moot. In addition, as stated in the investigator's April 17, 2019 email to the district "in a phone call with the parent, she indicated that she wanted to drop the issue concerning her son missing his

IEP services during professional development days because she was satisfied that the special education teacher has since made up those services for her son." The parent is alleging violations that concern all children with IEPs in USD #___, not just her son, thus issue one below is written as a systemic allegation.

As a second preliminary matter, in the district's written response to this complaint and specifically issue one, it contends that the parent does not have standing to file a systemic complaint on behalf of other students and/or parents. It further states that the parent's "allegations should be limited only to her son and, therefore, the scope of this investigation should be limited to the specific concerns raised by [parent] in connection with her son." Nothing in the federal regulations prohibit a parent from filing a complaint on behalf of students other than his/her own child. Federal regulations at 34 C.F.R. 300.153(a) and (b) state that ***an organization or individual may file*** a complaint and the complaint must include 1) a statement that a public agency has violated a requirement of Part B of the IDEA or its regulations, 2) the facts on which the statement is based, 3) the signature and contact information of the complainant, and 4) ***if*** alleging violations regarding a specific child the complaint must include the name and address of the child as well as the name of the child's school and a description of the problem of the child. Further, in Questions and Answers on IDEA Part B Dispute Resolution Procedures issued by OSEP on July 23, 2013, question B-9 asks, "May the State complaint procedures, including remedies outlined in 34 CFR 300.151(b), be used to address the problems of a group of children, i.e. a complaint alleging systemic noncompliance?" OSEP answers that question in the affirmative:

> State complaint procedures provide a powerful tool to enable a State to fulfill its general supervisory responsibility to monitor implementation of Part B requirements in the State. This responsibility applies to the monitoring of its public agencies' compliance with part B with respect to both systemic and child-specific issues. 34 CFR 300.149 and 300.600(a)…. If the complaint names certain children and alleges that the same violations apply to a class, category, or similarly situated children, the SEA must review all relevant information to resolve the complaint, but would not need to examine additional children if no violations are identified in the policies, procedures, or practices for the named children. However, if the SEA identifies violations for any of the named children, the SEA's complaint resolution must include measures to ensure correction of the violations for all children affected by the alleged systemic noncompliance described in the complaint. Additionally, the SEA would need to examine the policies, procedures, and practices that may be causing the violations and the SEA's written decision on the complaint must contain procedures for effective implementation of that decision, including corrective actions to achieve compliance. 34 CFR 300.152(b)(2)(iii), 300.149(a)(2)(ii), and 300.600(e).

Thus, pursuant to OSEP's directive regarding systemic complaints, the scope of this investigation is district-wide and not limited to only the student.

Issues

The parent raised three issues which were investigated. It is noted the IDEA allows state formal complaint investigations to cover a 12- month period from the receipt of the complaint. The time period for this complaint begins on April 16, 2018.

Issue One: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide all children with disabilities in the district with special education and related services in conformity with the students' individualized education programs (IEPs), specifically by not providing services during teacher professional development days during the weeks of March 18th and 25th.

Findings:

The parent reported USD #___ did not provide IEP services to students while special education teachers attended mandatory training during the weeks of March 18, 2019 and March 25, 2019. The parent reported that some schools had substitutes to provide IEP services while other schools only had substitutes to provide IEP services for part of the weeks in question (1 out of 5 days or 2-3 out of 5 days). The parent provided, as evidence, a text message sent to her from the student's special education teacher, M.S. The text message, dated March 8, 2019, stated:

> I wanted to let you know I have to attend a mandatory training the entire week after spring break [week of March 18] from 8:30-4:30. While I do think the training will be worthwhile as it's about dyslexia, I'm frustrated about a few things. 1. I just found out on Wednesday about it. 2. They are only granting a sub for me on Monday. Students on my caseload will miss services for 4 Straight (sic) days.

In the district's written response, it confirms that it provided a 5-day comprehensive training for staff during the week of March 18, 2019 and similar training was also offered during the week of March 25, 2019. USD #___'s written response also confirms that during 4 of 5 days in the week of March 18, the student was in a regular education classroom rather than in a special education classroom as provided in his IEP. The student's IEP dated April 19, 2018 states that he will receive special education services in a special education setting for 30 minutes, 5 days per week, every week. The district's written response also stated:

> [T]he District strives to have coverage for any teacher's absence, whether it be for personal leave, illness, bereavement, professional

> development or some other reason and has procedures in place to arrange for substitute coverage. However, there are circumstances that arise, as occurred in this particular situation, where substitute coverage that would have allowed Complainant's son to remain in his special classroom on those four days was simply not available.

The district did not provide any information regarding the services that other children with disabilities in USD #___ may have missed or any coverage that may have been provided during this time except to state:

> [T]he District has reviewed each situation where a student's regular [special] education teacher was absent, due to training during the weeks of March 18 or 25, 2019, and, where appropriate, made arrangements for the provision of compensatory educational services to ensure that each student received FAPE consistent with his or her IEP.

Federal regulations at 34 C.F.R. 300.17 define FAPE in part as "special education and related services that are provided in conformity with an individualized education program (IEP)." Federal regulations require that "special education and related services are made available to the child in accordance with the child's IEP" (34 C.F.R. 300.323(c)(2)). The U.S. 10th Circuit Court of Appeals, which has jurisdiction in Kansas, has held that a deviation from an IEP's requirements is not a denial of FAPE unless that deviation amounts to a "clear failure" of the IEP to confer an educational benefit. *L.C. and K.C. v. Utah State Bd. Of Educ. Et al.,* 43 IDELR 29 (10th Cir. 2005); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist.*, 28 IDELR 177 (10th Cir. 1998). Finally, in Letter to Clarke (48 IDELR 77, OSEP 2007) OSEP gave informal guidance stating:

> We encourage public agencies to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis.

Based on the foregoing findings of fact and legal authority, the allegation of a violation of special education laws and regulations is substantiated in that USD #___ did not comply with 34 C.F.R. 300.323(c)(2), by failing to make available special education services in accordance with children's IEPs during the weeks of March 18th and March 25th, 2019. However, this investigator is unable to find that this failure to provide services was a "clear failure" and a denial of FAPE, as KSDE accepts the informal OSEP guidance that this determination should be made on a case-by-case basis. While the district stated in its written response that it has "reviewed each situation where a student's regular education teacher

was absent…and, where appropriate, made arrangements for the provision of compensatory educational services to ensure that each student received FAPE," the district provided no evidence to support that statement. Thus, the Corrective Action 2 stated at the end of this report will require the district to provide such evidence.

> **Issue Two:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide written notice to the parent a reasonable time before the district changed the provision of FAPE to the child, specifically by not sending a prior written notice informing the parent that the services in the child's IEP would not be provided during teacher professional development days during the weeks of March 18th and 25th.

Findings:

The findings of issue one are incorporated herein by reference.

As established in issue one above, the student and other students with disabilities in USD #___ did not receive the services required by their IEPs during the weeks of March 18th and 25th, 2019. Further, the district stated in its written response that the student was in a general education placement for 4 out of 5 days, when his IEP called for a special education placement for 30 minutes each day. The district states in its written response to this issue that "as admitted by Complainant in her Formal Complaint Request Form, she [the parent] was advised in a written communication on March 8, 2019, that her son's regular special education teacher would be absent during the then upcoming week of March 18, 2019." The parent stated in her formal complaint request form "I received [a] text message from my sons (sic) SPED teacher the Friday before spring break to notify me that _____ would not get services 4 out of 5 days." The parent later provided that text message, which is quoted above in the findings of issue one.

Federal regulations at 34 C.F.R. 300.503(a)(1) require a public agency to give written notice to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The KSDE Special Education Process Handbook states that a change in service or placement, even if not material or substantial, requires prior written notice (Chapter 1. Section D.; Section E. Requirements for Parental Notice and Consent chart). The prior written notice must meet the content requirements of 34 C.F.R. 300.503(b):
(1) a description of the action proposed or refused;
(2) an explanation of why the agency proposes or refuses to take the action;
(3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) a statement that the parents of a child with a disability have protection under the procedural safeguards of Part B and the means by which a copy of a description of the procedural safeguards can be obtained;
(5) sources for parents to contact to obtain assistance in understanding Part B;
(6) a description of other options the IEP Team considered and the reasons why those options were rejected; and
(7) a description of other factors that are relevant to the agency's proposal or refusal.

While the district contends that the special education teacher's text message sent to the parent on March 8th constitutes prior written notice of this change in services and placement, that text message did not meet the content requirements of 34 C.F.R. 300.503(b). Further, the district provides no evidence that other parents of children who missed services or whose placements were changed received proper prior written notice.

Based on the foregoing findings of fact and legal authority, the allegation of a violation of special education laws and regulations is substantiated in that USD #___ did not comply with 34 C.F.R. 300.503, by failing to provide parents prior written notice a reasonable time before it changed the placement and provision of FAPE to children with disabilities.

> **Issue Three:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide written notice in response to the parent's request concerning the provision of a free appropriate public education (FAPE) to the child, specifically by not responding to the parent's emails sent March 8th and March 20th requesting that her child's missed services be made up.

Findings:

The findings of issues one and two are incorporated herein by reference.

On March 8th, 2019, upon learning from M.S. that her child would miss services during the week of March 18th, 2019, the parent sent an email to the Director of Special Education. The parent reported that she did not receive a response from the Director of Special Education. On March 20th, 2019, the parent sent a similar but shorter email to the Superintendent. The parent reported that she did not receive a response from the Superintendent. Finally, on March 26th, 2019 the parent sent another email to both the Director of Special Education and the Superintendent. This email was identical to the March 8th email except for three sentences in the first paragraph that reminded the Director of Special Education and the Superintendent that the parent had reached out to them in the past and had not heard back. The March 8th and March 26th emails stated in part:

> I understand that my son will have a substitute to receive his SPED minutes for Monday, but I am concerned about the rest of the week. What is the plan for the rest of the week?... How will these minutes be made up if no substitute is provided?... Thanks for your attention with this matter and I have faith that this issue will get resolved soon and that you will address my concerns and point me into (sic) the right direction of who I need to speak with to insure (sic) that my son get (sic) his SPED minutes for those 4 days!

The March 20th email sent to the Superintendent stated in part:

> I have attached the email that I sent on March 8th and have yet to hear back from this person [Director of Special Education] to address my concerns and my services that my son is entitled to. I am aware at this time my son has NOT received his educational minutes and want to know when they will be made up or what I can do as a parent to reinforce and make sure he gets his services met.

In its written response, USD #___ acknowledges that the parent sent the above referenced email to the Director of Special Education on March 8th and further acknowledges that the Superintendent did not respond to that email or become aware of it until the parent sent the March 26th email. The district also acknowledges that the parent sent an email to the Superintendent on March 20th but states the Superintendent did not see the email at the time it was sent.

USD #___ provided an email dated March 27th, 2019 sent from the Director of Special Education to the parent in response to the parent's March 26th email. The Director's email stated, "[M.S.], [the student's] Special Education Teacher, has developed a schedule to provide compensatory special education services for the services he and other students on her caseload missed the days there was not a substitute for her while she attended Orton-Gillingham Training from March 18 to March 22."

Federal regulations at 34 C.F.R. 300.503(a)(1) and (2) require a public agency to provide written notice to the parents of a child with a disability a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. KSDE has long interpreted this to mean that when a parent makes a request or proposal to a public agency concerning his/her child's identification, evaluation, placement or provision of FAPE, the public agency must respond with prior written notice within a reasonable time (See KSDE Special Education Process Handbook, Chapter 1. Section D.; see also KSDE Memo "Reasonable Time" to Respond to Parent Requests at http://www.ksde.org/Default.aspx?tabid=614;). Further, KSDE has interpreted "reasonable time" to mean 15 school days unless there is some unusual circumstance. Id. Federal regulations at 34 C.F.R. 300.11(c)(1) define the term

school day as “any day, including a partial day that children are in attendance at school for instructional purposes.”

In this case, the parent made a request/proposal regarding her son’s special education service minutes, asking that the district create a plan to make up those services. This was a request concerning the provision of FAPE to her child. She first made this request on March 8th, then on March 20th, and finally on March 26th. The district was required to respond to the parent’s request with prior written notice within 15 school days of the request. An examination of the USD #___ district calendar posted at _____ indicates that 15 school days from the date of the parent’s initial request (on March 8th, 2019) would have been April 5th, 2019 (spring break occurred March 11th through March 15th). The Director of Special Education did respond to the parent’s March 8th email within this timeframe, on March 27th, 2019; however, the Director’s response did not meet all of the required content elements of prior written notice (see 34 C.F.R. 300.503(b)).

Based on the foregoing findings of fact and legal authority, the allegation of a violation of special education laws and regulations is substantiated in that #USD ___ did not comply with 34 C.F.R. 300.503(b), by failing to provide the parent prior written notice that conforms with the content requirements of the regulation.

Corrective Action

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

A. Federal regulations at 34 C.F.R. 300.323(c)(2), require public agencies to ensure that special education and related services are made available to each child in accordance with the child’s IEP.

   The findings of this investigation show that USD #___ did not make available special education services in accordance with children’s IEPs during the weeks of March 18th and March 25th, 2019. However, this investigator is unable to find that this failure to provide services was a “clear failure” and a denial of FAPE, as KSDE accepts the informal OSEP guidance that this determination should be made on a case-by-case basis. While the district stated in its written response that it has “reviewed each situation where a student’s regular education teacher was absent…and, where appropriate, made arrangements for the provision of compensatory educational services to ensure that each student received FAPE,” the district provided no evidence to support that statement. Thus, the Corrective Action 2 stated below will require the district to provide such evidence.

B. Federal regulations at 34 C.F.R. 300.503(a)(1) require that written notice (that meets certain content requirements) must be given to the parents of a

child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or education placement of the child or the provision of FAPE to the child.

The findings of this investigation show that USD #___ failed to provide parents prior written notice a reasonable time before it changed the placement and provision of FAPE to children with disabilities during the weeks of March 18th and March 25th, 2019.

C. Federal regulations at 34 C.F.R. 300.503(b) require that written notice must include 7 listed elements.

The findings of this investigation show that USD #___ failed to provide written notice that included the content requirements of 34 C.F.R. 300.503(b) when it responded to the parent's request to make up her child's missed services.

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 assurances to Special Education and Title Services (SETS) stating that it will:

    a. Comply with 34 C.F.R. 300.323(c)(2) by ensuring that special education and related services are made available to each child in accordance with the child's IEP.

    b. Comply with 34 C.F.R. 300.503(a)(1) and (2) by ensuring that written notice is given to the parents of a child with a disability a reasonable time before the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

    c. Comply with 34 C.F.R. 300.503(b) by ensuring that when the district is required to provide written notice to parents, such notice will include:
        i. A description of the action proposed or refused by the agency;
        ii. An explanation of why the agency proposes or refuses to take the action;
        iii. A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
        iv. A statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA Part B and, if this notice is not an initial referral for evaluation, the

means by which a copy of a description of the procedural safeguards can be obtained;

v. Sources for parents to contact to obtain assistance in understanding the provisions of IDEA Part B;
vi. A description of other options that the IEP Team considered and the reasons why those options were rejected; and
vii. A description of other factors that are relevant to the agency's proposal or refusal.

2. No later than May 31, 2019, USD #___ will provide SETS with documentation to show that the district has in fact reviewed each situation where a student's regular special education provider was absent due to training during the weeks of March 18th or March 25th, 2019 and has in fact arranged for the provision of compensatory services for each student whose interruption in services constituted a denial of FAPE. Such documentation shall include all of the following:

    a. a list of all of the students who did not receive services in conformity with their IEPs;

    b. a list of all of the students that the district individually determined were not denied FAPE despite the interruption in services, and an explanation of the basis for making each of those determinations;

    c. a list of all of the students that the district individually determined were denied FAPE due to the interruption in services, and an explanation of the basis for making each of those determinations;

    d. a summary and schedule of the compensatory services provided to each student denied FAPE.

3. No later than August 30, 2019, USD #___ will provide training to all administrators and special education providers. Such training shall include information about all instances when prior written notice must be provided to parents and the required content of such prior written notice.

    a. No later than May 31, 2019, USD #___ will contact TASN to request a TASN provider who can conduct this training. USD #___ shall provide documentation of this request to SETS on the same day USD #___ contacts TASN.

    b. No later than August 30, 2019, USD #___ will provide documentation of the completed training to SETS which shall include: the name of the TASN provider who conducted the training, the names and titles of all individuals who attended the

training, and a description of the content of the training.

4. Within 10 calendar days of the date of this report, USD #___ shall 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.

_____

Tiffany Hester, 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: 19FC___-002

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on April 16, 2019, by _____, on behalf of their son, _____. and on behalf of all students with disabilities in USD #___. 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 May 15, 2019. That report concluded that there was a violation of special education statues and regulations, and ordered a variety of corrective actions.

Thereafter, on May 28, 2019, the school district filed an appeal of the Initial Report. Upon receipt of the appeal, and in accordance with K.A.R. 91-40-51(f), an Appeal Committee was appointed and it reviewed the report, the district's notice of appeal, the attachment to the notice of appeal, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

DISCUSSION AND FINDINGS OF FACT

As a preliminary matter, the Appeal Committee reviews the appeal to determine whether all procedural requirements of an appeal are met. In that preliminary review, the Appeal Committee made the following findings: (1) the letter issued by the complaint investigator to the parent and to Dr. Colvin, informing them that the decision had been completed and that the decision was enclosed with the letter, was dated May 15, 2019; (2) the date of the report issued by the investigator is also dated May 15, 2019; (3) on page 12 of the report, the report states that any appeal shall be in accordance with K.A.R. 91-40-51(f); (4) on page 13 of the report, under the title "Right to Appeal," the report states that any appeal must be delivered to Special Education and Title Services (SETS) within 10 calendar days from the date of the report; (5) on page 13 of the report, regulation K.A.R. 91-40-51(f) is provided in full, including the requirement to file an appeal within 10 calendar days of the report; (6) K.A.R. 91-40-51(f) provides no exception to the filing timeline of 10 calendar days from the date of the report; (6) the appeal filed by the school district was sent to SETS through an e-mail after office hours, at 10:46 p.m., on May 28, 2019. Thus, the receipt date was May 29, 2019, 14 days after the date of the report.

CONCLUSION

The appeal filed in this matter was not filed in accordance with the requirements of K.A.R. 91-40-51(f) because it was not delivered to SETS within 10 calendar days of the date of the report. Accordingly, the Appeal Committee does not have jurisdiction to consider the merits of the

appeal. All findings and conclusions in the original report are sustained, including the corrective actions.

This is the final decision on this matter, there is no further appeal. This final decision is issued this 29th day of May, 2019.

COMMENT

Although the Appeal Committee has determined that it does not have jurisdiction to consider the merits of this appeal, it did read the appeal, and believes some response is appropriate in order to clarify some of the issues on appeal. The following are comments of the Appeal Committee:

1. There was no finding in Issue 1 that [this student]. was denied a free appropriate public education (FAPE) [Report p. 5, where the investigator states that she was unable to find a violation of FAPE]. The complaint investigator agreed with the district's assertion that the guidance from the Office of Special Education Services (OSEP), in Letter to Clarke, applied to this situation. But Letter to Clarke does not give school districts a blank check to fail to provide services in accordance with an IEP. Letter to Clarke stated that: "Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis." Although the district stated in its written response that it had made such a case-by-case individualized determination, it did not produce any evidence of those individualized inquiries. Essentially, the investigator was saying that if a district is going to use the Letter to Clarke defense for an interruption in services, it must use and be able to document that it followed the standard set by Letter to Clarke (to make an individualized determination regarding each child whose services have been interrupted). Because the district did not document that it used the Letter to Clarke procedure, the investigator concluded that it had not met the standard set by Letter to Clark for an interruption in IEP services. The corrective action was simply for the district to use the standard on which it was relying for a defense, for each of the children whose services were interrupted and to document to Special Education and Title Services that it had done so. The Appeal Committee agrees with the investigator's analysis.

2. With regard to the standing of this parent to file a systemic complaint, there is no standing requirement. Federal regulations, at 34 C.F.R. § 300.153(a), state that a complaint may be filed by any organization or individual. There is no requirement that the complainant have a connection to the complaint or to the students who the subject of the complaint. Moreover, in Questions and Answers on IDEA Part B Dispute Resolution Procedures (OSEP 2013), Q. B-9, p. 20, OSEP states that state education agencies (SEA) are required to resolve complaints regarding "an individual child or a group of children…" In its appeal, the district notes that in this guidance, OSEP said that an SEA "would **not** need to examine additional children if **no violations** are identified in the policies, procedures or practices for the named children." The Appeal Committee agrees, but also would put emphasis on the word "need" in this statement. This statement means what it says. An SEA would not **need** to examine additional children under this circumstance, but, as the investigator correctly noted, it does not preclude an SEA from examining the allegations regarding other children.

3. The Notice of Appeal statement on page 4, says that "Ultimately, the Legal Consultant has put the proverbial cart before the horse in her Report by rendering a conclusion that a violation has been "substantiated" without reviewing any documents or evidence that might support such conclusion and ordering as 'corrective action' the provision of the educational records of other students which the Legal Consultant would have had to have reviewed before making a determination that any violation even occurred in the first place." The Appeal Committee is in complete disagreement with this statement. There is abundant evidence, including district employee admissions, that students missed services which would have justified a substantiation of a violation of Part B. If a district is going to use the Letter to Clarke defense in a complaint, such as this one, it needs to document that it followed the Letter to Clarke procedures. It is not the responsibility of the investigator to provide that documentation. When a district asserts any defense to any allegation, it is the district which has the obligation to provide the necessary support for that defense.

4. 34 C.F.R. § 300.503 requires school districts to provide prior written notice, that meets the requirements in this section, a reasonable time before it proposes to initiate or change the identification, evaluation, placement, or the provision of FAPE, or before it refuses to do so. In this case, the district did not discontinue services as a result of a teacher unexpectedly not showing up for work. Rather, the district interrupted services for a planned multi-day training session. When a district effectively, though not literally, unilaterally makes actual changes to the frequency or duration of a service that a child is receiving in conformance with an IEP, or unilaterally makes actual changes to a child's placement without a meeting, without any change to the content contained in the IEP, and without prior written notice to the parent, it is in violation of this regulation and likely of 34 C.F.R. § 300.320(a) and § 300.324(a) which empowers only IEP teams to make these kinds of changes (as opposed to school personnel making unilateral changes), and almost certainly of 34 C.F.R. § 300.322, which requires that parents have an opportunity to participate in such decisions. Although this Appeal Committee is not making any particular findings regarding this issue, any of the procedural violations suggested in this paragraph could result in a failure to provide a FAPE.

5. The Notice of Appeal, on page 5, states that the investigator does not specify how Dr. Colvin's e-mail was deficient with regard to providing prior written notice. In Issue 3, on page 7, the investigator incorporates by reference, the findings in issues one and two, which includes the specific content requirements of a prior written notice on pages 6 and 7. On page 8 of the report, the investigator quoted the entire e-mail from Dr. Colvin. It is apparent to the Appeal Committee that this e-mail did not include all of the requirements of a prior written notice, as provided by the investigator on pages 6 and 7. If a district is going to appeal this kind of conclusion, it would be advisable for the district to point out, in its appeal, exactly how the e-mail met each of the requirements of a prior written notice.

6. 34 C.F.R. § 300.600 states that SEAs have a general supervision obligation to monitor and to enforce the requirements of Part B, and 34 C.F.R. § 300.153 requires SEAs to have a complaint process to resolve allegations of a violation of any requirement of Part B, including procedural violations, even if those procedural violations do not constitute a failure to provide a FAPE.

APPEAL COMMITTEE:

_____
Rachel Beech

_____
Brian Dempsey

_____
Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ PUBLIC SCHOOLS #___
ON JANUARY 10, 2019

DATE OF REPORT: FEBRUARY 10, 2019

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Dr. Jennifer Harrington, Director of Special Education and Special Services for USD #___ on January 28 and 31, 2019 and February 8, 2019. The investigator spoke by telephone with the parent on January 28, 2019.

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

- IEP for this student dated November 29, 2017
- Videotaped story from WIBW television station dated November 21, 2018 entitled "Capper Foundation makes changes to program serving children with autism"
- IEP for this student dated November 29, 2018
- Termination of Related Service form dated November 29, 2018
- Attendance form for Speech/Language services covering the period of August 2018 through January 2019
- Service Log for Speech/Language and Occupational Therapy services for the period of August 22 through December 19, 2018
- Attendance form for Occupational Therapy services covering the period of August 2018 through November 2018
- Grade Report for the student for the 2017-18 school year
- Grade Report for the student for the 2018-19 school year
- Email dated February 1, 2019
- Email dated February 4, 2019
- Email dated February 8, 2019 regarding Winter Recess assignment
- Online District Calendar for USD #___ for the 2018-19 school year

Background Information

This investigation involves a 9-year-old boy who is currently enrolled in the 4th grade in his neighborhood elementary school. The student was determined to be eligible for and in need of services under the primary exceptionality of Autism. The student has two siblings who by report of the parent have also been diagnosed with Autism and receive services through this school district.

For approximately 4 years, the parent has enrolled the student in an ABA based program through the Easterseals Capper Foundation. The district neither recommended nor facilitated this service. During the 2018-19 school year, beginning September 7, 2018, the student left school on a total of 11 days to participate in the Capper Foundation program between the hours of 1:15 and 3:15 PM. The program ended on November 16, 2018 when the Foundation notified the parents by letter that ABA therapy would stop and that behavior therapy services were being restructured to "a consultative business model." The student is now enrolled full time in his neighborhood school.

Issues

In her complaint, the parent raised two issues:

Issue One: The district failed to implement the student's IEP as written in two areas:

1. **Between August and December 2018, the district failed to offer the student an electronic device when completing writing assignments of more than 5 sentences in length.**
2. **Between August and November of 2018 while the student was receiving services at Easterseals Capper Foundation, the district failed to provide the student with all the services specified in his November 2017 IEP.**

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 and, under 34 C.F.R. 300.17, define FAPE in part as special education and related services provided in conformity with an IEP. The IEP is intended to describe and guide services for each child on an individual basis.

Provision of Assistive Technology Device

Parent's Positon

The parent asserts that at October 2018 Parent/Teacher Conferences and at an IEP meeting on November 19, 2018, the student's general education classroom teacher stated that she was unable to read the student's handwriting. The parent

states that she then asked the teacher if the student had been offered an electronic device to use on longer assignments as required by the student's November 2017 IEP. By report of the parent, she was told that the student has not been offered such a device at any point during the 2018-19 school year. According to the parent, the teacher stated that she had "skimmed over his IEP" and was not aware that the student was to be afforded this accommodation.

The parent reports that over the Winter Break, the student was required to complete a multi-paged report but was not provided with any assistive device to use when completing that assignment.

District's Position

It is the district's position that while the student's general education classroom teacher told the parent she was not aware of the accommodation in the student's IEP related to writing tasks of more than 5 sentences, the student was nonetheless being provided with the appropriate accommodation.

Investigative Findings

The "Frequency" portion of the "Accommodations" section of the student's November 29, 2017 IEP contains the following statement:

> "The teacher/para will scribe short answers for (the student). (The student) will be able to use the iPad or cromebook (sic) for writing assignment longer than five sentences."

According to the "Accommodations" section of the student's November 29, 2018 IEP, the student was to receive the following accommodation:

> "Scribe or iPad/Chromebook – Whenever (the student) is working on a project that requires comprehension and/or writing 5 or more sentences"

The student's November 29, 2018 IEP also includes the following note under a section headed "Please list all accommodations used at this time:"

> "Breaks, Preferential seating, **Scribe or iPad/Chromebook** (emphasis added), Social Stories, Extended time, Clarification of Directions, Extended Processing time, Notes or study guides in cloze format, Separate Quiet Location."

According to a written statement from the student's special education teacher, the student "has never had to write over 5 sentences" in his reading group (which is facilitated by the special education teacher). The special education teacher also states that "in the general education classroom, (the student) used his chromebook to complete his writing assessment."

The student's general education classroom teacher acknowledges that during October 2018 Parent/Teacher Conferences she did tell the parent that she was having a hard time reading the student's handwriting and told the parent that she was unaware of the accommodation in the student's IEP regarding use of an iPad or Chromebook for assignments requiring the writing of 5 or more sentences. The classroom teacher contends that she was nonetheless providing the student with accommodations prior to the conversation with the parent. Writing assignments were routinely completed using the Chromebook. According to the teacher, either she or a paraeducator scribed for the student when he was taking notes in his reading journal or completing assignments. If the student's written product was illegible to the teacher, she would ask the student what he had written, and she would then write his response under the original product. For assignments or journal entries that required more than 5 sentences, he wrote some and some were scribed for him by the teacher or paraeducator.

With regard to the Winter Break assignment referenced by the parent, the classroom teacher states that she made no such assignment.

Summary and Conclusions

Although the student's general education classroom teacher admittedly was unaware that the student's November 2017 IEP contained a writing-related accommodation, it appears that the accommodation was nevertheless being provided to the student. The general education teacher and paraeducator routinely scribed for the student, and he has been allowed to use a Chromebook for completing some writing assignments/assessments. Under these circumstances, a violation of special education laws is not substantiated on this aspect of this issue.

Delivery of Special Education Services

The IDEA (Individuals with Disabilities Education Act) and its implementing regulations do not specifically address the issue of services missed due to the absence of the student from school. However, the Office of Special Education Programs (OSEP) has opined that if a student is not in attendance at school and the special education services called for in the student's IEP are available at the time of the student's absence, those services do not need to be made up (see Letter to Balkman, 23 IDELR 646, OSEP 1995). Quoting the letter as follows:

> "…the general rule is that if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services if the disabled student is absent from school at that time for reasons other than his or her participation in school-sponsored activities."

Parent's Position

According to the parent, while attending an IEP Team meeting on November 29, 2018, she overheard staff members talking amongst themselves about when the student was to receive his special education services while attending the Easterseals Capper Foundation program. By report of the parent, the Assistant Principal was overheard stating that the district had "been in violation of (the student's) IEP" because, since the start of the 2018-19 school year, no special education services had been provided to the student at his neighborhood school on the two days each week (Mondays and Fridays) that the student was at Easterseals Capper from 1:15 to 3:15 PM. The parent states that she is not sure what content was covered during the time the student was away from his elementary school or what services had been missed, but – based upon the comments of staff – she believes her son received no special education services

District's Position

The district agrees that the student missed out on special education services while he was participating in the Easterseals Capper Foundation Program. It is the position of the district that the parent's decision to have the student participate in the ABA program at Capper Foundation resulted in the student not being available to receive those services. The district asserts that it stood ready, willing, and able to deliver services to the student in the manner outlined in his IEP and would have done so had the student been in attendance. The district contends that in view of the parent's decision to make the student unavailable for services, there was little the district could do to ensure that the student received all the minutes of service outlined in his IEP.

Investigative Findings

According to the "Services" section of the student's November 29, 2017 IEP, the student was to receive the following services:

- Direct speech/language services for 20 minutes two times a week outside of the general education classroom
- Direct Occupational Therapy services outside of the general education classroom once a week for 20 minutes
- Inclusion support from special education staff in the general education classroom for 180 minutes per day, 5 days per week.

The "Services" section of the student's November 29, 2018 IEP states that the student is to receive the following services:

- Direct speech/language therapy for 20 minutes 2 times per week outside of the general education classroom

- Inclusion support from special education staff in the general education classroom during math, reading, and writing for 180 minutes per day, 5 days per week

Occupational Therapy services were discontinued as of November 29, 2018.

According to attendance records provided by the district, the student was signed out by the parent to participate in the Easterseals Capper program on the following dates:

- September 7, 10, 14, and 17, 2018
- October 5, 12, 19, and 22, 2018
- November 2, 5, and 12, 2018

On each of these occasions, the student left the building at 12:55 – 1:00 PM and did not return for the day.

According to the district, the student has since the start of the 2018-19 school year been provided with 180 minutes of special education services daily as follows:

- Intervention groups for reading and math taught by special education staff during the period of 9:25 – 10:20 AM
- paraeducator support in the general education classroom for math during a block between 12:45 – 2:30 PM
- paraeducator support in the general education class for shared reading time during a block between 2:30 – 3:40 PM

During the 2018-19 school year, Occupational Therapy services were provided on Mondays, from August 27 through November 29, 2018 (at which time services were discontinued). An attendance summary provided by the Occupational Therapist shows that the student received services every day during that period that school was in session. Records provided by the district show that, during the 2018-19 school year, the majority of OT services were provided from 11:35 to 11:55 AM (20 minutes). No OT service sessions were missed because of the student's absence while attending the Easterseals Capper Program.

Records provided by the district show that the majority of Speech/Language services were provided on the following schedule during the 2018-19 school year:

- Mondays between 9:05 and 9:25 AM (20 minutes)
- Wednesdays between 3:15 and 3:35 PM (20 minutes)

No services were missed due to the student's absence while he was participating in the Easterseals Capper Program. However, according to an Attendance record provided by the district, no Speech/Language services were provided to the student on September 24, October 31, and December 10, 2018 or on

January 14, 2019. The reason given for the break in service was "Teacher Testing, Field trip."

Clarification regarding the reasons for the NST coding on these four dates was provided by the district as follows:

- September 24, 2018: A fire drill was conducted at the time the student was scheduled for Speech/Language services.
- October 31, 2018: The classroom Halloween Party was held during the time the student would have been receiving Speech/Language services.
- December 10, 2018: The Speech/Language Pathologist was participating in another student's IEP Team meeting.
- January 14, 2019: The Speech/Language Pathologist was observing other students during this student's scheduled speech time.

The student "made up" 20 minutes of missed Speech/Language services on Thursday, January 24, 2019.

Summary and Conclusions

During the 2018-19 school year, the student received 20 minutes of Occupational Therapy services every Monday (between 11:35 and 11:55 AM) that school was in session beginning on August 27, 2018 and ending when the student was dismissed from those services on November 29, 2018. No OT services were missed.

All of the 180 minutes of special education services in the general education setting specified in the student's November 2017 IEP were available to the student every school day since the start of the 2018-19 school year. On 11 days between the start of the school year and November 16, 2018, none of those minutes were delivered to the student after 1:00 PM because he was pulled from school by the parent in order for him to participate in the Easterseals Capper program. The district stood ready, willing and able to provide services to the student. The district did not place the student in the outside program. The decision to have the student participate in the Easterseals Capper program was made by the parent and resulted in the student being unavailable to receive the services offered by the district. The district is under no obligation to make any other arrangements for the provision of these missed services.

The district did, however, fail to provide four 20-minute sessions of Speech/Language services to the student. One of those sessions has been "made up." Another session was missed due to a fire drill.

The district is not required to provide compensatory services for time when no child is receiving educational services. Accordingly, compensatory services are not required to make up for services scheduled on holidays, or when students are participating in a field trip, or participating in mandatory safety drills.

Compensatory services are also not required on days when services were available but the student was absent. However, the district has failed to provide the student with a total of 40 minutes of speech/language services (two 20-minute sessions) in situations where those services were required to be provided. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

Issue Two: The district failed to address incidents of bullying and harassment reported by the parent. These incidents interfered with the student's learning and thereby denied the student a free appropriate public education (FAPE).

Discrimination and bullying are not special education issues and cannot be investigated through a formal complaint. Therefore, this investigator will not be trying to determine whether bullying or discrimination occurred. However, the parent alleges that the student's learning is being affected by the actions of another student. If the student is not making adequate educational progress, a violation of FAPE could be identified, but this investigation will not result in any conclusions as to whether bullying or discrimination is occurring. 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.

Parent's Position

According to the parent, the student has been bullied and harassed by another student since the start of the school year. The parent asserts that since August of 2018, there have been 4 incidents of bullying or harassment but no action has been taken by the principal or any other school staff member to curtail the other student's behavior. The parent states that her son is fearful of using the restroom unless a staff member is present and believes that his anxiety has had a negative impact on his learning.

Investigative Findings

Reading Running Records for the student over the span of September 26, 2018 through January 4, 2019 show an overall increase in reading rate of 20 words per minute with accuracy levels consistently falling at 95% or above. Performance data from the student's November 2017 and November 2018 IEPs indicate that the student has made progress in the area of reading. While he continues to struggle with comprehension, he is able to read grade-level passages. Though he may need redirecting and cueing to complete, math tasks, he is able to solve grade-level problems.

Service Log notes for both the Speech/Language Pathologist and the

Occupational Therapist do not reflect any drop in skills during the period of August 22, 2018 through December 19, 2018. The student made sufficient progress with regard to his Occupational Therapy goals to be dismissed from OT services in November 2018. According to the student's November 29, 2018 IEP the student made progress on a variety of language tasks. Over the period of November 2017 to November 2018, he improved in his ability to name categories from 20% to 80%. He is now able to explain how objects are different at a 20% success level (up from 0%).

IEP Progress Reports for the period of December 18, 2017 through December 18, 2018 show that by October 11, 2018 the student reached the reading and math goals set for him in November of 2017. He reached the motor goals established in November of 2017 and was dismissed from Occupational Therapy. Speech/language goals established in November 2017 were attained by November 9, 2018.

An annual review of the student's IEP was completed on November 29, 2018. By December 18, 2018 he had increased his accuracy in targeted areas of reading comprehension from 50% to 60%. Reading fluency with instructional level material maintained at the 99% accuracy level. Math performance levels showed no drop in skills.

Grade reports for the student for the 2017-18 and 2018-19 school years show that the student fell at the "Developing" or "Proficient" levels in 64% of all skills assessed during the fourth quarter of the 2017-18 school year. Currently, 89% of all skills assessed are falling at the "Developing" or "Proficient" levels.

Summary and Conclusions

While in no way disregarding the parent's 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 academic progress or from achieving the goals and objectives established in his November 2017 or November 2018 IEPs. Therefore, the parent's allegation of a denial of FAPE is not confirmed and a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

The district has put in place a plan to address the parent's concerns regarding bullying and harassment. In a meeting on January 23, 2019, the district outlined a course of action as follows:

- Safeguards will be put in place for the remainder of the 2018-19 year to limit contact between the student and the student who has reportedly been bullying him.

- The student will be escorted in the hallway and when going to the restroom to minimize the chances for a negative interaction.
- Staff will be alerted to the situation and will be asked to be observant and proactive in addressing potential problems before they occur in any setting within the school including the classroom, playground, lunchroom, etc.
- The student and identified bully will not be assigned to the same classroom for the next school year. (The parent does not want the student to have to have the disruption of changing classes this year.)
- The team discussed the student's need for a communication method to let adults know when he is stressed or someone is bothering him (a key phrase). Although he is verbal, in highly stressful situations or if he has been hurt, it is difficult for him to report accurately or to feel comfortable seeking out an adult to make the report. Social Stories will be developed for use with the student that can address how he should respond if another student is name-calling or demonstrating other inappropriate behaviors. The Social Stories are to be reviewed at school (with a teacher or Social Worker), and a copy of the stories will be provided for the parent to use with the student at home.
- A referral will be initiated regarding the provision of Social Work services.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Violations have occurred with regard to 34 C.F.R. 300.101 and 34 C.F.R. 300.17 which require districts to provide FAPE to students in conformity with an IEP which describes services to exceptional students on an individual basis. Specifically, the district erred by

- failing to provide the student with 40 minutes of Speech/Language services.

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

1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education and Title Services stating that it will comply with 34 C.F.R. 300.101 and 34 C.F.R. 300.17 by providing services to this student in conformity with his IEP.

2) Within 10 school days of the receipt of this report, the district shall submit to the parent a written plan for the delivery of not less than 40 minutes of compensatory Speech/Language services. The parent shall have the option of accepting all or part of the compensatory services that are offered, or of declining any or all of these services.

3) Within 5 school days of submitting the above referenced plan and receiving the parent's response, submit to Special Education and Title Services a copy of the plan for compensatory services (or that portion of the plan accepted by the parents) addressed above under Item 2.

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 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 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), which is attached to this report.

_____
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 JANUARY 14, 2019

DATE OF REPORT: FEBRUARY 13, 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 was sent to the Department on January 14, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on February 13, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on February 5, 2019. USD #___ made the following staff persons available as part of the investigation process:

- J, General Director of Special Education
- L, General Counsel
- JJ, Special Education Teacher / IEP Case Manager

The Complaint Investigator also interviewed the parent and the student by telephone on January 6, 2019 as part of the investigation process.

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

- Individualized Education Program (IEP) dated November 15, 2017
- IEP Team Conference Notes dated October 18, 2018
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated October 18, 2018
- Grade Report for the 2018-19 School Year
- 2018-19 School Calendar for _____ Public Schools
- PWN dated November 6, 2018

- 2018-19 Kansas State High School Activities Association (KSHSAA) Handbook
- Proposed Resolution Agreement dated December 20, 2018
- IEP dated December 19, 2018
- PWN dated December 19, 2018
- Break Log for the student for first semester of the 2018-19 school year
- PWN dated November 15, 2017
- Special Education Mediation Agreement dated April 20, 2018
- Emails between the JJ, Special Education Teacher / IEP Case Manager and the parent dated January 11, 2018
- Email written by the Ms. J to the parent dated August 20, 2018

Background Information

This investigation involves a 13 year old boy who is enrolled in the eighth grade at _____ Middle School in USD #___ during the 2018-19 school year. Per parent report, the student was initially evaluated in USD #437 at the end of second grade and found eligible for special education under the exceptionality category of Young Child with a Developmental Disability. He received special education services until the beginning of fourth grade when the family moved into USD #___. At that time the parent revoked consent for special education and homeschooled the student through the Lawrence Virtual School program.

At the beginning of sixth grade, the student was enrolled in USD #___ and began attending _____ Middle School. The parent reported the student began to have significant behavior problems and that she requested an evaluation for special education at that time. The student was evaluated during first semester of seventh grade and was placed at Avondale West, an alternative school in USD #___, while the special education evaluation was being conducted. The student was found eligible for special education under the exceptionality category of Emotional Disturbance on November 2, 2017 and an IEP was developed on November 15, 2017. The student began attending _____ Middle School at the beginning of second semester of seventh grade and has received special education services since that time.

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint begins on January 14, 2018.

> **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 2018-19 school year, specifically participation in the school's basketball program.

Findings:

The parent reported the student is not able to participate in the school district's basketball program as an eighth grade student during the 2018-19 school year. The parent acknowledged the student did not pass all of his classes during first semester of this school year but believes this is because the student got behind after being taken out of class for disciplinary issues. The parent reported the school offered to give the student grades of "P" for "Passing" so he could play basketball if she agreed to move the student to a special education math class as proposed in both October and November 2018. The parent indicated that she refused to provide consent for this change both times.

The parent reported that a Resolution Conference followed by an IEP Team Meeting was held on December 19, 2018. At the Resolution Conference, the parent stated that the school offered to let the student complete "essential" school work to earn passing grades for first semester so he could play basketball if she agreed to sign the Resolution Agreement developed on that date. The parent reported that she refused to sign this agreement. At the IEP team meeting held on December 19, 2018 immediately following the Resolution Conference, the parent agreed to change the services and placement of the student from regular education math to special education math. The parent stated that she believed that consenting for the student to transfer to the special education math class would result in the student receiving "P" for "Passing" in all classes that he was failing at the end of first semester and that he would be eligible to participate in the basketball program.

Both the parent and school staff acknowledged the last agreed upon IEP in place during first semester of the 2018-19 school year was dated November 15, 2017.

That IEP required inclusion support for 150 minutes per day in math, English, and science classes to ensure the student received accommodations and 15 minutes per week of social work services outside of the regular education setting.

The student's grade report for the 2018-19 school year shows failing grades in Math, Science, and Career/Life Planning for first and second quarter as well as at the end of first semester. The student earned a grade of "C" for first quarter and "B" for second quarter and first semester in his Language Arts 8 class. The student's first semester grades included three failing grades and three passing grades.

The USD #___ School Calendar for the 2018-19 School Year indicates the end of first quarter was October 10, 2018. The end of second quarter and first semester was December 21, 2018 with third quarter and second semester beginning on January 8, 2019.

Documentation and interviews showed the student's IEP team met on October 18, 2018 to discuss concerns with behavior and academics. The Prior Written Notice with that same date proposes to provide 84 minutes per day of specialized instruction in math in the special education setting; 80 minutes per day of in class support for language arts and history/science in the regular education setting; 20 minutes per day of special education support for academics and behavior in the Behavior and Academic Support Room (BASR); and 20 minutes per week of social work services outside of the regular education setting. Both parent and school staff report the parent refused to provide consent for these proposed changes in services and placement.

The parent and school staff both reported the IEP team met again on November 6, 2018 to again discuss behavior and academic concerns. The school district again provided the parent with PWN for a change of services and placement to include 84 minutes per day of specialized instruction in math in the special education setting; 80 minutes per day of in class support for language arts and history/science in the regular education setting; 20 minutes per day of special education support for academics and behavior in the Behavior and Academic Support Room (BASR); and 20 minutes per week of social work services outside of the regular education setting.

School staff reported there was a discussion at this IEP team meeting of how the math grade would be handled if the transfer from the regular education math class to the special education math class occurred. Because this change would

be taking place so late into third quarter, the student's grade would be reported as P" for passing in the regular education math class and then averaged with the grades the student earned in the special education math class in order to determine the third quarter and semester grades. Both parent and school staff report the parent again refused to provide consent for these proposed changes in services and placement.

Documentation and interviews found the IEP Team met on December 19, 2018 to again discuss behavior and academic concerns. The Prior Written Notice with that same date proposes to provide 84 minutes per day of specialized instruction in math in the special education setting; 80 minutes per day of in class support for language arts and history/science in the regular education setting; and 20 minutes per week of social work services outside of the regular education setting. Documentation shows the parent provided written consent for these proposed changes in services and placement on December 20, 2018.

School staff reported USD #___ is a member district of the Kansas State High School Activities Association (KSHSAA). Rule 13, Article 3 of the 2018-19 KSHSAA Handbook states a student must pass at least five new classes the previous semester in order to be eligible to participate in extracurricular activities during the current semester. Each school district must submit a Second Semester Eligibility Report to the KSHSAA no later than 10 school days after the conclusion of the first semester. For the 2018-19 school year, the Second Semester Eligibility Report was due to KSHSAA no later than January 17, 2019.

Rule 14, Section 1, Article 5 of the 2018-19 KSHSAA Handbook allows for students to make up work after the close of the semester so long as the school district has a policy allowing make up work for missed days of school. School staff reported USD #___ has a policy that allows students to make up work for days missed. Since the second semester began on January 8, 2019 and the first semester closed on January 7, 2019, students in USD #___ had a maximum of 10 days until January 17, 2019 to complete work and meet the KSHSAA eligibility requirements for second semester. USD #___ reported that two students at French Middle School and one student from _____ High School were confirmed as having participated in this make up "window" to establish KSHSAA eligibility.

School staff reported the parent was informed on December 19, 2018 during a Resolution Conference that the student could complete make up work for days missed during first semester and establish KSHSAA eligibility to play basketball

during second semester just as any other student in USD #___ who had missed school days and failed a class. School staff indicated this information was specifically included in the proposed resolution agreement to address the parent's concerns related to the student's ability to participate in basketball camp and sessions. The Resolution Agreement states:

> _____ *Public Schools in conjunction with* _____ *Middle School will allow the student 10 days beyond the start of the second semester of the 2018-19 school year (January 17, 2019) to complete essential assignments in classes he is failing in order to have the opportunity to pass a minimum of 5 classes to meet the KSHSAA requirements for 7th and 8th grade students for participation on extracurricular athletic activities. Essential assignments can be collected at the request of the parent. If requested, the student will be provided one hour of tutoring for the 10 days beyond the start of the 2nd semester on the essential assignments.*

An email written by JJ, special education teacher / IEP case manager, to the parent dated January 11, 2019 at 1:23 p.m. references plans for the student to stay for basketball practice that same day and explains that the student is still not eligible to participate in the basketball program under KSHSAA rules because of his failing grades during first semester. Ms. J reminded the parent of the process for making up work during the "window" to earn passing grades and establish KSHSAA eligibility to participate in extracurricular athletic activities during second semester which would close on January 17, 2019.

An email written by the parent responding to Ms. J and copied to multiple USD #___ school administrators on that same date reflects her belief that the student is eligible to play basketball because "she was told that if she agreed to put the student in resource math then _____ would put P's for class." She then stated "I personally hold all of you responsible in federal court for depriving his rights if he isn't allowed to play basketball. I will hold you all responsible for breaking agreements and federal laws."

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.

In this case, USD #___ made attempts through the IEP Team process on October 18 and November 6, 2018 to address the failing grades resulting from the student's behavioral and academic concerns. The parent was provided with PWN following both meetings but refused to consent to the proposed change of services and placement. At the end of first semester, the student achieved three passing grades out of six courses and did not meet eligibility under KSHSAA rules to participate in nonacademic and extracurricular activities. USD #___ then provided the student the same opportunity to make up work for days missed during first semester in order to establish KSHSAA eligibility as was provided to other students in the district at the beginning of the second semester of the 2018-19 school year.

It is unfortunate the parent mistakenly believed that simply transferring the student to the special education math class at the beginning of the second semester would allow the student to pass his first semester classes and thus be eligible to participate in the basketball program. However, the documentation and interviews show USD #___ did take steps to assist the student to make passing grades to establish eligibility under KSHSAA rules in order to afford the student with an equal opportunity for participation in nonacademic and extracurricular services and activities during the 2018-19 school year. Based on the foregoing, the allegation of a violation of special education laws and regulations 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 appropriate prior written notice to the parent for a change of services and change of placement during the 2018-19 school year, specifically the special education services provided in the area of math.

Findings:

The parent alleges USD #___ wanted the student placed in the special education math class and proposed this change on October 18 and November 6. The parent was in disagreement with this change and refused to provide consent following both IEP team meetings. Despite the lack of consent, the parent reported the student was removed from his regular education classroom placement on multiple occasions to receive special education services in the Behavior and Academic Support Room (BASR). The parent acknowledged she did agree to the student transferring from the regular education math class to the

special education math class following the December 19, 2018 IEP team meeting and did provide written consent for this change in service and placement on December 20, 2018.

The findings in Issue One are incorporated herein by reference.

School district staff explained the student was not taken from the regular education classroom setting and provided his 150 minutes per day of special education services in the BASR setting during the first semester of the 2018-2019 school year. Rather, when the student became disregulated and/or became disruptive to the learning environment, he was asked to leave the regular education classroom and to report to JJ, special education teacher and IEP case manager, for behavioral support as required by the IEP and the Mediation Agreement. Since Ms. J's office is located in the BASR room, the student would go there to return to baseline.

Documentation found the November 15, 2017 IEP includes a goal for the student to exhibit calming strategies to regulate his emotions in the classroom and also includes an accommodation for use of frequent breaks and a stress pass when the student becomes overwhelmed in his classes.

The Special Education Mediation Agreement dated April 20, 2018 states that behavioral interventions are to be done by classroom teachers or certified staff only.

An email written to the parent by Ms. J on August 20, 2018 included the following description of how the accommodation of frequent breaks and the stress pass was being implemented:

> *Student was in the BASR room today for the first time due to a sub in Science. He had trouble settling down at the beginning of class and was sent out. He reported to me right away, which is exactly what he was supposed to do. He and I talked and he told me he didn't leave right away because he was not done playing around. I talked with him about trying to recognize when he was having behaviors that disrupt the class and ask to go to BASR before he is asked to leave. He said he will work on that. He became elevated when the para brought in his work, so we are going to have work brought in and dropped off on my desk. Paras will not interact with students in the BASR. While in BASR today Jamarion and I had time to play Connect 4 as a Social Connectivity Activity and he also played a couple games with Mr. Johnston.*

Student came in for a movement break during math class, he threw a ball at the wall and we talked. He said he has trouble staying awake after lunch so he thought he would move around. I took the opportunity to ask him about shooting baskets as a reward for his work completion goal. He is going to think about when would be a good time of the day for him to shoot baskets for every 10 assignments he turns in on time he can have 10 minutes to shoot baskets. I suggested a couple of times and he did not agree with them because he did not want to miss the class time. I will touch base with him tomorrow about a time. It will not be a reward if he doesn't want to miss the class I chose. He said shooting baskets is the only thing he can think of for his reward time.

A log of the student's breaks during first semester if the 2018-19 school year shows the student never started classes in the BASR setting. Ms. J reported the student often took breaks in common areas of the school with the paraprofessional to work on classwork.

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.

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, USD #___ proposed changes in services and placement following IEP team meetings held on October 18, November 6, and December 19, 2018. The parent did not consent to the proposed change in services and placement until December 20, 2018. Documentation and interviews found USD #___ did not change the services and placement to the math class until the beginning of second semester of the 2018-19 school year after parent consent was obtained on December 20, 2018.

The parent's allegation that a change of services and placement occurred when the student left the classroom to see Ms. J during first semester are not a change of services or placement as the parent provided consent to implement the November 15, 2017 IEP which included an accommodation for frequent breaks and the use of a stress pass to address behavioral issues. A Mediation Agreement made between USD #___ and the parent on April 20, 2018 required behavioral interventions to be provided by classroom teachers or certified staff. Ms. J is the certified staff responsible for implementing the IEP including providing frequent breaks and use of the stress pass with the student at _____ Middle School. Ms.J's office is physically located within the BASR classroom and that is where the student goes to receive the accommodations required by the IEP. Based on the foregoing, the allegation of a violation of special education laws and regulations 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, 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), which is attached to 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: 19FC-002

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on January 14, 2019, by _____ on behalf of her son _____. A complaint investigator undertook the investigation of the complaint on behalf of the Special Education and Title Services team at the Kansas State Department of Education. Following the investigation, the complaint investigator issued an Initial Report addressing the allegations on February 13, 2019. That report concluded that the allegations of a violation of special education statues and regulations was not substantiated.

Thereafter, on February 16, 2019, the parent filed an appeal of the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the report, the parent's notice of appeal and accompanying documents, the district's response and accompanying documents, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

The Appeal Committee will limit 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 documents described above. 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.

DISCUSSION OF ISSUES ON APPEAL

ISSUE 1: 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 2018-19 school year, specifically participation in the school’s basketball program.

The pertinent regulation is 34 C.F.R. § 300.107(a), which sates: “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.”

This regulation provides no guarantees that children with disabilities will participate. Students with disabilities may fail to attain eligibility to participate in extracurricular activities. This

regulation requires that those activities be provided in a manner necessary to afford children with disabilities an *equal opportunity* for participation. That could include the provision of supplementary aids and services, if the IEP team believes those supplementary aids and services are necessary in order for a child to have an equal opportunity for participation. No evidence was presented to the Committee that the IEP team believed this student needed supplementary aids and services in order to be eligible for extracurricular activities.

In the Initial Report, the investigator concluded that the district had taken steps to enable the student to have an equal opportunity for participation in basketball because it had notified the parent of a district policy which permitted students to earn a passing grade by making up work. The Committee finds that district took steps to provide this student with an equal opportunity to participate in basketball.

Specifically:

- December 19, 2018, at a Resolution Conference, the school informed the parent that the student could complete make-up work for days missed during first semester and establish Kansas State High School Activities Association (KSHSAA) eligibility to play basketball during second semester, just as any other student in the district who had missed school days and failed a class; and

- January 11, 2018, IEP case manager sent an e-mail to the parent reminding the parent of the process for making up work during the "window" to earn passing grades and establish KSHSAA eligibility to participate in extracurricular activities, a window which would close on January 17, 2019.

The student did not complete the make-up work required for KSHSAA eligibility. Moreover, the Committee received no evidence that this student's IEP Team believed he needed supplementary aids and services in order to complete the necessary make-up work that would have led to eligibility to play basketball. Without such evidence, the Committee finds that the district took steps to afford this child with an equal opportunity to participate in basketball.

Conclusion: Issue 1

The conclusion of the investigator on this issue is sustained.

COMMENT: The Committee finds it troubling that the district's initial proposals for providing the student with a passing grade in math were contingent upon obtaining parent consent to a proposed change in placement. Using participation in athletics as a bargaining chip for obtaining parent consent for a change in placement is not the way placement decisions should be made. If a district proposes a change in placement and the parent refuses to consent, the district may pursue the proposed substantial change in placement by using mediation or due process procedures.

In the background of this issue is the student's frequent absences from school. From a review of the evidence, those absences seemed to result from school requests for someone to come to school and take the student home, or from suspension, or from the parent withholding the student

from school. Whatever the reason, those absences likely contributed heavily to the student's poor educational performance and the resulting need to produce make-up work for KSHSAA eligibility. The Committee recommends that the district review its policies and procedures regarding discipline of children with disabilities, including what constitutes a suspension for purposes of counting disciplinary removal. Such policies and procedures must count as a disciplinary removal situations in which the school requests parents to come to school and take their child home due to behavior problems. Days where a parent chooses to keep their child home from school do not count a disciplinary removal.

ISSUE 2: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide appropriate Prior Written Notice (PWN) to the parent for a change in services and change in placement during the 2018–19 school year, specifically the special education services provided in the area of math.

In this issue, the parent alleged that the school moved the student to the Behavior and Academic Support Room (BASR) without providing a PWN, which is required whenever a change of placement occurs. The BASR is a special education setting.

It is undisputed that the student spent time in the BASR during school days. The question is whether the time in the BASR constituted a change in placement. The investigator determined that the district's use of the BASR did not change the student's placement because the use of that room was consistent with the already existing IEP. On page 16 of the student's IEP, dated November 15, 2017, the investigator noted the following accommodations: (1) frequent breaks every 20–30 minutes throughout the school day, and (2) a "stress pass" for whenever the student felt overwhelmed.

The investigator found that Ms. J is the staff member responsible for implementing the student's IEP requirements regarding the provision of frequent breaks and providing a stress pass. The investigator also determined that Ms. J's office is physically located within the BASR classroom, and that is why the student reported to that area to receive these two accommodations. The investigator also found that the student never started any classes in the BASR setting. None of these findings address the specific issue of whether providing the frequent breaks and stress passes in the BASR setting was a change in placement. The key to the answer of that question is in the student's IEP.

The IEP initiated on November 15, 2017, is the IEP relevant to this issue. An IEP Team, constituted of the parent and staff from Avondale West, an alternative school within the district, developed that IEP. At the beginning of the second semester of seventh grade, the student began attending school at _____ Middle School. His IEP remained unchanged until December 20, 2018, after the parent consented to the changes in a newly proposed IEP. Accordingly, this issue is connected to the November 15, 2017, IEP and the time during the 2018–19 school year when the district served this student under this IEP.

The November 15, 2017, IEP has a page titled "Accommodations." Among the accommodations listed on that page are "Frequent Breaks" and "Stress Pass." The IEP states that the location of those two accommodations is "all classes." On page 18 of this IEP, under the title: "Provide an

explanation of the extent, if any, to which this student will NOT participate in the general education classes and the general education curriculum," appears this statement: "[The student] will be in all general education classes as he is attending a general education alternative school."

This allegation by the parent does not involve the time the student was at the alternative school. It does, however, involve the IEP that was developed while the student attended the alternative school and brought with the student to the _____ Middle School. That IEP includes the accommodations listed above of frequent breaks and stress passes, but nothing in that IEP specifies that those breaks and stress passes will be provided in a special education setting, such as the BASR.

Yet, that is where those accommodations were provided. On page 8 of the Initial Report, the investigator states that school district staff explained that when the student became dysregulated and/or became disruptive to the learning environment "he was asked to leave the regular education classroom and report to JJ, special education teacher and IEP case manager, for behavioral support as required by the IEP and the Mediation Agreement. Since Ms. J's office is located in the BASR, the student would go there to return to baseline." On that same page of the Initial Report, the investigator cites an e-mail, dated August 20, 2018, from Ms. J to the parent, stating that the student had trouble settling down at the beginning of class and so "was sent out." The student reported to the BASR where he was counseled to ask to go to the BASR before he was "asked to leave."

To the extent that accommodations, such as frequent breaks and stress passes were provided to this student in the BASR, those accommodations were not provided in the location specified in the IEP. The Committee concludes that providing those accommodations in the BASR was a change in placement. While not every change in placement requires consent, a change in placement always requires parent participation [at a meeting or through the IEP amendment process] and requires a PWN. In this case the change in placement occurred without parent participation in the decision and without PWN.

Conclusion - Issue 2

On Issue 2, the Committee overturns the conclusion of the investigator. The allegation regarding a change of placement without a PWN is substantiated.

COMMENT: The accommodations in the IEPs for this student are listed in a column. Going from left to the right-hand side of that column are additional columns with these headings: Frequency, Location, Duration, and Date. Under the heading "Location" for every listed accommodation is the statement "all classes." "All classes" does not describe the location of services or accommodations. The term "location," when used to describe in an IEP the frequency, location, and duration of services or accommodations, does not refer to the physical location where services or accommodations will be provided. Rather, the term "location" refers to the educational environment where the services will available to the student and the educational environment where the services will be provided, if different. Educational environments differ to the extent the environment moves away from a general education classroom along the district’s continuum of placement options in terms of access to general

education peers. The "Location" requirement in the statement of frequency, location, and duration of services and accommodations means the IEP must identify whether the service or accommodation will be available and provided in a general education classroom, a special education classroom, a special class, a special school, at the child's home, or at a hospital or other environment.

Corrective Action

Because the Committee has concluded that the allegation in Issue 2 is substantiated, the Committee requires the following corrective actions:

1. The district shall coordinate a training to all special education staff at _____ Middle School that will address, at minimum: How to address in the IEP the requirement to include the "Location" of services for each special education service, supplementary aids and services (accommodations), program modifications, and supports for school personnel that are specified in the IEP, and what constitutes a change in placement that requires a PWN and parent participation. The trainer must be a Kansas Technical Assistance System Network (TASN) provider, approved by KSDE Special Education and Title Services (SETS). Within 15 days of the date of this decision, the district shall initiate contact with TASN to request this training, and the district shall provide SETS with a statement that it has made this initial contact. Within 5 days of receipt of a reply from TASN, the district shall notify SETS of the reply and request approval of the person TASN is proposing to provide the training. This training shall be completed prior to May 15, 2019, unless additional time is given in writing by SETS. The district shall provide SETS with notice when the training is completed.

2. Within 15 school days of the date of this decision, the district shall calculate the number of math classes this student attended from the first day of the 2018–19 school year until December 20, 2018, and make a written offer of compensatory services [consisting of supplementary math instruction] to the parent of one 20 minute session for each day the student was in attendance at school during the aforementioned time. The district shall send a copy of that offer to SETS on the same day it is sent to the parent. The parent may accept all, part of, or none of the offered compensatory services and has 15 school days from the date she receives the offer to notify the district of her decision. Within 15 school days of making this written offer to the parent, the district shall notify SETS, in writing, of the parent's decision regarding the offer of compensatory services. If all or some of the compensatory services are accepted by the parent, the district shall schedule those services to begin and be completed as soon as reasonably possible. The district must provide the parent and SETS with a copy of that schedule within 5 business days of the district receiving the parent’s decision of whether to accept the compensatory services. The district shall notify the parent and SETS in writing when the compensatory services have been completed or when the proposed schedule ends, whichever occurs first. If the proposed schedule ends without the compensatory services being completed, the district must notify SETS in writing of the reason and propose a schedule to SETS and the parent to finish the compensatory services.

COMMENT: There was some discussion in the report regarding a mediation agreement. Although KSDE recognizes that districts and parents are bound by such agreements, KSDE does

not interpret, regulate, or enforce mediation agreements. As a result, schools which have entered into a mediation agreement may have legal obligations in addition to the obligations specified in an IEP. This appeal does not address any possible additional obligations this district may or may not have under a mediation agreement.

This is the final decision on this matter. Kansas special education regulations provide no further appeal. This final decision is issued this _____ of March, 2019.

_____
Laura Jurgensen

_____
Stacie Martin

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

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

DATE OF REPORT: FEBRUARY 22, 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 was sent to the Department on January 23, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on February 22, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed USD #___ staff by telephone on February 18, 2019. USD #___ made the following staff persons available as part of the investigation process:

- J, General Director of Special Education
- LK, General Counsel

The Complaint Investigator interviewed the parent by telephone on February 6, 2019 as part of the investigation process. Following this interview, the parent provided two separate emails summarizing her concerns regarding each of the allegations and referencing email correspondence with USD #___ as her supporting documentation.

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

- Email written to the investigator by the parent dated February 6, 2019 regarding concerns with IEP implementation for paraprofessional supports and providing the accommodations of assignment chunking and frequent breaks
- Email written to the investigator by the parent dated February 16, 2019 regarding concerns with discipline

- Individualized Education Program (IEP) dated November 15, 2017
- Mediation Agreement dated April 20, 2018
- IEP dated December 19, 2018
- Written statements from the student's teachers describing the provision of accommodations in the classroom for the past 12 months
- Break Log for the Student for first semester of the 2018-19 school year
- Class schedule for the student for the 2017-18 school year
- Class schedule for the student for the 2018-19 school year
- Email correspondence dated December 7, 2018 between the parent and BZ-W, Assistant Superintendent of Teaching and Learning at USD #___
- Attendance Record for the student for the 2017-19 school year
- Attendance Record for the student for the 2018-19 school year
- Manifestation Determination Review (MDR) dated March 8, 2018
- MDR dated March 13, 2018
- MDR dated April 6, 2018
- Discipline Logs for the 2018-19 school year dated August 21 through December 13, 2018 showing 42 log entries
- Notice of Short Term Suspension dated September 6, September 18, November 20, and December 14, 2018
- Email dated October 1, 2018 from DB, Principal at _____ Middle School, to the parent
- Email correspondence between Mr. B and the parent dated October 5, 2018
- Email dated October 31, 2018 from JJ, Special Education Teacher / IEP Case Manager, to the parent
- Email correspondence between the parent and Dr. Z-W dated November 2, 2018
- Email dated December 13, 2018 from Ms. J to the parent
- USD #___ Response to the Allegations dated February 13, 2019

Background Information

This investigation involves a 13 year old boy who is enrolled in the eighth grade at _____ Middle School in USD #___ during the 2018-19 school year. Per parent report, the student was initially evaluated in USD #437 at the end of second grade and found eligible for special education under the exceptionality category of Young Child with a Developmental Disability. He received special education services until the beginning of fourth grade when the family moved into

USD #___. At that time the parent revoked consent for special education and homeschooled the student through the Lawrence Virtual School program.

At the beginning of sixth grade, the student was enrolled in USD #___ and began attending _____ Middle School. The parent reported the student began to have significant behavior problems and that she requested an evaluation for special education at that time. The student was evaluated during first semester of seventh grade and was placed at Avondale West, an alternative school in USD #___, while the special education evaluation was being conducted. The student was found eligible for special education under the exceptionality category of Emotional Disturbance on November 2, 2017 and an IEP was developed on November 15, 2017. The student began attending _____ Middle School at the beginning of second semester of seventh grade and has received special education services since that time.

Issues

The complainant raised two issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date of the complaint. The time period for this complaint begins on January 23, 2018.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the individuals with Disabilities Education Act (IDEA), failed to implement the IEP of the student as written, specifically by not providing the required paraprofessional support services, assignment chunking, and frequent breaks during the past 12 months.

Findings:

The parent believes USD #___ has not provided frequent breaks or chunking of assignments as required by the IEP. The parent indicated she has shared these concerns with school staff repeatedly through phone calls and at multiple meetings. The following specific descriptions and dates were provided by the parent to document her concerns for the provision of these two particular accommodations:

- On October 26, 2018 in an email to USD #___ staff by stating "*Also, student is supposed to have his work given to him in chunks and this hasn't been happening. Student said it's overwhelming when the teachers*

are giving him his assignment at one time and it causes him anxiety and contributes to his classroom disruptions."

- On November 3, 2018, the mother reported "*the student missed another Science class and I asked him why was he missing class and he said he doesn't understand the work and it's overwhelming when he gets all the work at once. I asked him if they were chunking his work and he said, "no." I asked Jamarion if he understands the work better when he gets it in chunks and he said he does because he works and takes a break."*

- On December 6, 2018, the science teacher, Mrs. D, stated in a Disciplinary Report (DR) that "*he was continuously getting up out of his chair and sitting back down so I instructed him to please stay in his seat. A few minutes later he put his hood on and laid his head down on the table. After a break in the reading, I instructed him to remove his hood and sit up. He then got up, took his paper and exited the room after Mrs. P (the paraprofessional in the classroom) tried asking him to stay in the room."* The parent explained that earlier that same day that *"My mother had called the school and advised that the student was restless and may need extra breaks. Before I left in the morning, I told the student that if he needs extra breaks today then to ask his teachers. However with the school chunking his work he should work for 20, get a break or movement and then go back to working. However, this hasn't been happening. The student said he put his head down on the desk because Ms. D will constantly tell him he needs to get ready for an assignment and he will have a test. I have already advised from past incidents that this causes anxiety. The student told me that he put his head down from frustration and Ms. D became upset. The student said he attempted to have movement and she told him to set down. He then asked for a break and she said no, he needed to stay in class and then he asked the Para and the Para said no as well, the student said he decided to leave and go to Ms. J's office."*

In addition, the parent believes the student is not receiving the paraprofessional support services as required by the IEP. The parent reported there is an overuse of paraprofessional support with the student. She also reported "*His current IEP outlines what classes the Paras will be in and that doesn't seem to be followed."* in an email dated December 7, 2018 written by the parent to BZ-W, Assistant Superintendent of Teaching and Learning at USD #___.

Based upon the parent's specific concerns, it appears that the concerns with implementation of the IEP in regards to the two accommodations and paraprofessional support occurred during the 2018-19 school year.

Documentation found the IEP in effect for the student for that time period was dated November 15, 2017 IEP. This IEP included 150 minutes per day of inclusion support in math, English and science and was modified by a mediation agreement dated April 20, 2018 that stated "*Parties agree that the 150 minutes of special education services is to be used for classroom academic support only for approximately 60 minutes for Math, 45 minutes total for Science and History, and 45 minutes for Language Arts."*

The November 15, 2017 IEP included the accommodation of "Frequent Breaks" with a frequency described as "*Student needs a break every 20-30 minutes during the school day.*" It also included the accommodation of "Work Chunked" with a frequency described as "*All work chunk work into smaller more parts so student is not overwhelmed by the amount of work he sees at one time."*

It is noted that these accommodations were changed in the December 19, 2018 IEP. "Frequent Breaks" became "Breaks" with a frequency of "Per BIP – When the student of his classroom teacher believes he is feeling overwhelmed." "Work Chunked" became "Chunk work into segments that would take approximately 20 minutes to complete" with a frequency of "When the student is given an assignment that is expected to take more than 20 minutes to complete."

LK, attorney for USD #___, reported "*Chunking assignments can mean different things to different people. However, as is outlined in the student's IEP, in this case, chunking seems to refer to giving work in smaller parts so as not to overwhelm the student. The IEPs state that about 20 minute chunks would be appropriate. The school is implementing the IEP in regards to chunking and teacher are providing the work to the student in approximately 20-minute chunks or less."*

Ms. K also reported that the student is receiving breaks at least every 20-30 minutes. She indicated that "*the student is allowed to take breaks when necessary. These breaks were sometimes the product of a natural transition during class that were afforded to all students, a specific break given to the student during class, or they may have been breaks outside of the classroom where he was able to report to Ms. J."*

Ms. K indicated that in-class paraprofessional support was provided to the student as required by the IEP. It is noted that the complainant's son is not the only student at _____ Middle School who has inclusion support written into his/her IEP. For this reason, it is not uncommon for a special education teacher or paraprofessional to provide push-in support for other students who may also be enrolled in the student's classes. Ms. K reported there were at least two additional students with IEPs who required in-class special education support and were enrolled in several of the student's classes.

USD #___ provided a copy of the paraprofessional schedule for first semester of the 2018-19 school year as well as offered written statements from school staff describing how chunking of assignments and frequent breaks were provided to the student. The following chart summarizes this information:

Class	Staff	Description of Accommodations
Language Arts 8	Mr. M, Classroom Teacher Ms. K, Paraprofessional, is assigned to support the student Mrs. B, SPED Teacher, is assigned to support other students in the classroom	Everything is operated on 20 minute chunks in order for the student to be successful. Many of the lessons provide even more of an opportunity for movement and when those movement pieces are not built in, I provide him that time he needs for movement. Many times this consists of him helping me hand out papers, books, or other items for class. He is allowed to move freely around the room and change seating if he becomes anxious. If none of these interventions are working, he is able to take a break outside the room as planned, but he rarely chooses that option.
Math 8	Mr. R, Classroom Teacher Mr. C, paraprofessional, is assigned to support the student	We start the class with bell work in which the students work at their own pace. We then go over the problems and the students can work through problems with the class if needed. During instruction, we usually go through one or two of the problems (10-15 minutes) then we talk for a few minutes about what is happening at school or in our lives for 5 minutes or so (not math related) then we move into more problems. A portion at

		the end of class, several days a week is reserved for small group remediation / enrichment in which students complete work from previous units to "keep it fresh" in their minds. The students have two or three weeks to complete their choice of posted assignments – they work at their own pace and at various levels. The student was able to take discretionary breaks with the para. He could sit in the foyer, outside of the room until he was ready to rejoin the class. All work is usually chunked into 10-20 minutes sessions with a small reprieve in between, or it is independent/group work in which students work at a personal pace and learn to manage time wisely.
History 8	Mr. N, Classroom Teacher Ms. P, Paraprofessional, is assigned to support the student Ms. N, Paraprofessional, is assigned to support other students in the classroom	All my work for U.S. History is chunked into 20-30 minutes sections with instructional time and activities planned. Lessons are designed to fit the time frame of all my classes.
Science 8	Ms. D, Classroom Teacher Ms. P, Paraprofessional, is assigned to support the student Ms. N,	We have 45 minute days. During classes, daily, we spend 5-10 minutes for our quick write or intro activity. We spend the next 20-30 minutes working through the material within HMH. Some days this requires a lot of movement, some days this only requires discussion activities with little movement. On block days, the first half is set up the same, with a break between hours, and the second half typically involves some kind of lab. Now labs do not occur every day, but I try to break up the second half of the hour in the same

	Paraprofessional, is assigned to support other students in the classroom	manner. The student has not requested a break in my class in a very long time. Definitely not this quarter (referring to third quarter) so far. However, previously when he has needed a break, he would let Ms. P or myself know that he needed one and I would jot the time down and let him know to please return within 5-10 minutes.

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.

In this case, the November 15, 2017 IEP as updated per the April 20, 2018 Mediation Agreement required paraprofessional support to be provided in the Math, Language Arts, and History/Science classes. Documentation provided by USD #___ shows paraprofessional support was scheduled for the student in these classes during the first semester of the 2018-19 school year.

The November 15, 2017 IEP included the accommodation of "Frequent Breaks" with a frequency described as "*Student needs a break every 20-30 minutes during the school day.*" The written statements provided by the student's classroom teachers appear to support that the student was generally allowed breaks at least every 20-30 minutes as part of the general class routine. The parent's concern on December 6, 2018 appears to be related to the student being allowed to request breaks but that is not required by the plain language of this accommodation in the November 15, 2017 IEP. It is noted that the accommodation in the December 19, 2018 IEP does address the parent's concern that the student is allowed to request breaks when feeling overwhelmed in the classroom.

The November 15, 2017 IEP also included the accommodation of "Work Chunked" with a frequency described as "*All work chunk work into smaller more parts so student is not overwhelmed by the amount of work he sees at one time."* USD #___ acknowledged this accommodation refers to "*giving work in smaller parts so as not to overwhelm the student."* USD #___ indicated this accommodation was implemented because the teachers are providing the work to the student in approximately 20-minute chunks or less.

However, the plain language of this accommodation as written in the November 15, 2017 IEP states that work should be chunked "*into smaller, more parts so the student is not overwhelmed by the amount of work he sees at one time.*" The parent described several instances that suggest work was provided to the student "all at one time" and the district's assertion is that work is "chunked" when it is provided in an amount that can be completed in a 20 minute block of time. Simply providing work in chunks that can be completed in 20 minutes does not break assignments into "smaller, more parts" that reduce "the amount of work he sees at one time." It is noted the December 19, 2018 IEP changes this accommodation to match USD #___'s description of "chunking assignments."

Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the IEP as written by providing paraprofessional support services and the accommodation of frequent breaks is not substantiated. However, the allegation of a violation of special education laws and regulations related to implementing the IEP as written by providing the accommodation of chunking assignments during first semester of the 2018-19 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 follow appropriate discipline procedures during the past 12 months, specifically by not conducting a manifestation determination review (MDR) when the student was removed from school for more than ten days in a school year.

Findings:

The parent alleges USD #___ has removed the student for more than 10 days in a school year but has not conducted the manifestation determination review (MDR) as required.

Documentation shows that three MDRs for the student were conducted during the 2017-18 school year on March 8, March 13, and April 6, 2018, when the student was removed for greater than 10 days in that school year.

Documentation provided by the parent and USD #___ both confirm the student was assigned out-of-school suspension (OSS) for a total of eight days on the following dates during the 2018-19 school year: September 6, September 7, September 10, September 19, September 20, September 21, November 20,

and December 17, 2018. All of these suspensions were the result of a violation of school rules related to inappropriate comments, physical altercations, and disruption to the learning environment.

The parent reports the student violated school rules related to inappropriate comments and school disruption on October 1, 2018. An email dated October 1, 2018 from DB, Principal at _____ Middle School, shows the student was assigned "*in-school suspension (ISS) at least for tomorrow.*" The parent reports she talked with Mr. B and it was agreed for the student to have three "cool off days" on October 2, October 3, and October 4, 2018 instead of serving ISS on October 2, 2018. The Attendance Record for those days show the student had excused absences on those three dates.

On October 5, 2018, the student returned to school for his scheduled classes. The parent reports and an email dated October 5, 2018 from Mr. B shows the student refused to go to ISS on that date. The parent responded via email to Mr. B that the student shouldn't have ISS because he had stayed home for three "cool off days" as agreed. The parent reported she called Mr. B and was told that if the student refused to go to ISS then he would need to be picked up and couldn't return to general education classes until the ISS was served. The Attendance Record for this date shows the student left early and had an unexcused absence for the remainder of the day.

The parent reported she visited with other middle school principals in USD #___ and was told the usual practice was that when a student refuses to serve ISS, the student is assigned to one day of OSS and then is allowed to return to school. Documentation shows the student did not attend _____ Middle School on October 5, 8, 9, 10, 11, 12, 17, and 18, 2018 because Mr. B refused to allow the student to return to class until the ISS from October 2 was served and the parent's stance that the three "cool off" days at home had more than fulfilled the district's usual practice of serving an OSS instead of the ISS.

Documentation shows an IEP meeting was held on October 18, 2018. Mr. B again indicated the student could not return to his regular classes until the ISS from October 2, 2018 was served. The option was given for the student to serve this ISS with JJ, his special education teacher, and the student returned to school on Friday, October 19, 2018.

On Monday, October 22, 2018, the parent reported and an email written by Mr. B shows the student had a discipline referral, was assigned to ISS, and was refusing to serve the ISS on October 23, 2018. The parent reported she kept the student home on October 23, 2018 because the student was refusing to

serve the ISS and there was no point in sending him to school just to have him refuse to serve ISS and be sent back home again.

She sent an email to Dr. H on October 23, 2018 letting her know that the student couldn't go back to school until this ISS situation was resolved because Mr. B said the student was required to serve ISS before he could return to his general education classes and the student continued to refuse to serve ISS.

The parent reported and the Attendance Record shows the student did not attend school on October 23, 24, 29, 30, and 31, and November 1 and 2, 2018. These dates are shown as unexcused absences.

An email written to the parent on October 31, 2018 by JJ, Special Education Teacher, states "*I spoke with Mr. B about the student's ISS. We would like for him to return to school and Mr. B is willing to assign a 45 minute detention in place of the ISS or the option of a modified ISS is still available.*" On November 1, 2018, Mr. B sent an email to the parent informing her that " . . . *I would be willing to accept a 45 minute after school detention as a substitution for ISS."*

On November 2, 2018, the parent sent an email to Dr. BZ-W, Assistant Superintendent for Teaching and Learning, stating "*Please offer additional guidance on this issue as I was told by Mr. B that the student couldn't return until he serves ISS. The student refused ISS and when a general education student refuses ISS, in ___ then it's OSS. If Mr. B told me he couldn't return until he serves ISS then what am I expected to do with the student? Have him go to school every day and refuse ISS, pick him up and then return him until Mr. B feels satisfied?"* The parent goes on to say "*Currently the student is suspended because Mr. B said he can't return unless he did ISS. An alternate resolution was offered yesterday but my question is why is he expected to have after school detention and he has been home for over a week."*

Dr. Z-W responded to the parent via email on that same date stating "*Our goal is to have the student in school . . . He can return at any time without having ISS."* Documentation shows the student returned to school on November 5, 2018.

On December 13, 2018, the parent reported the school staff contacted the student's grandmother saying the student was having some challenging behaviors and they wanted her to come pick him up from school. The parent reported the student left school with his grandmother about 12:15 p.m. that day. An email dated December 13, 2018 written by Ms. J to the parent

indicated she was aware of the challenging behaviors during the morning and was appreciative of the grandmother's support and that she picked him up early from school that day. The Attendance Record show the student left early for an excused absence on that date.

Federal regulations, at 34 C.F.R. 300.530(e)(1), requires public agencies to conduct a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.

Federal regulations, at 34 C.F.R. 300.536(a), define a change of placement as a removal for more than 10 consecutive school days; or when the child has been subjected to a series of removals that constitute a pattern. A pattern exists when

1) a series of removals totals more than 10 school days cumulative in a school year,

2) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and

3) additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another are considered.

Federal regulations, at 34 C.F.R. 300.536(b) require public agencies to determine on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.

Federal regulations, at 34 C.F.R. 300.530(b)(2), require a public agency, beginning on the 11th cumulative day of removal for disciplinary purposes, to provide educational services to the child, although in another setting, that would enable the child to continue to progress in the general education curriculum and to make progress toward IEP goals.

In this case, documentation shows USD #___ appropriately conducted three MDR meetings for the student during the 2017-18 school year.

During the 2018-19 school year, both the parent and USD #___ agree that the student was removed for out-of-school suspension (OSS) for a total of eight days on the following dates: September 6, September 7, September 10, September 19, September 20, September 21, November 20, and December 17, 2018. All of these suspensions were the result of a violation of school rules related to

inappropriate comments, physical altercations, and disruption to the learning environment.

Documentation also supports the fact the student was also removed on the following dates for the specified reasons:

Date	Reason for Removal
October 2, 3, and 4, 2018	Three “cool off days” in lieu of ISS for October 2, 2018.
October 5, 2018	Student refused to serve ISS assigned for October 2, 2018 and was sent home.
October 8, 9, 10, 11, 12, 17, and 18, 2018	Unclear if parent chose to keep student home or whether the student was not in school because of refusal to serve ISS assigned for October 2, 2018.
October 23, 24, 29, 30, 31, and November 1 and 2, 2018	Unclear if parent chose to keep student home or whether the student was not in school because of refusal to serve ISS assigned for October 23, 2018.
December 13, 2018	Grandmother was called to pick up the student because he was exhibiting challenging behaviors.

USD #___ maintains that none of these dates should be considered as removals as the parent was the one who chose to keep the student out of school for these 19 days during first semester of the 2018-19 school year. However, documentation suggests that, at a minimum, the school initiated or agreed to the removals on October 2, 3, 4, and 5 as well as the removal on December 13, 2018, resulting in an additional five days of removals.

These five days combined with the eight days of removals acknowledged by both parties mean the student was removed for a total of 13 days during first semester of the 2018-19 school year. However, there is nothing automatic about the need for a manifestation review based solely on the number of days a child has been removed. The pertinent regulation is 34 C.F.R. 300.536. That regulation says a series of short-term removals may constitute a change of placement that would require a manifestation review, but a change in placement does not occur simply because the number of disciplinary removals accumulates to more than 10

school days in a school year. Rather, the regulation says a series of short-term removals may constitute a change of placement [which would require a manifestation review] when: (i) the series of removals total more than 10 school days in a school year; (ii) the child's behavior is substantially similar to the child's behavior in previous incidents; and (iii) because of additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

In other words, all three elements must have occurred. Moreover, the additional factors described in (iii) are only suggested factors and other factors may also be considered. Importantly, paragraph (b)(1) of this regulation says: "The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement." Paragraph (b)(2) of this regulations says: "This determination is subject to review through due process and judicial proceedings." In short, whether a series of short-term removals constitute a change of placement which would require a manifestation review, is: (1) subject to a variety of subjective factors; (b) is determined by school officials; and (c) is subject to review through due process and judicial proceedings.

Accordingly, whether a series of short-term removals constitutes a change in placement that would require a manifestation review is not a decision a state complaint investigator can make. That decision is, by law, made by school officials. If a parent wishes to challenge that decision, the parent must do so through due process and judicial procedures, not through a state complaint. Thus, the allegation that the district has failed to conduct a manifestation review, as required by law, is not substantiated.

However, the law does require the district to provide educational services, although in another setting, beginning on the 11th cumulative day of suspension in a school year. This student was removed for 13 cumulative days. For cumulative days 11, 12, and 13, the district should have offered educational services sufficient to enable the student to continue to progress in the general education curriculum and to make progress toward IEP goals, although in another setting outside of the setting described in the student's IEP.

It is noted this student missed a total of 27 days during first semester of the 2018-19 school year and that 14 of those days were because of a refusal to serve two days of ISS. It is unfortunate that building level staff refused to follow generally accepted practices for converting ISS to OSS until the assistant superintendent became involved in the ongoing situation.

Corrective Action

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

- 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 special education and related services that are provided in conformity with the IEP.

  The findings of this investigation show USD #___ failed to provide the accommodation of chunking of assignments during the first semester of the 2018-19 school year.

- Federal regulations, at 34 C.F.R. 300.530(b)(2), requires a public agency, beginning on the 11th cumulative day of removal for disciplinary purposes, to provide educational services to the child, although in another setting, that would enable the child to continue to progress in the general education curriculum and to make progress toward IEP goals.

  The findings of this investigation show USD #___ removed the student for a total of 13 days cumulatively during the first semester of the 2018-19 school year and did not provide services to the student beginning on the 11th day of removal.

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. 300.101 and 34 C.F.R. 300.17 by ensuring that IEPs are implemented as written.

2. Comply with 34 C.F.R. 300.530(b)(2) by providing educational services, although in another setting, to this child, and to any child with a disability beginning on the 11th day of removal for disciplinary reasons.

~~3.~~ No later than March 30, 2019, USD #___ shall make a written offer of compensatory services to compensate the student for services not provided during the three days of suspension that exceeded the 10th cumulative day of suspension. The compensatory services may be provided in an alternative setting, and shall consist of, at minimum, 450 minutes of special education services. The parent shall have the option of accepting all, or some, or none of the offered compensatory services. The district shall, within 5 days of delivering the written offer of compensatory services to the parent, send Special Education and Title Services a copy of the written offer.

4. No later than April 30, 2019, USD #___ will provide training to the principal and general education teachers of the student at _____ Middle School regarding implementing the IEP as written and the disciplinary procedures required by the IDEA for students with disabilities as well as strategies for effectively working with students with Emotional Disturbance. 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.

5. Further, USD # ___ shall, within 14 calendar days of receipt 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 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), which is attached to 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 APRIL 23, 2019

DATE OF REPORT: May 23, 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 was received by the Kansas State Department of Education on April 23, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint which ends on May 23, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on May 17, 2019 as part of the investigation process.

_____, General Counsel for USD #___, was interviewed by telephone on May 16, 2019 as part of the investigation process.

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by both parties:

- Individualized Education Program (IEP) dated November 15, 2017
- IEP dated December 20, 2018
- PowerSchool Log Entries dated April 17, 2019 and April 22, 2019
- Photo of the Hit List written on the whiteboard
- Letter written by _____, Assistant Principal at _____ Middle School, to the parent dated April 17, 2019
- Notice of Short-Term Suspension dated April 18, 2019
- Notice of Meeting dated April 19, 2019 for a Manifestation Determination Review
- Manifestation Determination Review dated April 22, 2019
- Meeting 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 (PWN) dated November 6, 2018
- PWN dated February 21, 2019
- Evaluation/Reevaluation Report February 21, 2019
- Break Log dated January 6, 2019 through April 30, 2019
- Email conversation between the parent and _____, School Psychologist, dated November 1, 2018
- Email dated November 30, 2019 written by _____, Special Education Teacher to the parent
- Email dated January 18, 2019 written by Ms. _____ to the parent
- Email dated January 25, 2019 written by Ms. _____ to the parent
- Email dated February 4, 2019 written by Ms. _____ to the parent
- Email dated February 18, 2019 written by Ms. _____ to the parent
- Email conversation between Ms. _____ and the parent dated March 5, 2019
- Email dated April 3, 2019 written by Ms. _____ to the parent
- Email conversation between Ms. _____ and the parent dated April 4, 2019
- Email conversation between Ms. _____ and the parent dated April 17, 2019
- Email conversation between Ms. _____ and the parent dated April 17, 2019
- Email written by the parent to _____, Coordinator of School Psychology
- PowerSchool Assignment Record for Language Arts 8, Middle School Math, Science 8, US History 8, Design Exp. 8, Integrated Computer Applications
- USD #___ School Calendar for the 2018-19 School Year
- Snow Days for USD #___ during the 2018-19 school year
- Attendance Record for the student during the 2018-19 school year
- _PS Threat Assessment Protocol
- Response to the Allegations dated May 13, 2019 written by Ms. ____
- Complaint Evidence Description dated May 15, 2019 written by the parent

Background Information

This investigation involves a 13 year old male who is enrolled in the eighth grade at _____ Middle School in USD #___ during the 2018-19 school year. The student was originally found eligible for special education under the exceptionality category of emotional disturbance on November 2, 2017. The student has attended _____ Middle School since the beginning of second semester of seventh grade and has received special education services since that time.

Issues

The complainant raised four issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. The time period for this complaint begins on April 23, 2018.

> **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) which is part of the individual education program (IEP) on April 17, 2019 which resulted in a disciplinary action.

Findings:

The parent reported the school staff did not follow the student's BIP on April 17, 2019 when the science teacher asked the student to take a break from the science class due to inappropriate behavior and offered to escort the student from the classroom to the special education classroom.

The parent reported that subsequently, the special education paraprofessional made inappropriate comments to the student about using the special education classroom for too many breaks that day, and the principal failed to follow the protocol in the BIP for contacting the parent when the inappropriate behavior was happening on April 17, 2019. Finally, the parent reports that the school staff refused to allow the student to return to the classroom without first responding to them.

The parent believes that the failure to follow the required procedures in the BIP caused the student to escalate to the point of cursing at and threatening to kill school staff, resulting in the student's suspension from school. The parent reported USD #___ admitted that the school staff did not follow the BIP during the manifestation determination review (MDR) held on April 22, 2019.

On April 17, 2019, the IEP in effect was dated December 19, 2018. That IEP includes a BIP which lists specific steps to follow when the student displays behavior that is interfering with his learning or the learning of others. One of the steps requires the classroom teacher to contact a special education staff person to report to the classroom and walk with the student to his break spot when the student is asked to leave the classroom. The BIP also requires special education staff to discuss re-entry strategies with the student before going back to the general education classroom following a break; however, the student is not required to participate in this discussion and can still return to class. In addition, the BIP requires adults address the student in a calm manner and not to make threats of consequences or inflammatory statements such as calling him a liar. The IEP also includes supports for school personnel for quarterly training on how to implement the student's services and BIP.

An emergency plan for when the student's behavior is out of control is also included in the BIP. This plan lists specific steps to allow the student to take breaks in order to regulate his emotions. The plan states:

> If the student does not report to the special education office within 7 minutes of leaving class, an email will be sent to his mother. Staff will wait 5 minutes for her to respond to the email before making a phone call to her or the student's grandmother. The student's mother prefers that the student's grandmother be contacted first.

An examination of the PowerSchool Discipline Log, the MDR, emails, and the parent report establishes the following timeline of events that occurred on April 17, 2019:

1. Ms. _____ reminded the student about after school tutoring and the student was worried that he would miss a sports activity. The parent and Ms. _____ emailed each other about the student questioning the tutoring and the parent asked Ms. _____ to have the student call her so she could reassure the student he could do both the tutoring and participate in the sports activity.
2. Following lunch, the student took a 10-minute break in the special education classroom. He then went to the science class and requested to go back to the special education classroom to take a quiz. He then returned back to the science classroom where he became disruptive and started making animal

noises. The student requested to take a break to get a drink of water and then returned to the science class again and continued to be disruptive.

3. _____, the science teacher, then requested the student accompany her to the special education classroom and the student refused. Ms. _____ then phoned the special education classroom and the student left the science class and walked to the special education classroom.
4. When the student entered the special education classroom, _____, the paraprofessional, made a comment to the effect that the student had been in the special education classroom a lot that day and not in class. The student began cursing, calling staff bad names, and threatening to fight staff.
5. Ms. _____ was called to the special education classroom and asked the student to call his grandmother. The student spoke to his grandmother on the phone and, following the phone call, the student paced around the special education classroom and the principal left the classroom. Staff indicated this is typically a calming behavior for the student.
6. The student started to again curse at staff and threaten bodily injury to Mr. _____. The student then wrote “Death Wish” on the whiteboard listing Mr. _____’s name as number one on the list. Next, the student stated he was going to get his uncle’s gun and shoot Mr. _____ in the head. At this point, the school resource officer and Ms. _____ were called to the special education classroom.
7. School staff kept the student in the special education classroom office while they conducted a threat assessment per school district procedures. Ms. _____ began to email the parent from Ms. _____’s computer regarding this situation while Ms. _____ had the student call the parent. The parent reported receiving a phone call from the student and asking the student to call her back in 5 minutes; however, the student did not call back until almost 15 minutes later. None of the school reports reflect two phone calls.
8. The student spoke to the parent on the phone but refused to allow the school staff to speak to the parent. The student continually asked if he was going to be allowed to go back to class and school staff told him that Ms. _____ or Ms. _____ needed to speak to the parent before that could happen.
9. At this same time, the parent was telling the student to return to class because his BIP didn’t require that he talk to school staff before returning to the classroom. It is noted that, at this point, the parent was still unaware of the threat made toward Mr. _____ because she had not yet received an email from the school about the threat assessment because she was unable to receive an email while she was talking on the phone.

10. The student remained in the special education classroom office pending the results of the threat assessment. The parent arranged for the student's grandfather to come pick him up from school rather than wait for school staff to allow him to return to class because she believed this was causing the student to become increasingly frustrated and escalate his behavior.
11. School staff completed the threat assessment and concluded the level of the threat was a 3 out of 10, which is in low range, borderline medium. Staff indicated the threat was rated this way because, while the threat was specific and appeared to indicate access to a weapon, the student did not currently have access to the weapon he mentioned in his threat. The student did not return to class at this time because his grandfather had already picked him up from school.

It is noted that the parent never spoke to school staff on April 17, 2019.

The MDR conducted on April 22, 2019 confirms that the IEP team believed the IEP and BIP were followed on April 17, 2019 with the exception of the science teacher offering to escort the student to the special education classroom.

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. Federal regulations at 34 C.F.R. 300.17 define the term "free appropriate public education" in part as special education and related services that are provided in conformity with the IEP.

Federal regulations, at 300.324(a)(2)(i), require IEP teams to consider the use of positive behavioral intervention and supports, and other strategies to address the behavior of a student whose behavior impedes the child's learning or the learning of others. The Kansas Special Education Process Handbook in Chapter 4, Section E.1.e., states that the focus of behavioral interventions and supports in the IEP is prevention of the behavior, not just provision for consequences subsequent to the behavior. The positive behavioral interventions and supports could be implemented through the IEP annual goals, program modifications, or a behavioral intervention plan (BIP). If a BIP is developed by the IEP team, it becomes part of the IEP.

In this case, the science teacher failed to correctly implement the student's December 19, 2018 BIP on April 17, 2019 when she offered to escort the student to the special education classroom for a break due to his continued disruptions in

the classroom, and USD #___ acknowledged this noncompliance. In addition, the first time she intervened in the special education classroom on April 17, 2019, Ms. _____ did not email the parent prior to having the student call the grandmother. It is noted that these lapses in implementation occurred even though school staff should have received their required quarterly training on how to implement the services and BIP in the student's IEP during third quarter.

Documentation and evidence did not corroborate the parent's other examples of staff failing to implement the BIP. The BIP requires that comments made to the student are made in a calm manner, and do not include threats of consequences or inflammatory statements such as calling the student a liar. When the paraprofessional made a comment about the student being in the special education classroom multiple times that day, which was certainly unnecessary but not inflammatory; thus, did not violate the requirements contained in the BIP. In addition, the BIP allows for the student to return to class following a break in the special education classroom without talking to school staff. However, in this situation, the student made a specific threat of violence toward Mr. _____ which triggered district-wide procedures related to the safety of students and staff necessitating a threat assessment. As part of this procedure, the student is not allowed to return to class until the threat assessment is completed.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to correctly implement the BIP as written is substantiated.

It is noted that the breakdown in communication that occurred between the school staff and the parent on April 17, 2019 exacerbated the whole situation.

> **ISSUE TWO:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate disciplinary procedures in regards to the manifestation determination review (MDR) meeting that occurred as a result of the disciplinary action taken on April 17, 2019.

Findings:

The parent reported the student was suspended for three days as a result of the threat he made towards Mr. _____ on April 17, 2019. The parent believes this behavior was the result of the school staff failing to implement the BIP as written and therefore the behavior should be considered a manifestation of his disability.

She stated she disagrees with the conclusions made by USD #___ at the MDR held on April 22, 2019.

The findings of issue one are incorporated herein by reference.

It is noted that the IEP reflects that the student meets the criteria to be identified with the disability of emotional disturbance and needs a structured setting where expectations are consistent and modifications/accommodations are provided with fidelity. The IEP shows the student struggles with emotional regulation. The BIP describes the target behavior as:

> When redirected for disrupting the learning environment the student responds with inappropriate language and actions which results in further disruption to the learning environment. This can look and sound like language and volume, that can include cursing at staff or students and insults to staff or students that is distracting to all in the room.

The student made the threat towards Mr. _____ on Wednesday, April 17, 2019. A MDR was held the following Monday, April 22, 2019.

Documentation shows the following persons were present for the MDR: Ms. _____, Assistant Principal/LEA Representative; Ms. _____, Special Education Teacher; _____, General Education Teacher; _____, Social Worker; Ms. _____, School Psychologist; Dr. _____, Director of Special Education for USD #___; _____, Social Work Coordinator; _____, School Psychologist Coordinator. It is noted the parent participated in the MDR by phone.

Documentation shows the team considered the student's behavior in the incident on April 17, 2019 as well as the student's behaviors in two previous MDRs held on February 21, 2019 and March 25, 2019. The team also considered the student's current performance, strengths, IEP goals, BIP, and special education services. The team concluded that the student's behavioral needs are being addressed through a goal, accommodations and modifications, and positive behavioral supports. In addition, the team considered the observations from the special education and general education teachers as well as information provided by the parent.

The MDR reflects school staff members' belief that "the very quick escalation of the behavior as well as the level of severity and specific nature (getting a gun from the uncle and shooting the staff member in the head) of the threat do not reflect a behavior that is directly and substantially related to his disability."

The parent disagreed with the conclusion because she believes the student's responses to triggers can differ when he is escalated and the specificity of the threat does not preclude the possibility that the behavior resulted from his disability.

The MDR also reflects the school staff members' belief that the IEP and BIP were followed with the exception of the science teacher offering to escort the student to the special education classroom. The IEP team acknowledged this was a mistake but does not believe the threat was a direct result of this error.

The parent disagreed with that conclusion because she believes the student needs consistency. She believes the student's inappropriate behavior was triggered by the science teacher offering to escort the student to the special education classroom and by Mr. _____'s derogatory comment about the student's break usage. The parent thinks these triggers are what caused the student's behavior to escalate to the point of making the threat toward Mr. _____.

Federal regulations, at 34 C.F.R. 300.530(e)(1), require the public agency, the parent, and relevant members of the student's IEP team to meet within 10 school days of any decision to change the placement of a child with a disability to review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent They must use this information to determine 1) if the behavior resulting in the violation of a code of student conduct was caused by, or had a substantial relationship to, the student's disability or 2) if the conduct in question was the direct result of the public agency's failure to implement the student's IEP. If the aforementioned group determines that either condition is met, they must also determine that the conduct is a manifestation of the child's disability.

In this case, the MDR was held three school days following the incident on April 17, 2019. The parent, LEA representative, and the entire IEP team met on April 22, 2019 to conduct the review of all relevant information in the student's file, including the student's behavior in two previous MDRs, the student's IEP, teacher observations, and relevant information provided by the parent. After considering all of the relevant information, the group determined that the threat toward Mr. _____ was neither caused by, nor had a substantial relationship to,

the student's disability, nor was it a direct result of the school's failure to implement the student's IEP.

Based on the foregoing, the allegation of a violation of special education laws and regulations by failing to follow appropriate procedures in the MDR determination is not substantiated.

It is noted that the parent disagrees with the decision that was made at the MDR, and while the documentation provided by the district does not clearly and completely describe the team's discussion of the review of data that occurred at the meeting in order to make the determination that the threatening behavior is not related to the student disability of emotional disturbance, the complaint investigator does not have the authority to make a decision as to the correctness of the final determination. If the parent disagrees with the determination of the MDR and wishes to appeal that decision, the parent must do so by requesting an expedited due process hearing outlined in federal regulations, at 34 C.F.R. 300.532(a) and (c) as described in the Kansas Special Education Process Handbook, Chapter 13, Section H.3.

> **ISSUE THREE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the parent's request for speech services during the past 12 months.

Findings:

The parent acknowledged that USD #___ responded to her request for an evaluation for speech services in a timely manner by conducting a reevaluation of the student. The parent indicated the reevaluation was completed on February 21, 2019 and showed the student has very low speech and language skills and he is reading on a 5th grade level.

The parent reported the student needs "speech or some type of accommodations because the student has a fear of reading out loud or in a classroom setting which often leads to disruptive behaviors in the class or inappropriate language." The parent indicated she consulted with Families Together which told her they see success with children who have the label of emotional disturbance (ED) in improving communication and relationships when they receive speech services.

The parent believes the reevaluation shows the student's need for speech and language services and reported she requested the student qualify for these

services. However, the parent reported USD #___ refused to accept these findings and qualify the student for speech and language services. The parent stated, “The speech language pathologist indicated that the student does have a need for services but it’s not something that she has time for or can do at his grade level.”

The Evaluation/Reevaluation Report dated February 21, 2019 shows the student’s reading skills were assessed through Scantron on December 14, 2018. He scored at the 16th percentile rank and at a Grade Level Equivalent of 5.3 (5th grade 3rd month). Language skills were assessed through the Clinical Evaluation of Language Fundamentals and the student scored at or below the 3rd percentile rank for receptive and expressive language as well as language content and memory and in the low and very low ranges. The report noted that the student was distracted during the testing and would only test for 5-10 minutes before refusing to continue. The Evaluation/Reevaluation Report summarizes:

> The student had difficulty with this test which looks at academic language. However, functionally in the classroom, the student is reading at a 5th grade level per IEP baseline. Much written material (even for adults) is written at a 5th grade level indicating the student is beginning to demonstrate community-readiness. Reading at this level implies a basic/core understanding of vocabulary, inferential ability, comprehension skills, and sentence structure. So, although these language areas were weaker in the speech-language therapist’s testing, the student demonstrates these skills are emerging in real-life situations. These are not areas are being monitored by special education teacher services and do not need to be addressed by speech-language services. Another area, processing larger amount of grade-level material, continues to be harder. However, it is accommodations that will help the student access the curriculum. Accommodations listed on his IEP (chunking, verbal assistance with generating ideas), will help the student in this area. In high school, the student may also benefit from the accommodations of receiving a copy of class notes and checks for understanding. Overall, the student does not demonstrate a need for speech-language therapy for academic language development. The accommodations, supports, and instruction he is receiving from special education teacher services and general education will allow him to access the curriculum.

The Evaluation/Reevaluation Report concludes the student continues to be eligible for special education and related services under the exceptionality

category of emotional disturbance (ED) and reflects that the parent was in attendance at the eligibility determination meeting but refused to sign the report.

Ms. _____ provided a prior written notice (PWN) dated February 21, 2019 to the parent in person. That PWN indicates the student does not qualify for speech-language services based on the results of the most recent reevaluation. The PWN explains that the student's current IEP programming is supporting areas of language needs in the school setting and concludes that speech-language services would not provide additional benefit. The PWN indicates providing speech-language services would result in the student spending less time with his general education peers and would not be the least restrictive environment for the student. The PWN shows that parent consent is not required for this action. The PWN states that any disagreement with the actions shown in the PWN may be resolved through mediation or through due process proceedings and includes information about where to obtain additional information about the procedural safeguards to protect parent's rights under the IDEA.

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 1) a description of the action proposed or refused by the agency; 2) an explanation of why the agency proposes or refuses to take the action; 3) a description of data used as a basis for the action; 4) a statement that parents of a child with a disability have procedural safeguards; 5) sources for the parent to contact to obtain assistance in understanding those procedural safeguards; 6) a description of the options considered and why those options were rejected; and 7) a description of any other factors that are relevant to the agency's proposal or refusal.

In this case, the parent requested that the student qualify to receive speech-language services at the eligibility determination meeting held on February 21, 2019. The parent believes that the student requires these services because the Evaluation/Reevaluation Report shows the student scored significantly below average in the area of speech-language skills.

USD #___ provided the parent with a PWN on February 21, 2019 refusing to qualify the student for the speech-language services because the student's current IEP programming is supporting areas of language needs in the school setting and concludes that speech-language services would not provide

additional benefit. The PWN indicates providing speech-language services would result in the student spending less time with his general education peers and would not be the least restrictive environment for the student. The PWN also includes information about conflict resolution and the parent's procedural safeguards.

Based upon the foregoing, the allegation that USD #___ failed to respond appropriately to the parent's request for speech-language services for the student 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 Individual Education Program (IEP), specifically the accommodations for giving basketball time and sending Friday packets during the 2018-19 school year.
>
> Findings:

The parent alleges the student is not receiving basketball time during his scheduled breaks at school. She reports she has brought this to the attention of school staff on multiple occasions but USD #___ continues to omit this accommodation. She indicates school staff acknowledged this noncompliance in an email dated April 4, 2019.

The BIP, which is included in the December 19, 2018 IEP, contains the accommodation noted in the allegation. This requirement states:

> Student will have 2 check-in periods during the day that are designed to be positive interactions with special education staff. Check-in times will be the last 5 minutes on a class period (one during morning classes and one during afternoon classes). Check in will take place in the gym where the student can shoot baskets. The student may choose to not participate in the check-in times. There will be a log sheet kept to monitor when check-in times occur and if the student utilized them.

Ms. _____ sent an email dated April 4, 2019 to the parent which states:

> "The student has check-in breaks twice per day that are designated for shooting baskets in gym. The time identified is at the end of 2nd hour and end of 7th hour. Check-in started after the IEP was signed

> which was in January after we returned back to school. Check-in time was offered by Mr. _____ [a special education teacher] for the first week of school after winter break and the student declined all breaks. When I talked to the student about why he was declining check-in time the student told me if he wasn't going to play basketball for the school he did not want to go shoot hoops. I told him if he decided he wanted to check-in time again to let me know and I would set it up. The student sent me an email this week asking about why he wasn't getting basketball time and I let him know he can start check-in at the end of 2nd and 7th hour again."

The 2018-19 school calendar for USD #___ shows classes resumed on January 8, 2019. USD #___ provided a break log for the student starting on January 16, 2019 through April 30, 2019. No documentation shows that check-in breaks were provided the first week of school after winter break. The break log does include documentation that the student was provided 108 breaks during second semester; however, the break log does not document that the check-in breaks were offered twice daily and refused by the student.

The parent also alleges USD #___ staff have not provided her with the weekly emails on Friday showing missing assignments for the student. The parent reported the purpose of these Friday emails is to allow the student the opportunity to complete any missing assignments over the weekend. The parent acknowledged she received these emails on January 18, 2019 and February 4, 2019 but has not received them on any other dates as required.

The December 19, 2018 IEP includes one accommodation related to the allegations which requires the student to have extended time to complete work. Extended time is described as three additional school days.

The BIP included in the December 19, 2018 IEP includes the accommodation noted in the allegation. This requirement states, "A list of missing assignments will be e-mailed to the parent at least once weekly and the student will be provided copies of the work."

The BIP does not include a requirement to provide the list of missing assignments on Fridays, only that they are provided at least once weekly. Nor does the BIP require a weekly email if there are no missing assignments.

The district provided five emails that appear to relate to this requirement as noted below:

1. The email dated January 18, 2019 states the student does not have any missing assignments at this point.
2. The email dated January 25, 2019 does list missing assignments in math, science, and design (art); however, no documentation shows that copies of these missing assignments were provided to the student.
3. The email dated February 4, 2019 shows missing assignments in science and art but again does not indicate these missing assignments were provided to the student to complete. This email refers to a "Friday weekly update."
4. The email dated February 18, 2019 shows a missing assignment in design but again does not indicate the missing assignment was provided to the student to complete.
5. The email dated April 3, 2019 shows a missing assignment in history and indicates Ms. _____ will follow-up with the student.

Four of these five emails included a listing of the student's current grades and that five included some type of summary of breaks the student had taken out of class during that week.

USD #___ noted that they only considered assignments to be missing if they were not completed following the three days of extended time to complete the original assignment. The district provided a PowerSchool report for each class in which the student was enrolled during second semester, which showed all of the assignments and the score the student earned for each one. This document included notations if the student was exempt from an assignment for some reason and if a grade was not taken on an 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. Federal regulations at 34 C.F.R. 300.17 define the term "free appropriate public education" in part as special education and related services that are provided in conformity with the IEP.

Federal regulations, at 300.324(a)(2)(i), require IEP teams to consider the use of positive behavioral intervention and supports, and other strategies to address the behavior of a student whose behavior impedes the child's learning or the learning of others. The Kansas Special Education Process Handbook in Chapter 4, Section E.1.e., states that the focus of behavioral interventions and supports in the IEP is prevention of the behavior, not just provision for consequences

subsequent to the behavior. The positive behavioral interventions and supports could be implemented through the IEP annual goals, program modifications, or a behavioral intervention plan (BIP). If a BIP is developed by the IEP team, it becomes part of the IEP.

In this case, the BIP includes a requirement to provide two check-in breaks to the student daily and to keep a log documenting that these breaks were offered and whether the student utilized the breaks. Documentation and interview found the school staff did not offer these breaks daily and did not keep a record of them.

The BIP also requires staff to send home a listing of missing assignments at least weekly and to provide the student with copies of these missing assignments to complete. It is unclear whether there were additional missing assignments in addition to those described in the five emails; however, it is clear that no documentation showed that staff provided copies of those missing assignments to the student.

Based on the foregoing, the allegation of failing to provide these requirements in the BIP is substantiated.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issues that were presented in this complaint. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.101, require states to make a free appropriate public education 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. Federal regulations, at 34 C.F.R. 300.17, define the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

   The findings of this investigation show that on April 17, 2019 the science teacher did not implement the student's BIP included in the December 19, 2018 IEP and that USD #___ acknowledges this noncompliance. In addition, staff did not implement the requirements in the BIP related to check-in times and missing assignments as written.

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

1. Within 10 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 34 C.F.R. 300.101, K.A.R. 91-40-2(b)(1), and 34 C.F.R. 300.17 by providing special education and related in conformity with the IEP.

2. It is noted that this parent previously made an allegation of failure to implement the student's IEP and that allegation was substantiated on February 22, 2019. A corrective action required the principal and general education teachers of the student to be trained on the requirement to implement the IEP as written by April 30, 2019. USD #___ reported this training was provided on April 17, 2019 and was attended by the principal, assistant principal, and the student's general education teachers. In addition to this training, the student's IEP also requires quarterly training for school personnel on how to implement services and the BIP. It is apparent that training of school personnel has not been an effective method of ensuring implementation of the student's IEP. No later than June 30, 2019, all school staff who work with the student will review the student's BIP and develop a flowchart or checklist to include all of the requirements of the student's BIP. USD #___ will share this document with the student's IEP team at the high school to facilitate the implementation of the requirements of the BIP in that setting. No later than July 1, 2019, USD #___ shall provide to SETS: 1) a copy of the flow chart or checklist, and 2) documentation that the flow chart or checklist was shared with the student's high school IEP team.

3. No later than August 1, 2019, USD #___ will conduct a review of policies, procedures, and practices related to implementation of IEPs at Landon Middle School. As a result of this review, USD #___ will create new written policies and procedures to ensure that all special education and general education staff are a) aware of their responsibilities for implementing the IEP of each student they are teaching, b) are trained to be able to implement the IEP of each student as written, and c) are implementing each student's IEP as written. This new procedure will describe the responsibilities of all special education and general education teachers and include active administrative oversight and monitoring. No later than August 30, 2019, USD #___ will provide a copy of these new

policies and procedures to SETS for review. No later than 10 school days after SETS approves these new policies and procedures, USD #___ will share these new policies and procedures with all special education and general education teachers in the district, as well as the relevant school administrators who monitor these staff persons. No later than 15 school days after SETS approves the policies and procedures, USD #___ will provide SETS with documentation of when and with whom the procedure was shared. USD #___ will implement the policies and procedures beginning with the 2019-20 school year.

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 is attached to 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: 19FC___-004

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on April 23, 2019, 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. Following the investigation, an Initial Report, addressing the allegations, was issued on May 23, 2019. That report concluded that, with regard to Issues 1 and 4, the allegations of a violation of special education statutes and regulations was substantiated.

Thereafter, on May 31, 2019, the district filed an appeal of the findings and conclusions in Issues 1 and 4 in the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the report, the district's notice of appeal, the parent's response, and information contained in the complaint file at the Kansas State Department of Education (KSDE). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

I

The Appeal Committee will limit 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

In her response, the parent requests that the district's appeal be dismissed because the district did not serve her with a copy of the appeal. In support of this request, the parent cites the Kansas Rules of Appellate procedure. The Kansas Rules of Appellate Procedure were adopted by the Kansas Supreme Court and apply only to criminal or civil actions in the Kansas Court of Appeals and the Kansas Supreme Court. They do not apply to the appeal of a special education formal complaint decision. The appeal of a special education formal complaint decision is governed entirely by Kansas Administrative Regulation 91-40-51(f). That regulation requires that a copy of the complaint against an education agency be sent to the education agency that is the subject of the complaint. There is no requirement in this regulation, however, which requires that a copy of an appeal to the complaint decision be sent to the other party. It is a practice of Special Education and Title Services (SETS) to send a copy of a complaint appeal to the non-appealing

party and give that party a short time in which to file a response. That was done in this appeal. In a previous complaint involving these parties, SETS had requested that the district, if it filed a response to the parent's appeal, send a copy of that response to the parent. This request was made merely as a curtesy to the parent. It was not required by any statute or regulation.

III

Much of the argument presented by both sides of this appeal refers to the issue of whether the actions of the school district resulted in a violation of a Free Appropriate Public Education (FAPE). The Appeal Committee will not address whether the actions of the district amounted to a violation of FAPE because it is the finding of the Appeal Committee that the complaint investigator did not find or conclude that there was a violation of FAPE. K.A.R. 91-40-51(f) permits a party to appeal only the findings and conclusions of a complaint report. Since there was no finding or conclusion that the district failed to provide a FAPE, there can be no appeal on that issue. The investigator cited the regulatory FAPE definition in the corrective action portion of the report to emphasize that there is a legal requirement to implement the IEP. When, as in this case, there is no finding or conclusion of a failure to provide a FAPE, but there is, nevertheless, a failure to fully implement the IEP, the more pertinent regulation for corrective action is - 34 C.F.R. § 300.323(c)(2). That regulation requires 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. As will be discussed later in this decision, the failure to fully implement an IEP and the failure to provide a FAPE are not synonymous.

DISCUSSION OF ISSUES ON APPEAL

ISSUE 1: 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) which is part of the Individual Education Program (IEP) on April 17, 2019, which resulted in a disciplinary action.

Two provisions in the IEP apply to this issue:

First, the Behavior Intervention Plan (BIP), which states that if, after three redirections during a 20-minute period, the student takes a break, school staff will call the office, which will inform the student's case manager or other certified staff member to accompany the student to his break space.

Second, the Emergency Plan, which states it is to be used when the "behavior gets out of control." One of the provisions in the Emergency Plan is that if the student does not report to the office within seven minutes of leaving class, an e-mail is to be sent to the student's mother. If five minutes after the e-mail is sent, the student's mother does not reply, a phone call will be made to the student's mother or grandmother.

With regard to the first provision, the district states in its appeal, that any failure to implement the BIP was not a material failure. The district provides this comment: "Believe it or not,

teachers and school staff are not perfect." The Appeal Committee agrees and agrees that districts are not required to implement every detail in an IEP, no matter how minute the detail might be. The most authoritative source for this view is L.C. and K.C. v. The Utah State Board of Education, 125 F. App'x 252, 43 IDELR 29 (10th Cir. 2005). In this decision of the United States Circuit Court of Appeals for the tenth circuit (and Kansas is in the tenth circuit, so its decisions are law in Kansas), the court says occasional deviations from an IEP are not necessarily a violation of the Individuals with Disabilities Education Act (IDEA). In this tenth circuit case, the child's IEP said the child would not be required to take assignments home. The court ruled that the district did not violate the IDEA when teachers occasionally, and erroneously, assigned homework.

Other circuits, as cited by the district in its appeal, have ruled that minor deviations from the IEP do not necessarily constitute a failure to provide FAPE. Those rulings have been codified into statute. In 20 U.S.C. 1415(f)(3)(E), the IDEA states that a hearing officer may find a violation of FAPE only on substantive grounds, and that procedural violations of the IDEA constitute a violation of FAPE only if they impede the child's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. However, section (E)(iii) of that same statute states that "Nothing in this paragraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section." In the same way, a State Educational Agency (SEA), such as the Kansas State Department of Education, may also require a local education agency to comply with procedural requirements even when (as in this case) the SEA agrees that the procedural violation was not a violation of FAPE. In addition, federal regulations, at 34 C.F.R. § 300.600(d)(2), require SEAs to exercise general supervision of local education agencies, including effective monitoring of procedural matters.

The Appeal Committee finds that when the science teacher requested the student to accompany her to the special education classroom instead of calling the office to request the case manager or other certified staff to accompany the student to the break space, that request was a deviation from the BIP. However, it was only a very minimal deviation that did not, in itself, result in disciplinary action. The Appeal Committee also finds that the Emergency Plan in the IEP did not apply to that situation because the student was not out of control in the science classroom. In addition, the Appeal Committee could find no evidence to indicate that the student had been asked to report directly to his break spot and then failed to arrive within seven minutes of leaving the classroom. Thus, the e-mail and phone call requirements in the Emergency plan did not apply at that time.

In addition, the Office of Special Education Programs (OSEP), which is the office in the United States Department of Education that writes the federal special education regulations, has provided guidance, stating that disciplinary measures, including suspension, may, on a case-by-case basis, be imposed even for behavior that is specifically addressed in an IEP (See Federal Register, Appendix A, March 12, 1999, p. 12479). This guidance is in recognition that a child may act in a manner that was not contemplated by the IEP. When this student made a specific threat to harm a school staff member, it was entirely appropriate for the district to implement its threat assessment procedure, even though this procedure was not in the student's BIP.

As a result of these findings, the Appeal Committee is removing Corrective Action 2 from the complaint report. However, even though the Appeal Committee finds only a minimal failure to implement the IEP, which certainly did not rise to a violation of the FAPE requirement, corrective action is needed in order to help prevent similar failures in the future.

The Appeal Committee also finds that the BIP and the Emergency Plan are complex and nearly impossible to implement without any deviation. As such, the Appeal Committee is not sure it is even possible to implement the portion of Corrective Action 2, to develop a flowchart to include all of the requirements of this student's current BIP. It is not the Appeal Committee's function to write a BIP or an Emergency Plan for an IEP, and this Appeal Committee will not attempt to do so. However, the Appeal Committee is requiring the IEP team for this student to review this student's BIP and Emergency Plan in the manner described in the Conclusions portion of this decision.

ISSUE 4: 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 the accommodations for giving basketball time and sending Friday packets during the 2018-19 school year.

With regard to basketball time, this was referred to in the IEP as "check-in periods" and "check-in breaks." These were to be positive interactions with special education staff, and were to take place in the gym where the student could shoot baskets if he wanted to do that. In addition, these were to occur twice daily with a log kept to monitor when check-in times occur and if the student utilized them. According to the student's special education teacher, the student declined to take the check-in breaks when they were offered for the first week of school after winter break, and was told to let the special education teacher know if he wanted to resume them. On page 14 of the report, the investigator says:

> USD #___ provided a break log for the student starting on January 16, 2019 through April 30, 2019. No documentation shows that check-in breaks were provided the first week of school after winter break [the week of January 8]. The break log does include documentation that the student was provided 108 breaks during the second semester; however, the break log does not document that the check-in breaks were offered twice daily and refused by the student (emphasis added).

The evidence presented supports this description. The district asserts on page 3 of its appeal that the investigator determined the school failed to implement the IEP "because those breaks were not specifically identified as check-in breaks." This is an inaccurate statement of the investigator's findings. The investigator found, and the Appeal Committee agrees, that the break log does not show check-in breaks were provided during the first week of school (week of January 8th) and the break log does not show check-in breaks were provided twice daily and refused. Rather, the April 4, 2019 email from the special education teacher to the parent shows that when the breaks were initially offered and the student declined, the special education teacher told the student "if he decided he wanted to check-in time again to let me know and I would set it up." Under this kind of circumstance (when the student is refusing a service required by the IEP) school staff members must not just stop providing that service. Rather, the staff member must

continue to make the service available and document each instance in which the student declines, or the IEP team could meet to determine whether the IEP needs to be adjusted. Accordingly, the Appeal Committee finds there is sufficient evidence to support the investigator's conclusions.

With regard to the Friday packets, the IEP states that "A list of missing assignments will be e-mailed to the parent at least once weekly, and the student will be provided copies of the work." The district provided information that was also provided to the investigator in a PowerSchool report. That report shows that the student completed all of the assignments referenced in the five e-mails listed on pages 14 and 15 of the complaint report. Accordingly, the Appeal Committee finds that the student was provided with copies of the work as required by this portion of the IEP. The Appeal Committee recommends that the IEP team clarify how this requirement of providing copies of work will be documented in the future. For example, the IEP could specify that any missing assignments will be attached to each of the e-mails sent to the parent.

CONCLUSION

The Appeal Committee concludes that the deviation from the IEP described in Issue 1 is only minimal, is not a violation of FAPE, and that Corrective Action 2 in the report should be, and is, removed. However, because the Appeal Committee finds there was a minor deviation from the BIP in the IEP, and that there is a high likelihood that there will be future deviations from the BIP and Emergency Plan in the IEP, the Appeal Committee orders that the following corrective action be implemented:

Prior to the first day of school for the 2019-20 school-year, an IEP meeting will be held to review this student's BIP and Emergency Plan. If the student will be attending a different USD #___ school in the 2019-20 school year, the IEP meeting shall include relevant staff members from that school. Within 15 business days of the date of this decision, the district shall schedule the IEP meeting at a mutually agreed upon time, and provide the parent with written notice of the meeting, in accordance with law. On that notice, the district shall inform the parent that a representative of the Technical Assistance Team (TAT) will attend the meeting to provide technical assistance on the development of a BIP and Emergency Plan. On the date the district sends this notice to the parent, it will send SETS a copy of the notice. Upon receipt of the notice of meeting, SETS will assign a representative from the Technical Assistance Team (TAT) to attend the meeting and provide the required technical assistance. The purpose of the meeting is to consider the difficulties already encountered and anticipated, under the current BIP and Emergency Plan, and make changes to the BIP and Emergency Plan that will reduce the complexity of the plan, make the plan more workable for student and staff, and more adequately meet the needs of the student. The plan developed by the team will not need parent consent as long as the changes to the plan consist only of changes to the interventions in the plan, and do not involve a change of 25 percent or more to the frequency or duration of the plan itself. The district shall send SETS a copy of the revised plan within 5 business days of the IEP meeting. In the event the IEP team makes no changes to the BIP or Emergency Plan at this meeting, the district will notify SETS of that determination.

The Appeal Committee further concludes that the finding in the Initial Report that the district failed to implement the "check-in breaks" provision in the IEP is sustained. The finding in the Initial Report that the student was not provided with missing assignments is overruled. Corrective Actions 1 and 3 in the Initial Report are sustained.

This is the final decision on this matter. There is no further appeal. This Final Report is issued this 19th day of June, 2019.

APPEAL COMMITTEE:

_____
Melissa Valenza

_____
Brian Dempsey

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON APRIL 2, 2019

DATE OF REPORT: May 1, 2019

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 Department received the complaint on April 2, 2019. The Kansas Department of Education allows for a 30 day timeline to investigate the child complaint which ends on May 2, 2019.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 19, 2019 as part of the investigation process. In addition, MH, the student's Case Manager at Individual Advocacy, was interviewed on April 22, 2019 with written permission from the parent.

USD #___ did not schedule an interview but did provide a written response to the allegations and provided supporting documentation for their response.

In completing this investigation, the Complaint Investigator reviewed the following material which was provided by the both parties:

- Individualized Education Program (IEP) Amendment dated August 9, 2018
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent (PWN) dated August 9, 2018
- PWN dated September 6, 2018
- IEP dated September 26, 2018
- PWN dated September 26, 2018
- PWN dated October 10, 2018
- IEP dated November 6, 2018
- PWN dated November 6, 2018

- IEP dated February 15, 2019
- PWN dated February 15, 2019
- PWN dated February 25, 2019
- PWN dated April 4, 2019
- Email conversation between parent and M C-P, Administrative Liaison/Student Support at _____ Middle School dated October 1-2, 2018
- Email conversation between parent and Ms. C-P dated January 28, 2019
- Email from the parent to Ms. C-P dated January 30, 2019
- Email from Ms. C-P to the parent dated February 1, 2019
- Email conversation between parent and Ms. C-P dated February 4, 2019
- Email from parent to Ms. C-P dated February 20, 2019
- Email from Ms. C-P to the parent dated February 22, 2019
- Email from parent to Ms. C-P dated March 22, 2019
- Email from Ms. C-P to the parent dated March 25, 2019
- Email conversation between the parent and Ms. C-P dated March 26, 2019
- Email conversation between the JE, School Psychologist at _____ Middle School, and Ms. C-P dated April 2, 2019
- Copy of the student's 8th grade class schedule
- Copy of a blank copy of the student's visual schedule
- Photograph provided by USD #___ described as three sensory items located in Room A213, the alternate break location for the student at _____ Middle School
- Photograph provided by USD #___ described as 3/8 Para Training
- Photograph provided by USD #___ described as BIP training 2/19 & 3/8
- Photograph provided by USD #___ described as visual reminder on classroom desk (CWC)
- Photograph provided by USD #___ described as Mini-Checklist in study hall (A202)
- Photograph provided by USD #___ showing the student's binder titled Math/Study Hall Homework
- Blank copy of a Pre-Test for Exponents and Scientific Notation showing reduced number of items to be completed
- Blank copy of Worksheet 3-Scientific Notation Operations: Multiplication & Division showing reduced number of items to be completed

- Copy of an appointment inviting the student's team of paraprofessionals including CW, CA, and SI to a PBS Planning Meeting on November 9, 2018
- Copy of a PBS Para Meeting Agenda dated March 8, 2019 showing an agenda item for a review of the student's IEP accommodations and BIP
- Copies of point sheets dated March 19, 20, 21, 25, 27, 28, 29 and April 1 and 2, 2019
- Response to the allegations written by Ms. C-P dated April 1, 2019
- Written response to the allegations written by A, Due Process Supervisor at USD #___, dated April 15, 2019

Background Information

This investigation involves a 14 year old female who is currently enrolled in the 8th grade at _____ Middle School in USD #___ during the 2018-19 school year. The student was most recently reevaluated for special education on February 15, 2019. At that time, the student was found eligible for special education and related services under the exceptionality categories of Autism and Emotional Disturbance.

Issues

The complainant raised five issues which were investigated. It is noted the IDEA allows child complaint investigations to cover a 12 month period from the date the complaint is received. The time period for this complaint begins on April 2, 2018.

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 appropriate prior written notice for the IEP amendment made to the student's IEP during first semester of the 2018-19 school year.

Findings:

The parent believes USD #___ failed to inform her of material changes in services related to the provision of a free appropriate public education (FAPE) to the student during the first part of the student's 8th grade school year, particularly in relationship to Language Arts instruction.

The parent reported the student's IEP was amended prior to the beginning of this school year to match the student's 8th grade schedule. Documentation showed that an IEP dated April 4, 2018 was amended on August 9, 2018. A PWN was provided to the parent on August 9, 2018 which stated "*It is proposed that the student's minutes on her IEP be changed to accurately reflect the frequency of services she will receive. The student will receive pull out services for Math, Social Studies, and Language Arts totaling 132 minutes per day, five days per week. She will receive Class-Within-A-Class service for Science, two electives, and supervision during lunch. She will continue to receive 20 minutes per week of direct counseling services . . .*" The parent signed the PWN on August 9, 2018 giving consent for these changes.

A PWN dated September 6, 2018 was provided to the parent proposing a triennial reevaluation with assessment. The parent signed consent for this reevaluation on September 7, 2018.

The parent reported the student struggled in the online Language Arts curriculum because the online modules were designed to take approximately 90 minutes to complete and the student's assigned class period for Language Arts was only about 45 minutes in length. The parent reported discussing this concern with the IEP team at the end of September and a new IEP being developed.

Documentation found an IEP dated September 26, 2018 and a PWN dated that same date proposing a 25% reduction in the quantity of work in the student's online courses. The PWN indicated this change was considered a material change in services and required parental consent. The PWN also proposed an updated Present Level of Performance, updated goals, and new accommodations. The parent signed consent for these changes on September 26, 2018.

The parent reported that in lieu of reducing the writing portion of the online modules, the special education teacher was going to teach a writing unit at the end of the school year to cover the missed material. Documentation included an email dated October 1, 2018 written by Ms. C-P to the parent which states "*Here is the plan for reducing about 25% of the student's assigned work in her online classes. Since she is only two lessons behind I Math, and there is little writing in Math, the reductions have come from Language Arts and Social Studies."* The email goes on to state "*try not to let it worry her because of the things I've*

skipped and dropped and pushed to next semester when she can do a writing/research unit in isolation."

Another PWN was provided to the parent on October 10, 2018 which included the following description of the action being proposed:

- Student will receive 132 minutes of CWC 5x a week, each week
- Student will receive 176 minutes of pull-out 5x a week, each week
- Student will receive 20 minutes of counseling 1x a week, each week

The explanation for this action was that the student showed a need for support in the classroom and that the student continues to meet the eligibility criteria for an exceptionality of an emotional disturbance. It is noted the only difference in the services from the August 9, 2018 IEP amendment was specifying the pull-out classes were to be held five times per week, each week. No parent consent was obtained nor was it required for this proposed change.

On November 6, 2018, the IEP team met again to review and revise the IEP. A determination was made for the following services to be provided to the student:

- Student will receive 132 minutes of Special Ed Direct Services in Regular Ed Classroom 5x a week, every week
- Student will receive 176 minutes of Special Ed Direct Services outside Regular Ed Class 5x a week, every week
- Student will receive 30 minutes of counseling 1x a week, every week

The parent was provided a PWN dated November 6, 2018 proposing a reevaluation in the area of Social/Emotional/Behavioral and a functional behavior analysis to determine if a new exceptionality would be warranted. The parent provided consent for this proposed action on November 6, 2018. It is noted that the additional 10 minutes per week of counseling was not referenced in the PWN.

The parent reported the student was transferred from the online Language Arts class to an in-seat Language Arts class in January and that her written assignments continued to be reduced by 25%.

An email to the parent dated January 28, 2019 at 11:04 a.m. written by Ms. C-P states "*We'd like to change the student's schedule to allow for the CWC Language Arts class . . .*" A second email from Ms. C-P to the parent on that same day at 4:04 p.m. summarized a conversation with the general education Language Arts teacher, Mrs. Brown, regarding many students who were also struggling with writing conventions in the 8th grade Language Arts class and

states "*I told her that I would also be working with the student during study hall on writing. If the student can open her mind to it, I think she will be able to have some fun with the writing. I intend for our instruction to be non-threatening and am looking forward to having some fun with it. I hope I can get her there too!"*

A third email to the parent that same day from Ms. C-P at 9:52 p.m. states "*We'll plan to start the change on Wednesday."* It is noted the date of the referenced Wednesday was January 30, 2019 and that there is no documentation of an IEP amendment or PWN for a change of placement for special education services being provided in the pull-out setting to the special education services being provided in the CWC regular education setting.

The IEP team met again on February 15, 2019 and a new IEP was developed. That IEP states "*Through the end of school year 2018-19, the student will continue to receive Special Education support in the general education classroom for Math, Language Arts, Spanish, Garden Club elective, Art, and Science. These minutes total 264 minutes per day, 5 days per week. The student will receive pull out support in Social Studies and study hall for 88 minutes per day, 5 days per week. Supervision will be provided during lunch and is added to the minutes in general education setting for a total of 308 minutes of support in the general education setting. She will continue to receive 30 minutes once a week of direct counseling service."* The new IEP also includes an updated Behavior Intervention Plan (BIP) and references the addition of Autism as a category of exceptionality for the student.

A PWN dated February 15, 2019 was provided to the parent which describes each of these changes. The parent signed the PWN on February 15, 2019 granting consent for these changes.

The parent reported she contacted Ms. C-P following the February 15, 2019 IEP team meeting because she forgot to discuss the need for a writing goal and services as well as several classroom accommodations and wondered if those could just be added since the IEP had not been finalized or if a new IEP team meeting would need to be held. The parent indicated that Ms. C-P checked with her supervisors and reported these changes could still be incorporated in the IEP and that a new PWN would need to be provided and signed by the parent.

A PWN dated February 25, 2019 was provided to the parent describing the change in services as "*Since the last IEP the student has transitioned from the online curriculum to CWC classes for Math and Language Arts*." Three additional

accommodations were recommended including having the student escorted to class by staff. The parent signed the PWN on February 25, 2019 granting consent for these changes.

On March 22, 2019, the parent inquired in an email to Ms. C-P regarding the status of the February 15, 2019 IEP which she had not yet been provided and inquired about the writing unit that was supposed to be taught at the end of the school year.

Ms. C-P responded on March 25, 2018 indicating she would send another copy of the IEP home and explaining that "*Ms. Brown is doing some amazing writing work with the student, so I am not going to teach the student the writing unit. That really was planned for when she was working online and we had eliminated the writing assignments because it was so overwhelming for her. On several occasions I've visited with the student in study hall to work on some writing before she started working on writing in her CWC, but she refused. You can speak with Ms. Brown for more information about the writing she is doing in class."*

On March 26, the parent sent an email to Ms. C-P at 9:58 AM stating "*Just got an email from Ms. Brown who said that the student hasn't done any writing in her class yet. Right now they are doing research for a writing assignments but it's not due for a couple of week. Basically, this tells me that in 8th grade, the student will have one writing assignment. This is not acceptable. You put off doing writing work until the end of the year so you could do a writing unit. I agreed with that idea. Now you have dropped the ball and decided you aren't doing the writing unit so it would seem that the student is not getting an appropriate 8th grade education."*

Ms. C-P replied via email to the parent the same day at 10:57 AM and stated "*The writing unit was offered when the student was working online and was doing no writing whatsoever. It was contingent on her finishing her language arts curriculum online and them me filling in with writing instruction to the end of the year to fill in gaps in the student's writing. The ball wasn't dropped, the situation with the student's opportunity to receive instruction in the classroom versus online changed. I did not put off doing her writing work. The IEP team, at your request, agreed to decrease her assigned work online by 25% and you specifically wanted her to have the writing assignments deleted because she was anxious. I will not be teaching the student writing as I am not her language arts teacher."*

The parent then responded to Ms. C-P that same day at 12:20 PM and stated "*When the student was doing the online course it was overwhelming because she had to fit an hour and a half lesson into 44 minutes. She was stressed and just clicked through to get done. We decided as a team that there needed to be a reduction in work so she could complete in the allotted time. You said it would be easier to cut the writing. You skipped the writing portion of the assignments. I only agreed to relieve the stress on the student and because you made an arrangement to make up the writing portion at the end of the year in one writing unit. It was never mentioned to me that it was contingent on her being in online classes. You are now saying that because she is no longer online you don't need to keep your word because she is doing writing in a reg ed English class and you are no longer her English teacher. All the assignments you were responsible for are no longer necessary because she has a new teacher. This is unacceptable . . .The thing that make this even more ridiculous is that we spoke on the phone about the writing unit after she went to the reg ed class and you were saying you'd do a csi themed writing unit to get her interest. You said she could do it during study hall which would be great because then she'd have something to do in there . . . rather than failing."*

The parent was provided with a PWN dated April 4, 2019 that states "*On 4/4/19, you and staff members reviewed information related to your child's educational program.* " The PWN then states "*The district refuses parent request for alternative or change of writing curriculum and instruction. There was no additional curriculum or instruction agreed upon by the IEP team. Additional or alternative class placement, curriculum and instruction was not included in the IEP. The IEP team had previously agreed to add an accommodation to reduce work load and graded assignments by 25% at parent request due to student anxiety and refusal to write during her online curriculum lessons. In February, student was moved to a General Education classroom for Language Arts and is no longer taking any online classes. The district refuses change of study hall work expectations to include writing instruction. Study hall provides a valuable opportunity for student to catch up on work missed or not completed due to slow work pace, attendance or refusal to work in her classes."*

The parent reports she was not involved in any review of information with the student's IEP team regarding her requests related to the writing unit or goals on April 4, 2019.

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 statute and regulation, at K.S.A. 72-3430(b)(6) and 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(bb) 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.

Federal regulations, at 34 C.F.R. 300.320(a), requires that IEPs are developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. 300.320 through 34 C.F.R. 300.324. Federal regulations, at 34 C.F.R. 300.324(a)(1)(ii) requires that the IEP team must consider the concerns of the parents for enhancing the education of their child.

In this case, documentation and interviews found the student's IEP was substantially changed five times during the 2018-19 school year. Appropriate PWN was provided to the parent on August 9, 2018 for a change in service minutes and on September 26, 2018 for the reduction of writing assignments by 25%.

Interview and documentation found the student's IEP was also substantially changed at the November 6, 2018 IEP team meeting by increasing the counseling service minutes from 20 minutes per week to 30 minutes per week. However, this change was not described in the PWN dated November 6, 2018.

In addition, the student's special education services were changed on January 30, 2019 from pull-out special education services in the special education setting for the Language Arts class to CWC support in the general education setting for the Language Arts class. No PWN was provided to the parent regarding this change at that time.

PWN was again provided to the parent following the February 15, 2019 IEP team meeting which described changes in services, eligibility, goals and the BIP. Parental consent was also obtained on February 15, 2019. Subsequently, the parent contacted the case manager and requested some additional accommodations, a writing goal, and services be added into the February 15, 2019 IEP. A new PWN was provided to the parent on February 25, 2019 describing the addition of accommodations but did not address the parent's request for a goal for writing. This PWN was signed by the parent on February 25, 2019.

On March 25, 2019, the parent realized that the writing goal and services had not been included in the IEP and that the promised writing unit had not been provided in the study skills class as described in email correspondence on October 1, 2018 and January 28, 2019. The parent complained about this oversight and USD #___ responded by providing a PWN dated April 4, 2019 refusing to make the changes in regards to writing; however, the parent's request for this change was never considered by the entire IEP team and as such cannot be refused without any deliberation.

The IDEA requires a public agency to provide the prior written notice to a parent to make clear what changes are being proposed by the school district in order to provide the student with a free appropriate public education. The purpose of this prior written notice is to avoid miscommunication and to inform parents of their procedural safeguard rights if they disagree with the public agency's actions.

USD #___ did not provide PWN to the parent nor obtain consent for material changes from the parent for changes in the student's special education program that occurred on November 6, 2018 and on January 30, 2019. In addition, no matter how well intended, the practice that allowed the February 15, 2019 PWN to be "updated" on February 25, 2019 led to miscommunication about the Language Arts class and writing instruction between what the parent believed was happening and what the district was actually providing for the student. In addition, the April 4, 2019 PWN does not reflect a decision made by the IEP team which includes the parent and as such is not appropriate. Based on the foregoing, the allegation of a violation of special education laws and regulations related by failing to provide the parent with appropriate prior written notice is substantiated.

ISSUE TWO: 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) following the February 15, 2019 IEP team meeting.

Findings:

The parent reported school staff have not implemented the student's BIP as written in the February 15, 2019 IEP. The parent provided two specific instances that happened in March 2019 which cause her to believe the BIP procedures are not being followed.

The first incident occurred on March 22, 2019. A daily point sheet was accidentally sent home from school that showed the student did not get any points in one class period because she was sleeping. The parent reported the BIP is supposed to include a plan for addressing sleeping in class and how to redirect the student. The parent asked the student about the incident and learned the student had put her head down on the desk due to stress and that the paraprofessional did nothing and just let the student sleep.

Ms. C-P reported point sheets are not required to be sent home but that she is more than willing to send the point sheets home upon parent request. Ms. C-P acknowledged and the Present Level of Academic Achievement and Functional Performance (PLAAFP) shows the student often chooses to put her head down, and by using this strategy, the student is able to remain in the classroom. The staff working with the student encourage her to return to work but allow her time to "center" herself in the classroom in order to avoid having to leave the classroom.

The February 15, 2019 IEP shows the student exhibits behavior that impedes her learning or that of others and that a Functional Behavioral Assessment has been conducted and a Behavior Plan is warranted. A BIP was developed by the IEP team to address the behavioral concerns; however, the BIP included in the February 15, 2019 IEP does not include any specific procedure for responding to the student sleeping in class despite the parent's report a procedure was discussed for inclusion in the BIP.

The second incident occurred on March 27, 2019 when the parent and MH, the student's case manager, observed the student at the school for approximately one hour. The parent requested to see copies of the student's visual schedule, mini schedules, and break request card. A visual schedule was produced from the student's binder but it was from the beginning of the school year and still showed the online classes and a different order of classes than where the

student was currently enrolled. No mini schedules were produced nor was a break symbol card included in the binder. When asked how the student indicates she needs a break, the paraprofessional indicated the student just verbally asks or uses the sign language sign for “break.”

The paraprofessional was then asked about the procedure for the student’s sensory breaks and the sensory items. The paraprofessional was not able to produce these items and indicated they were kept in Ms. C-P office in another area of the school building. The para indicated she did not know where the student’s separate break room was located and that, while a visual timer was not available for the 3-minute break intervals, she used the timer on her phone to keep track of how long the student is on break.

Documentation found the BIP included in the February 15, 2019 IEP does include the use of a “*visual schedule of her day to be kept in her notebook or binder; have mini-visual schedules for important parts of her day (reminder to write in agenda, reminder to write down homework, reminders of deviations to schedule, mini schedules as needed for steps of completion of academic tasks*).”

The BIP also indicates the student will verbally request a break or visually request a break by pointing to a symbol on the binder. Once the break is requested, the student will be escorted outside the classroom to the hallway by the door or, if a separate setting is needed, then the student will be escorted to a previously identified break room. The BIP states “*the student will have available to her sensory items total of 3, ball, theraputty, glitter bottle, or bubbles within the break room.”* The student will have a 5-minute break limit with added 3-minute extensions allowed until the student is able to return to the classroom. The BIP states that a visual timer should be used. The BIP also includes the use of de-escalation strategies involving the use of a weighted blanket.

Ms. C-P reported the student’s visual schedule is a half-sheet that stays in her binder. Extra copies of the visual schedule are kept in a folder in the classroom and are available to the paraprofessionals who work with the student or when the student loses her copy. Ms. C-P stated the student’s visual schedule was updated in late January/early February when the student’s schedule was changed to include the CWC Language Arts class and provided a copy of that updated schedule. Ms. C-P indicated an updated copy of the updated schedule was located in the student’s binder and suggested that the student kept a copy of the old version of the schedule in the binder which was what the para mistakenly showed to the parent on March 27, 2019.

Ms. C-P reported the student has a mini-visual schedule taped to her desk in the study hall classroom and the CWC classroom. A picture of these mini-visual schedule was provided showing a list of three-four reminders on each related to writing in the binder and completing work. It was reported that other mini-visual schedules are created as the need arises. A copy of a laminated template for deviations to the student's schedule which is reported to be located in the student's binder was also provided.

Ms. C-P stated "*Because the student has exhibited social awareness and has expressed discomfort with supports that make her appear different from her general education peers, it has been better practice to make the break symbol something that the student does not feel self-conscious about. The student's support team reports that the student has no problem asking for or taking a break when she feels she needs one."*

Ms. C-P reported the alternate setting break room is in Room A213 and that the student is aware of where her break room is located because she participated in the February 15, 2019 IEP team meeting where the BIP was developed. The sensory items are kept in the break room and a photograph of what appear to be bubbles, a glitter bottle, and theraputty in the break room was provided. Ms. C-P stated the student's weighted blanket and vest are kept in her office but that these items are easily accessible because staff can radio her and request these items be sent to the break room.

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 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. 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 300.324(a)(2)(i), require IEP teams to consider the use of positive behavioral intervention and supports, and other strategies to address the behavior of a student whose behavior impedes the child's learning or the learning of others. The Kansas Special Education Process Handbook in Chapter 4, section E.1, states that the focus of behavioral interventions and supports in the IEP is prevention of the behavior, not just provision for consequences subsequent to the behavior. The positive behavioral interventions and supports

could be implemented through the IEP annual goals, program modifications, or a behavioral intervention plan (BIP). If a BIP is developed by the IEP team, it becomes part of the IEP and any changes to it would require a meeting of the IEP team or an agreement to amend or modify the IEP without a meeting pursuant to 34.C.F.R. 300.324(a)(4) and (a)(6).

In this case, it appears that the student's February 15, 2019 BIP was not implemented for two requirements. First, the BIP includes the requirement that the student be given the option to visually request a break by pointing to a break symbol on the binder. Ms. C-P acknowledged this requirement has not been implemented because the school support team believes it is a "*better practice to make the break symbol something that the student does not feel self-conscious about*" and unilaterally determined the student should verbally request a break or use the sign language sign for break.

Second, the BIP requires "*the student will be escorted outside the classroom to the hallway by the door or if separate setting is needed then the student will be escorted to a previously identified break room. The student will have available to her sensory items total of 3, ball, theraputty, glitter bottle, or bubbles within the break room."* The plain language of this statement is read that a ball, theraputty, and a glitter bottle are available to the student when taking a sensory break either in the hallway or in the alternate break room. Bubbles are only available to the student in the alternate break room. Documentation showed that three designated sensory items were available in the alternate break room but not in the hallway.

Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the BIP as written is substantiated.

ISSUE THREE: 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 the accommodations/modifications following the February 15, 2019 IEP team meeting.

Findings:

The parent reported the IEP accommodation that the student be provided an alternate passing period between her classes is not being implemented. On March 27, 2019, the parent and MH, the student's case manager, observed the student at the school for approximately one hour beginning in the 7th hour elective Garden Club class. When this class ended, the student was escorted by a paraprofessional in the hallway with her peers to the 8th hour Spanish class. The parent believes the IEP requires the student be allowed to leave early to move to her next hour class with no peers in the hallway.

The February 15, 2019 IEP includes an accommodation for "*Alternate passing period: Leaving early from class for next class when needed*." The frequency is noted to be "*When the student is struggling going to class*."

Ms. C-P acknowledged that an alternate passing period was not provided to the student on March 27, 2019. She reported this was because the student was not struggling with going to class. Ms. C-P stated "*We know that when the student is escalated, an alternate passing period can be beneficial*."

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 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. 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. 300.320(a)(4), require school districts to develop an IEP for each student that includes a statement of the program modifications that will be provided to enable the student to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and children without disabilities.

In this case, it appears the accommodation for an alternate passing period is contingent upon the student needing this accommodation due to struggling to go to class. Documentation shows the student was not struggling to go to class on March 27, 2019 and thus this accommodation was not needed at that time. Based on the foregoing, the allegation of a violation of special education laws and regulations related to implementing the BIP as written is not substantiated.

ISSUE FOUR: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to make school staff aware of their responsibilities related to the student's IEP and BIP following the February 15, 2019 IEP team meeting.

Findings:

The parent believes the paraprofessionals who are assigned to work with the student have not been trained on the requirements for implementing the BIP and accommodations/modifications described in the February 15, 2019 IEP. On March 27, 2019, the parent and MH, the student's case manager, observed the student at the school for approximately one hour. During that school visit, the parent and Ms. H visited with the paraprofessional who was working with the student. It is reported that the paraprofessional was unable to answer questions related to the procedures for implementing the BIP and accommodations and was unable to provide documentation showing the BIP was being implemented.

The findings of Issue two are incorporated herein by reference.

Ms. C-P reported that the paraprofessionals have been trained twice since the February 15, 2019 IEP meeting for the student. The first time was on February 19, 2019, and the second time on March 8, 2019. Documentation was provided showing agendas for both training days indicating an agenda item to review IEP accommodations and the BIP of the student.

Ms. C-P indicated she spoke with Mrs. I, the paraprofessional who was questioned by the parent and Ms. H on March 27, 2019. She stated "*Regarding the March 27th visit, she (the para) never knew who the other women questioning her was, didn't know what to do, and froze. The para states she never answered that she had no idea where the alternative room was."*

Federal regulations, at 300.323(d), require school districts to ensure that each teacher and provider be informed of his or her responsibilities related to implementing the child's IEP as well as the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

In this case, documentation shows USD #___ did provide training to the paraprofessionals regarding the student's IEP accommodations and BIP two times following the February 15, 2019 IEP meeting. The first time was on February 19 and the second time on March 8, 2019. Based on the foregoing, the

allegation of a violation of special education laws and regulations related to making staff aware of their responsibilities for implementing the student's IEP and BIP is not substantiated.

ISSUE FIVE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to the parent request for written expression goals and services at the February 15, 2019 IEP team meeting.

Findings:

The parent reported the most recent IEP team meeting was held on February 15, 2019. She indicated the meeting was rather chaotic as the student was having a difficult time while attending the IEP team meeting and the majority of the discussion was focused on the development of the BIP. She acknowledges that she forgot to bring up her request for written expression goals and services during the meeting that day. She then contacted Ms. C-P following the IEP team meeting and requested these things be included in the final copy of the February 15, 2019 IEP; however, this was not done.

The findings of Issue One are incorporated herein by reference.

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 acknowledges she did not make a request for written expression goals and services at the February 15, 2019 IEP team meeting. Based on the foregoing, the allegation of a violation of special education laws and regulations related failing to appropriately respond to the parent request is not substantiated.

Corrective Action

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

A. 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 and statute, at K.A.R. 72-3430(b)(6) and K.A.R. 91-40-27(a)(3), require parent consent before making a material change in services and/or a substantial change in placement. K.S.A. 72-3404(bb) describes a material change in services as an increase or decrease of 25% or more of any one service and K.S.A. 72-3404(aa) describes a substantial change of placement as movement to a less or a more restrictive environment for more than 25% of student's day.

   The findings of this investigation show USD #___ did not provide PWN to the parent nor obtain parental consent for material changes in the student's special education program that occurred on November 6, 2018 and on January 30, 2019. In addition, USD #___ did not respond to the parent's request for a writing goal and the parent's belief that a curricular modification of a writing unit would be provided to the student in the special education setting as described in the email correspondence throughout the 2018-19 school year.

B. Federal regulations, at 34 C.F.R. 300.101, require states to make a free appropriate public education 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. Federal regulations, at 34 C.F.R. 300.17, define the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

The findings of this investigation show USD #___ did not implement the BIP dated February 15, 2019 for two requirements. Specifically, USD #___ did not provided the student with the option to visually request a break by pointing to a break symbol on the binder nor did the district make three sensory items available to the student when taking a break in the hallway.

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. 300.503 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 when a request is made.

   b) Comply with K.A.R. 72-3430(b)(6) and K.A.R. 91-40-27(a)(3) by obtaining parent consent before making a material change in services and/or a substantial change in placement.

   c) Comply with 34 C.F.R. 300.101, K.A.R. 91-40-2(b)(1), and 34 C.F.R. 300.17 by providing special education and related services including the BIP in conformity with the IEP.

2. No later than August 30, 2019, USD #___ will provide training to the special education teachers and administrators who work with the student regarding when and how to appropriately provide prior written notice to parents regarding the initiation or changes to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The training will also emphasize proper procedures for the consideration of parent requests for changes to the IEP. USD #___ will document who provided the training and the content of the training as well as who attended the training and send that documentation to Special Education and Title Services.

3. No later than May 30, 2019, USD #___ will reconvene the student's IEP team to discuss the use of a visual symbol for the student to use to request a break. In addition, the IEP team will clarify the procedures for a sensory break, specifically, the items to be available for use by the student in the various settings. These new procedures will be shared with all staff

who work with the student. USD #___ will provide documentation to Special Education and Title Services of these actions.

4. No later than May 30, 2019, USD #___ will reconvene the student's IEP team to discuss parent's request for written expression goals and services. USD #___ will provide the parent with appropriate prior written notice regarding these parent requests. 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). USD #___ will provide documentation to Special Education and Title Services of these actions.

5. Further, USD # ___ shall, within 14 calendar days of receipt 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) within 10 calendar days from the date of this report, file 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, 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 the State Commissioner of Education within 10 calendar days from the date of the

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