

## Special Education Formal Complaint Decisions 2016 Fiscal Year

Each decision has been redacted to remove the identification of the school district and any personally identifiable information of the student or the student's parents. The initial file number represents the fiscal year in which the case was filed and the letters immediately following the initial file number represent the kind of hearing held. Accordingly 16FC01 signifies a Formal Complaint filed in the 2016 fiscal year (July 1, 2015 to June 30, 2016). The case citation of 16FC02 Appeal Review signifies the decision of the state appeal committee for case number 14FC02. All files are PDF.

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON NOVEMBER 23, 2015

DATE OF REPORT: DECEMBER 23, 2015

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

**Investigation of Complaint**

Nancy Thomas, Complaint Investigator, spoke with USD # [redacted] by telephone on December 17, 2015. The following staff persons were interviewed:

- [redacted], Director of Special Education
- [redacted], Principal of [redacted] Elementary School
- [redacted], Case Manager / Special Education Teacher / English as a Second Language (ESL) Teacher
- [redacted], School Social Worker
- [redacted], Speech/Language Pathologist
- [redacted], Special Education Coordinator
- [redacted], Special Education Instructional Coach
- [redacted], Occupational Therapist

The Complaint Investigator spoke to the complainant by telephone using an interpreter on December 8 and December 14, 2015. The following person was interviewed:

- [redacted], Parent

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

- Notice of Meeting for annual IEP review dated January 12, 2015
- Conference Notes from the annual IEP meeting dated January 27, 2015
- Copy of the January 27, 2015 IEP for the student
- Discharge Summary from Children's Mercy Hospital and Clinics dated August 2015
- Conference Call Notes regarding transitioning from Kids Transforming Lives in our Community (KidsTLC) dated August 25, 2015
- Conference Call Notes regarding transitioning from KidsTLC dated September 1, 2015
- Conference Call Notes regarding transitioning from KidsTLC dated September 8, 2015
- Notice of Meeting to discuss transition back to school dated September 11, 2015
- Conference Notes dated September 15, 2015
- Notice of Meeting to discuss other dated October 1, 2015
- Conference Notes regarding transitioning from the Kaw Valley Center Behavioral Healthcare (KVC) dated October 1, 2015
- Notice of Meeting to discuss third emergency safety intervention (ESI) dated October 21, 2015
- Conference Notes dated October 22, 2015
- Conference Notes dated November 18, 2015
- Notice of Meeting to discuss possible changes to the IEP dated November 23, 2015
- IEP Meeting Agenda dated November 23, 2015
- Student work samples dated September and October 2015
- Elementary staff schedules for \_\_\_\_\_ (Case Manager / Sped Teacher / ESL Teacher), \_\_\_\_\_ (SLP), and \_\_\_\_\_ (OT)

### **Background Information**

This investigation involves an eleven year-old student who is enrolled in the fourth grade at USD # \_\_\_\_\_ and attends \_\_\_\_\_ Elementary School. The student first enrolled in USD # \_\_\_\_\_ as a second grade student when she moved to the United States from Mexico during the 2013-14 school year. The student and her family's primary language is Spanish. The student was determined eligible for

special education and related services under the primary disability category of Other Health Impaired due to medical diagnoses of seizure disorder and cerebral palsy on February 13, 2014 at Oak Grove Elementary in the Kansas City, Kansas School District. The student transferred back to USD # [redacted] at the beginning of second semester of third grade in January 2015. USD # [redacted] developed the student's most current Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) on January 27, 2015.

### **Issues**

The complainant raised seven issues which were investigated.

**ISSUE ONE:** The USD # [redacted], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of [redacted] during the 2015-16 school year, specifically by not providing transportation as a related service.

### **Findings:**

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

Ms. [redacted] reports USD # [redacted] provided a special bus and a bus aide for the student to be transported to/from school during third grade. However, during fourth grade, the student was placed on a shortened school day schedule and transportation was not provided by the district. Ms. [redacted] reported she had to provide transportation for the student to attend school for the months of September, October, and November and that due to transportation problems the student was absent many days from school. She reported that she often did not call into the school to report these transportation concerns and the student had an unexcused absence. The parent reported USD # [redacted] once again began to provide transportation on December 1, 2015 when the student's schedule was changed back to a full days.

Interviews and attendance records were found to document that the student was residing at KidsTLC in [redacted], Kansas from August 20 through August 28, 2015.

The district staff reported that a request for educational records had been made by the [redacted] public schools in August, 2015. The student visited Elementary for approximately one hour per day while on a day pass from KidsTLC beginning on Monday, August 30 through Friday, September 4, 2015 in order to prepare for transitioning back to home and the public school.

Records show USD # [redacted] was responsible for providing a free appropriate public education (FAPE) to the student for a total of eight days in September, 2015. The student returned to her home on Monday, September 7, 2015 and was absent from USD # [redacted] due to illness for the next two days. The student attended school for one hour per day on September 10, 11 and 14, 2015. The parent kept the student home on September 15, 2015. Between September 16 and September 28, 2015, the student was residing at KVC in Kansas City, Kansas and did not attend USD # [redacted]. The student returned home and again began attending USD # [redacted] for one hour per day on September 29 and 30, 2015. The student's attendance rate at USD # [redacted] for September was 63%.

Records show USD # [redacted] was responsible for providing FAPE to the student for a total of 19 days in October 2015. The student had four excused absences, ten unexcused absences, and five days of school attendance for one hour per day during the month of October. Excused absences were for illness, neurologist appointment, and rough night at home. The student's attendance rate for October was 26% with a 53% unexcused absence rate.

Records show USD # [redacted] was responsible for providing FAPE to the student for a total of 16 days in November 2015. The student had five excused absences, 11 unexcused absences and no days of school attendance during the month of November. Excused absences were for the parent being unable to get the student to school on four occasions and a rough night at home. An IEP meeting was held on November 23, 2015 where USD # [redacted] proposed revising the IEP for a shortened school day of three hours per day; however, Ms. [redacted] was not in agreement and the district agreed to provide the student with a full day school schedule with special transportation to/from school beginning on December 1, 2015. The student's attendance rate for November was 0% with a 69% unexcused absence rate.

Records show USD # [redacted] was responsible for providing FAPE to the student for a total of 14 days in December 2015 during the course of this investigation. The student had three excused absences and 11 days of full day school attendance. The student's attendance rate for December was 79%.

The student's most recent IEP dated January 27, 2015 requires special transportation. Interviews with school staff described the special transportation as the student being transported individually on a bus with a bus aide for safety and behavioral concerns. District staff acknowledged that transportation was not provided by USD # during the months of September, October and November, 2015.

The allegation of a violation of special education laws and regulations on this issue is substantiated as there is evidence to demonstrate USD # did not provide transportation as a related service during the months of September, October and November as required by the student's IEP during the 2015-16 school year. The impact of not providing transportation as a related service to the student is documented in a 30% average attendance rate per month during the three month period as compared to a 79% attendance rate for the month of December when the required transportation was provided to the student. In addition, the 41% average unexcused absence rate per month during the three month period is a concern as the parent indicated she was not always able to provide transportation to the district and failed to notify the district for the reason for the student's absence.

**ISSUE TWO:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of during the 2015-16 school year, specifically by not providing 95 minutes of English as Second Language (ESL) services per day.

#### Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

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.

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 25% or more of student's day.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September through the end of November, 2015. During this timeframe, the student did not receive the 95 minutes per day of ESL services required by the IEP.

The findings of Issue One are incorporated herein by reference.

The IEP dated January 27, 2015 states that the student is an English Language Learner and that her language needs will be addressed through 95 minutes five days per week of ESL services.

Interviews with the school staff as well as documentation found three team meetings were held in August, September, and October to discuss and develop a transition plan from the residential settings at KidsTLC and KVC back into USD # . However, school staff acknowledge that an IEP amendment was not made and that no PWN and consent was obtained for the shortened school days plan for transitioning the student back into the school setting. Another team conference was held on October 22, 2015 to discuss the increased behavioral concerns and the use of ESI with the student, but again, no IEP amendment was made nor PWN and consent was provided to the parent. An IEP meeting was held on November 23, 2015 where USD # proposed revising the IEP for a shortened school day of three hours per day; however, Ms. was not in agreement and wanted the January 27, 2015 IEP to be implemented. The district agreed to provide the student with a full-day school schedule and special transportation to/from school beginning on December 1, 2015.

Interviews with the school staff as well as documentation found the special education teacher also serves as the ESL teacher for the student. In addition, an ESL aide works with the student in the school setting. During the three month period between September and November 2015, the student received 60

minutes per day of instruction in the special education classroom from 9:00 – 10:00 a.m. for each of the ten school days of attendance. This instruction included the ESL services described in the IEP.

The allegation that the student was not provided 95 minutes per day of ESL services to address communication needs is substantiated. There is evidence that the student was in attendance at USD # for a shortened school day schedule of only 60 minutes per day on ten school days between September and December 2015. During this timeframe, the student did not receive 35 minutes per day of ESL services as required by the IEP. In addition, the parent was not provided with PWN and consent for the material change in services from 95 minutes per day to 60 minutes per day of ESL services nor the substantial change of placement from full day attendance to a shortened day of one hour per day of attendance.

**ISSUE THREE:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of during the 2015-16 school year, specifically by not providing 30 minutes per week of direct Speech and Language services.

#### Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September through the end of November, 2015. During this timeframe, the student did not receive the 30 minutes per week of speech/language services required by the IEP.

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

The IEP dated January 27, 2015 states that the student will receive speech and language services in the special education setting for 30 minutes, one time per week. Interviews with the speech/language pathologist as well as documentation found the student was scheduled for speech/language therapy on Tuesdays of each week during the 2015-16 school year.

During the month of September, USD # [redacted] was responsible for providing FAPE on two Tuesdays. The student was absent on September 8 due to illness and received speech/language therapy on September 29, 2015.

During the month of October, USD # [redacted] was responsible for providing FAPE on four Tuesdays. The student had an unexcused absence on October 13 and received speech/language therapy on October 6, 20 and 27, 2015.

During the month of November USD # [redacted] was responsible for providing FAPE on three Tuesdays. The student had unexcused absences on November 10, 17, and 24, 2015.

During the month of December, USD # [redacted] was responsible for providing FAPE on three Tuesdays. The student had an excused absence on December 15 and received speech/language therapy on December 1 and 8, 2015.

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD # [redacted] did not provide the specialized transportation as required by the IEP during the months of September, October, and November causing the student to be unavailable to receive the required speech/language therapy required by the IEP on four school days during this timeframe. It is noted that USD # [redacted] did provide the speech/language therapy services required by the IEP when the student was in attendance at school on the days the service was scheduled to be provided.

**ISSUE FOUR:** The USD # [redacted], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of [redacted] during the 2015-16 school year, specifically by not providing 20 minutes per week of direct and 10 minutes per week of indirect Occupational Therapy.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September

through the end of November, 2015. During this timeframe, the student did not receive the 20 minutes per week of direct and 10 minutes per week of indirect Occupational Therapy required by the IEP.

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

The IEP dated January 27, 2015 states that the student will receive 20 minutes per week of direct occupational therapy in the special education setting and 10 minutes per week of indirect occupational therapy. Interviews with the Occupational Therapist and Special Education Teacher as well as documentation found the student was scheduled for 20 minutes of direct occupational therapy and the special education teacher was scheduled to receive occupational therapy consultation on Tuesdays of each week during the 2015-16 school year.

During the month of September, USD #      was responsible for providing FAPE on two Tuesdays. The student was absent due to illness on September 8 and the student / special education teacher received occupational therapy services on September 29, 2015.

During the month of October, USD #      was responsible for providing FAPE on four Tuesdays. The student had an unexcused absence on October 13 and the student / special education teacher received occupational therapy on October 20 and 27, 2015. The Occupational Therapist was absent on October 6 but indicated the required services were provided on Thursday, December 3, 2015.

During the month of November USD #      was responsible for providing FAPE on three Tuesdays. The student had unexcused absences on November 10, 17, and 24, 2015. The Special Education Teacher and Occupational Therapist indicated they did consult about the student for ten minutes per week during the month of November.

During the month of December, USD #      was responsible for providing FAPE on three Tuesdays. The student had an excused absence on December 15 and the student / special education teacher received occupational therapy on December 1 and 8, 2015.

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD #      did not provide the specialized transportation as required by the IEP during the months of September, October, and November causing the student to be unavailable to receive the required direct occupational

therapy required by the IEP on four school days during this timeframe. It is noted that USD # \_\_\_\_\_ did provide the occupational therapy services required by the IEP when the student was in attendance at school on the days the service was scheduled to be provided. In the one instance where the service provider was absent on a scheduled day of services, those missed services were provided to the student and special education teacher.

**ISSUE FIVE:** The USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_ during the 2015-16 school year, specifically by not providing 1,795 minutes per week of direct Special Education services.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

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.

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 25% or more of student's day.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September

through the end of November, 2015. During this timeframe, the student did not receive the 1,795 minutes per week of direct Special Education services as required by the IEP.

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

The IEP dated January 27, 2015 states that the student will receive special education instruction services for 375 minutes per day, three times per week and for 335 minutes per day, two days per week. A total of 1,795 minutes per week of specialized instruction will be provided to the student in the special education setting.

Interviews with the school staff as well as documentation found the student was scheduled to receive special education instruction from 9:00 – 10:00 a.m. daily during the months of September, October and November of 2015. This shortened day schedule reflects a total of 300 minutes per week available for providing the 1,795 minutes per week of special education instruction as well as the required 475 minutes per week of ESL services, 30 minutes per week of speech/language therapy, 30 minutes per week of social work services, and 20 minutes per week of occupational therapy.

The allegation that the student was not provided 1,795 minutes per week of special education instruction is substantiated. There is evidence that the student was in attendance at USD #        for a shortened school day schedule of only 60 minutes per day on ten school days between September and December 2015. During this timeframe, the student did not receive 1,795 minutes per week of special education instruction as required by the IEP. In addition, the parent was not provided with PWN and consent for the material change in services from 1,795 minutes per week to 300 minutes per week of special education instruction nor the substantial change of placement from full day attendance to a shortened day of one hour per day of attendance.

**ISSUE SIX:** The USD #        , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of        during the 2015-16 school year, specifically by not providing 30 minutes per week of direct Social Work services.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September through the end of November, 2015. During this timeframe, the student did not receive the 30 minutes per week of social work services required by the IEP.

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

The IEP dated January 27, 2015 states that the student will receive 30 minutes per week of social work services in the special education setting. Interviews with the Social Worker as well as documentation found the student was scheduled for 30 minutes of social work services on either Mondays or Wednesdays of each week during the 2015-16 school year.

During the month of September, USD # [redacted] was responsible for providing FAPE on two weeks on either a Monday or Wednesday. The student received the social work services on Monday, September 14 and on Wednesday, September 30, 2015.

During the month of October, USD # [redacted] was responsible for providing FAPE on four weeks on either a Monday or Wednesday. The student was absent for a neurologist appointment on Monday, October 5 and had an unexcused absence on Wednesday, October 7. The student had unexcused absences on both the weeks of October 12 and 14 as well as October 26 and 28. The student had an unexcused absence on Monday, October 19 and the social worker was unavailable to provide services on Wednesday, October 21, 2015.

During the month of November USD # [redacted] was responsible for providing FAPE on five weeks on either a Monday or Wednesday. No school was scheduled on November 2 and 25, 2015. The student had unexcused absences on November, 16, 18, and 30, 2015. The district documented that the mother was unable to get the student to school on November 4, 9, 11, and 23, 2015.

During the month of December, USD # [redacted] was responsible for providing FAPE on three weeks on either a Monday or Wednesday. Social work was provided on Wednesdays, December 2, 9, and 16, 2015.

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD # [redacted] did not provide the specialized transportation as required by the IEP during the months of September, October, and November causing the student to be unavailable to receive the required direct social work services required by the IEP for seven weeks during this timeframe. It is noted that USD # [redacted] did provide the social work services required by the IEP when the student was in attendance at school on the days/weeks the service was scheduled to be provided.

**ISSUE SEVEN:** The USD # [redacted], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of [redacted] during the 2015-16 school year, specifically by not providing 30 minutes per week of indirect Physical Therapy services.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports the student was placed on a shortened school day schedule of only one hour per day of instruction beginning in September through the end of November, 2015. During this timeframe, the student did not receive the 30 minutes per term of indirect physical therapy services required by the IEP.

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

The IEP dated January 27, 2015 states that the student will receive 30 minutes per term of indirect physical therapy services in the special education setting.

Interviews with the Special Education Teacher as well as documentation found the special education teacher was scheduled for 30 minutes of physical therapy consultation, one time per term. This consultation was provided for the first term on August 25, 2015 and for the second term on October 20, 2015.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # [redacted] did provide the indirect physical therapy services as required by the IEP.

## Corrective Action

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

- 34 C.F.R. 300.17 which requires that special education and related services be provided in conformity with an IEP. Specifically, USD # failed to provide transportation as a related service, ESL services and special education instruction as required by the student's IEP during the months of September, October, and November in the 2015-16 school year. While USD # held multiple conferences to discuss the plan for transitioning the student back into the public school setting from residential treatment centers, the IEP was never reviewed, revised, or amended to reflect this plan. After the IEP meeting on November 23, 2015, the district once again began implementing the IEP as written on December 1, 2015.
- 34 C.F.R. 300.503 and K.A.R. 91-40-27(a)(3), which require prior written notice and parent consent before making a material change in services and/or a substantial change in placement. Specifically, USD # made material changes in services and substantially changed the student's placement when unilaterally decreasing the student's school day from a full day to a shortened school day consisting of only one hour per day of special education instruction. USD # failed to provide the appropriate prior written notice and obtain consent prior to implementing these changes in the student's educational programming. While the district did hold an IEP team meeting on November 23, 2015 and proposed a shortened school schedule, they failed to provide the parent with appropriate PWN and to obtain consent for the proposed changes in services and placement. Instead, the district began implementing the IEP as written on December 1, 2015.

As a result of these violations, the student was denied a free appropriate public education during the months of September, October and November during the 2015-16 school year.

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

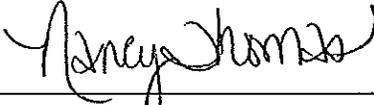
1. Within 10 calendar days of the receipt of this report, submit a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.17 by implementing the IEPs of students as written; and
  - b) comply with K.A.R. 91-40-27 (a)(3) by obtaining the written consent of the parent before making a material change in services and/or a substantial change in placement; and
  - c) comply with 34 C.F.R. 300.503 by providing prior written notice of any proposed change in placement or services.
  
2. Within 60 calendar days of the receipt of this report, central office administrators and special education staff as well as building level administrators, special education teachers, and related services providers will be trained on the special education process including the circumstances that require reviewing, revising and amending the IEP as well as when to provide PWN and consent for students with IEPs. USD #      will document who provided the training, the content of the training, and who attended the training.
  
3. Within 45 calendar days of the receipt of this report, meet with the parent to develop a plan to provide compensatory services for ESL services, related services, and special education services missed during the months of September, October and November, 2015. The IEP team will make the final determination of the total amount of compensatory services that are required to provide the student with FAPE. Based upon an attendance rate of 79% during the month of December when USD #      did provide the required transportation as a related service, a minimum of 185 hours of specialized instruction in the special education setting must be provided to compensate for the 10 days of shortened school day attendance and the 21 days of unexcused absences which may have been caused by the failure to provide transportation as a related service. In addition, a minimum of 90 minutes of speech and language therapy, a minimum of 60 minutes of direct occupational therapy, and a minimum of 180 minutes of social work services must be provided to compensate for the days these

services were not available to the student due to the district's failure to provide the specialized transportation as a related service.

- a) 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.
  - b) A copy of the plan to provide the compensatory services shall be submitted to Early Childhood, Special Education and Title Services, within 5 days after the meeting with the parent.
4. Further, USD #        shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
- a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), 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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON MAY 17, 2016**

**DATE OF REPORT: JUNE 17, 2016**

This report is in response to a complaint filed with our office by [redacted] and [redacted] on behalf of their son, [redacted]. In the remainder of this report, [redacted] will be referred to as "the student." [redacted] will be referred to as "the father," and [redacted] will be referred to as "the mother." When referring to both the mother and father, the report will use the term "the parents."

### **Investigation of Complaint**

Nancy Thomas, Complaint Investigator, spoke with USD # [redacted] by telephone on May 24, June 6, and June 15, 2016. The following staff persons were interviewed:

- [redacted], Director of Special Education
- [redacted], Principal
- [redacted], School Psychologist
- [redacted], Special Education Teacher/Case Manager
- [redacted], Occupational Therapist
- [redacted], General Education Teacher
- [redacted], Assistive Technology Specialist
- [redacted], Student Services Consultant

The Complaint Investigator spoke to the complainant by telephone on May 23 and June 3, 2016. With a written release of information, the Complaint Investigator spoke to the student's advocate on June 6, 2016. The following persons were interviewed:

- Mother and Father, Parents
- Barb Orsi, Advocate, Law Office of Peter Orsi

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

- Evaluation Report of the student dated April 30, 2015
- Individualized Education Program (IEP) team meeting notes dated August 20, 2015, taken by USD #
- School team meeting notes for the fourth grade student review dated September 24, 2015, taken by fourth grade teachers
- IEP team meeting agenda for the October 22, 2015 IEP team meeting
- Amended IEP of the student dated October 22, 2015
- IEP team meeting notes dated October 22, 2015, taken by USD #
- Audio recording of the October 22, 2015 IEP team meeting
- Comprehensive Speech/Language Evaluation dated February 12, 2016, from Children's Mercy Hospital
- Occupational Therapy Evaluation dated March 4, 2016, from Children's Mercy Hospital
- Email correspondence dated April 7, 2016, between the mother, parent, and Elena Hermanson, case manager / school psychologist, regarding Children's Mercy Hospital reports
- Notice of Meeting dated April 11, 2016, scheduling an IEP team meeting for May 12, 2016 at 12 noon in the Conference Room
- Email correspondence dated April 21, 2016, from the mother, parent, and Elena Hermanson, case manager / school psychologist, regarding Extended School Year (ESY) services
- Email correspondence dated April 22, 2016, from school psychologist, and the mother, parent, regarding ESY services
- School team meeting notes of the review of the Children's Mercy Hospital reports from April 25, 2016, taken by Elena Hermanson, case manager
- School team meeting notes of the review of the Children's Mercy Hospital reports dated April 25, 2016, taken by ; occupational therapist
- Letter dated May 9, 2016 from the mother, parent, to , principal, and copied to Elena Hermanson, case manager / school psychologist, requesting that ESY services be discussed at the May 12, 2016 IEP team meeting
- Copy of Parent Questionnaire completed by the parent in preparation of the May 12, 2016 IEP team meeting
- Draft copy of an IEP for the student dated May 12, 2016 (note "DRAFT" is typed at bottom of pages 2-10)
- IEP Progress Report – Annual Goals dated May 12, 2016
- IEP team meeting notes dated May 12, 2016, taken by USD #

- IEP team meeting notes of the May 12, 2016 IEP team meeting from Barb Orsi, advocate
- Audio recording of the May 12, 2016 IEP team meeting
- School team meeting notes for the student review dated May 19, 2016, taken by Elena Hermanson, case manager
- Prior Written Notice (PWN) dated May 19, 2016 proposing a reevaluation of the student including an Occupational Therapy(OT) and an Assistive Technology (AT) evaluation
- USD # School Board Policy 4710 for Special Education (adopted November 9, 2009) and Administrative Guidelines

### **Background Information**

This investigation involves a nine year-old student who was enrolled in the fourth grade at USD # and attended the Elementary School during the 2015-16 school year. Records indicate the student previously attended a parochial school within the USD # boundaries. The student was initially evaluated at the end of third grade and found eligible for special education and related services under the eligibility category of Specific Learning Disabilities on April 30, 2015. The student enrolled in USD # at the beginning of the 2015-16 school year and an initial IEP was developed on August 20, 2015. This IEP was amended on October 22, 2015, and is the current IEP for the student.

### **Issues**

The complainant raised six issues which were investigated.

**ISSUE ONE:** The USD #, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parents of the student the opportunity to participate in the development of the IEP on May 12, 2016, specifically by having the IEP developed prior to the IEP team meeting, and not considering parent concerns for enhancing the education of their child including the need for access to word processing in the classroom.

### **Findings:**

Federal regulations, at 34 C.F.R. 300.322, require that each public agency shall 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, including notifying the parents of the meeting early enough to ensure they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. Federal regulations, at 34 C.F.R. 300.320, require that an IEP be developed, reviewed, and revised in a meeting and that the concerns of the parents for enhancing the education of their child must be considered in the development of each child's IEP. Federal regulations, at 34 C.F.R. 300.323 require each public agency to ensure that the IEP team reviews the child's IEP periodically, but not less than annually. The Federal Register, August 14, 2006, on page 46678, and the Kansas Special Education Process Handbook, on page 97, both confirm that a draft IEP may be developed prior to any IEP team meeting so long as there is a full discussion with the IEP team, including the parents, before the child's IEP is finalized regarding content, the child's needs, and the services to be provided to meet those needs. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting for discussion.

In this case, documentation shows the parents were provided with a Notice of Meeting on April 11, 2016, scheduling an IEP team meeting for May 12, 2016, at 12 noon in the Conference Room. The purpose of the meeting was to discuss possible changes in the student's IEP and to conduct an annual review of the student's IEP. Documentation and interviews found that the parents attended the May 12, 2016 IEP team meeting in person with their advocate attending via telephone.

Interviews with school staff found the USD # has a procedure to obtain parental input prior to the IEP meeting via a Parent Questionnaire and to provide a draft copy of the proposed IEP to the parents for their review prior to the IEP team meeting.

Documentation shows the parents of the student completed a Parent Questionnaire prior to the May 12, 2016 IEP team meeting and that the parent input on the questionnaire was included in the draft copy of the Present Level of Performance under the Long Range Vision, the Strengths of the Student, and the Parent Concerns for Enhancing the Student's Education. The copy of the IEP provided to the parent prior to the IEP team meeting and discussed at the May 12, 2016 IEP team meeting shows "DRAFT" marked at the bottom of pages 2 through 10. Interviews with school staff revealed the first page of the draft IEP does not include the word "DRAFT" because this page is used as the IEP team signature page during the IEP team meeting. Documentation found a copy of

page 1 of the draft IEP with the handwritten signatures of the May 12, 2016 IEP team members.

IEP team meeting notes provided by USD # [redacted] and the advocate as well as an audio recording of the May 12, 2016 IEP team meeting all reflect a discussion of the special consideration for the necessity of the use of assistive technology for the student. The school staff, parent, and advocate agreed to add a statement that the student uses the word processor in the classroom to complete written work in the Present Level of Performance. As a result of the discussion, USD # [redacted] also proposed to conduct OT and AT evaluations at the beginning of the 2016-17 school year.

Documentation as well as interviews with the parent, advocate, and USD # [redacted] staff found that the IEP team decided to suspend the May 12, 2016 IEP meeting and to reconvene the IEP team at the beginning of the 2016-17 school year to continue this discussion as consensus could not be reached regarding the need for assistive technology for the student.

Documentation shows the current IEP was developed on August 20, 2015 and that the annual review must be conducted prior to August 20, 2016. School staff report that an IEP team meeting will be scheduled for prior to the annual review date.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # [redacted] did provide the parents of the student the opportunity to participate in the development of the IEP on May 12, 2016 through appropriate notification of the IEP team meeting resulting in the parents attending the May 12, 2016 IEP team meeting; the Parent Questionnaire information being included in the draft version of the Present Level of the IEP; and the discussion at the May 12, 2016 IEP team meeting of the need for the use of assistive technology with the student. Although the draft IEP was updated to include a statement regarding the use of the work processor for completing classroom assignments, evidence shows the IEP team could not reach consensus on the need for assistive technology on May 12, 2016, and that the draft IEP was not finalized. Evidence indicates that the IEP team plans to reconvene at the beginning of the 2016-17 school year to conduct the annual review and revision of the current IEP dated August 20, 2015.

**ISSUE TWO:** The USD # \_\_\_\_\_ in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to include the required members of an IEP team at the May 12, 2016 IEP team meeting, specifically the 5<sup>th</sup> grade teacher for the 2016-17 school year.

**Findings:**

Federal regulations, at 34 C.F.R. 300.321, require each public agency to ensure that the IEP team for each child with a disability includes 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 of the child, or, where appropriate, not less than one special education provider of the child; 4) 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; 5) an individual who can interpret the instructional implications of evaluation results, who may already be a member of the team; 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. Required IEP team members may be excused from attending the IEP team meeting if the parent, in writing, and the public agency consent to the excusal, and the excused IEP team member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.

The findings of Issue One are incorporated herein by reference.

In this case, the Notice of Meeting dated April 11, 2016, indicates USD # \_\_\_\_\_ will have the following people at the IEP meeting scheduled for May 12, 2016: a general education teacher of your child; a special education teacher of your child; a school representative; and other(s) who can help explain the evaluation results or who have knowledge or special expertise regarding your child that may be needed. Handwritten under "other" are the following names and positions:

\_\_\_\_\_, SPED Consult \_\_\_\_\_ ; \_\_\_\_\_, OLT/L MLS-AT; \_\_\_\_\_, O/T; and 5<sup>th</sup> grade teacher.

Documentation, audio recordings, and interviews found the following persons attended the May 12, 2016 IEP team meeting for the student: [redacted] and The mother, parents; Barb Orsi, advocate via telephone; [redacted], principal; [redacted] assistive technology consultant; Elena Hermanson, special education teacher and case manager; [redacted], fourth grade general education teacher; [redacted], occupational therapist; [redacted], school psychologist; and [redacted], student services consultant.

School officials should take care to provide parents with correct information in the Notice of Meeting. In this case, the Notice of Meeting contained the incorrect information that the general education teacher to attend the IEP meeting would be a future fifth grade teacher of the student. The purpose of this notice is to afford the parents an opportunity to participate at the meeting. Without condoning this error in the notice, there was no credible evidence to indicate that the error prevented the parents from effectively participating at the meeting, and, as stated in the findings section of Issue One of this report, and incorporated by reference into this issue, USD # [redacted] did provide the parents the opportunity to participate in the development of the IEP on May 12, 2016.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # [redacted] included the required members of the IEP team at the May 12, 2016 IEP team meeting by including at least one of the general education teachers of the student, specifically Ms. [redacted], the student's fourth grade general education teacher. There is no requirement in the IDEA that requires a teacher from the grade the student will be enrolled in during the following school year to be a member of the IEP team and excused from attending the IEP team meeting.

**ISSUE THREE:** The USD # [redacted] in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the request from the parents of the student in April 2016 and again in May 2016 for extended school year services during summer 2016.

**Findings:**

Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action.

The findings of Issue One are incorporated herein by reference.

In this case, documentation shows the parent requested consideration of extended school year (ESY) services in email correspondence with Ms. [REDACTED] and Ms. [REDACTED] on April 21, 2016. The mother, parent, referenced a school district procedure stating that ESY services were to be determined by the IEP team no later than April 15. The mother, parent, indicated that she did not realize the date to determine Extended School Year was by April 15<sup>th</sup> and asked "With our IEP Meeting scheduled for May 12<sup>th</sup>, we will be past this deadline. Are we too late to determine if the student will require ESY?"

Ms. [REDACTED] responded on April 22, 2016 in an email to the parent by writing, "Thank you for your inquiry about ESY services. ESY services are looked at for a student in Special Education when the student shows a regression over a break. For example, a student is not able to retain a skill and shows a regression in their ability over winter break or spring break. Per the student's progress reports from [REDACTED], the data shows that he continues to grow in the area of his IEP goals and he is not having a regression of his skills during breaks. The data does not support ESY services for the student. In fact, it looks like he is even surpassing his goals which is a celebration. Additionally, ESY services are for maintenance of a skill and it does not focus on growth of a skill set. The students in ESY are often times lower cognitive functioning and may have multiple disabilities that impact their ability to grow academically. Please let me know if you have additional questions about ESY services."

Documentation and interviews found that the parent sent a letter dated May 9, 2016, regarding ESY services to Ms. [REDACTED], and copied to both Ms. [REDACTED] and Ms. [REDACTED]. In the letter, The mother, parent, wrote that she wanted to ensure that the IEP team would be discussing the possibility of ESY services for the student at our IEP team meeting on May 12, 2016. The mother, parent, referenced IDEA regulations noting that the IEP team, including the parents, must determine if ESY is appropriate for a student and stating the decision must be make on an individual basis, and not be limited to any one category of disability, or one type of service.

Interviews with school staff found USD #      does have a practice of setting a preliminary deadline of April 15 each school year in order to plan for ESY staffing. However, interviews with school staff found the preliminary deadline is flexible as evidenced by 22 students being determined eligible for ESY services during summer 2016 after the April 15, 2016 deadline.

Team meeting notes, audio recordings, and interviews indicated the parents wanted the student to receive ESY services during the summer of 2016. The parents believed the student needed occupational therapy, assistive technology services, and services to address spelling. The school team indicated their data did not support the need for ESY services to address his current IEP goals. Documentation and interviews with school staff and the parents found the parent was not provided with a written notice refusing the parent's request for ESY services following the May 12, 2016 IEP team meeting.

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD #      failed to appropriately respond to the parent request for ESY services at the May 12, 2016 IEP meeting. USD #      failed to provide written notice of the refusal of the parent request for ESY services and explain why USD #      refused to provide ESY services during summer 2016.

**ISSUE FOUR:** The USD #:      , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately consider the two evaluations from Children's Mercy Hospital provided by the parents of the student to USD #      on April 7, 2016.

#### Findings:

Federal regulations, at 34 C.F.R. 300.502, require each public agency to consider the results of an independent evaluation obtained by the parent at private expense and shared with the agency by the parent if it meets agency criteria in any decision made with respect to the provisions of a free appropriate public education to the student.

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

In this case, documentation and interviews show the parents of the student obtained two evaluations from Children's Mercy Hospital at their own expense.

Documentation and interviews found the parent provided copies of these two evaluations to school staff on April 7, 2016.

A Comprehensive Speech/Language Evaluation was conducted by Chris Scranton, M.A., CCC-SLP on February 12, 2016. The formal evaluation included the following tests: Clinical Evaluation of Language Fundamentals – 5<sup>th</sup> edition; Comprehensive Test of Phonological Processing – 2<sup>nd</sup> edition; Dynamic Indicators of Basic Early Learning Skills (DIBELS); Test of Word Reading Efficiency – 2<sup>nd</sup> edition; and the Word Identification and Spelling Test.

An Occupational Therapy Evaluation was conducted by Lindsey Phillips, OTR on March 4, 2016. The evaluation consisted of a joint review; shoulder evaluation; elbow evaluation; hand evaluation including grip and pinch strength; the McMaster Handwriting Assessment – 2<sup>nd</sup> edition; Activities of Daily Living Skills review; and the Test of Visual Perceptual Skills – 3<sup>rd</sup> edition

USD #: School Board Policy and Guidelines #4710 on Special Education does not include any agency requirements for independent educational evaluations.

School Team meeting notes from April 25, 2016, and interviews with school staff indicate \_\_\_\_\_, school psychologist, \_\_\_\_\_, special education teacher/case manager, \_\_\_\_\_, OT, \_\_\_\_\_, AT Specialist, and \_\_\_\_\_, student services consultant reviewed the two Children's Mercy Hospital evaluation reports. School staff stated the speech/language evaluation report included a generic listing of possible academic and school accommodations and resources while the OT evaluation report included therapy goals for handwriting and recommended a "burst" of therapy model of service provision to first address printing and later address cursive and keyboarding.

IEP team meeting notes and the audio recording of the May 12, 2016 IEP meeting show the Children's Mercy Hospital evaluation reports were discussed by the IEP team. School staff proposed to conduct an AT and OT assessment based on this discussion. In addition, the school staff agreed to include the diagnoses of dysgraphia, dyslexia, and dyspraxia and to reference the Children's Mercy Hospital evaluation reports in the Present Level of Performance of the draft IEP.

The PWN dated May 19, 2016 documents the results of the evaluations conducted by Children's Mercy Hospital were reviewed and considered along

with the results of the initial special education evaluation conducted on April 30, 2015 and current classroom performance data in making the determination to request a reevaluation for the student. Based on this review, the USD #, proposed to conduct an evaluation to assess how the student functions in the academic setting and to assess whether he has any educationally relevant needs in the areas supported by OT or AT.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as evidence shows USD # did consider the two Children's Mercy Hospital evaluation reports which were provided to school staff by the parent on April 7, 2016. Evidence shows school staff reviewed the reports on April 25, 2016 and that both evaluation reports were discussed at the May 12, 2016 IEP team meeting. As a result of that discussion, USD # proposed to conduct AT and OT evaluations at the beginning of the 2016-17 school year as well as include the dyslexia, dyspraxia, and dysgraphia diagnoses in the Present Level of Performance. It is noted that the IDEA only requires the consideration of the evaluation by an outside agency; there is no requirement for the outside evaluation to be given preference over school data.

**ISSUE FIVE:** The USD #, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the request from the parents of the student for changes in special education services at the May 12, 2016 IEP meeting, specifically the requests for Occupational Therapy (OT) services and Assistive Technology services.

#### Findings:

Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action.

The parents believe USD # refused to include OT and AT services in the IEP developed on May 12, 2016. Interviews, IEP team meeting notes, and the audio recording show that the parents wanted a writing goal to be added to the student's IEP and requested both OT and AT services be added to the student's IEP to address the additional writing goal as well as the proposed spelling goal.

The findings of Issue One and Four are included herein by reference.

The draft IEP, IEP team meeting notes, interviews, and the audio recording of the May 12, 2016 IEP meeting show the draft IEP did not include a writing goal as the student had mastered the previous writing goals included in the August 20, 2015 and the October 22, 2015 IEP amendment. The IEP team discussed the parent's request to add a goal for writing and the request to include both OT and AT services to the student's IEP. The IEP team could not reach consensus and the school staff proposed to conduct an AT evaluation and an OT evaluation to gather additional information and data. Because consensus could not be reached, the IEP team agreed to suspend the IEP meeting and reconvene at the beginning of the 2016-17 school year. District staff acknowledged that a written notice refusing the parent's requests was not provided to the parent's following the May 12, 2016 IEP meeting.

The allegation of a violation of special education laws and regulations on this issue is substantiated as evidence shows the parents were not provided with written notice refusing the request for the addition of a writing goal as well as OT and AT services following the May 12, 2016 IEP team meeting. By suspending the IEP meeting, and therefore the decision, until a later date after the AT and OT evaluations were to be conducted, the team effectively refused the parent's requests at the meeting. When these parents left the meeting, the answer to their proposals to add a goal for writing and to add AT and OT services was "No, at least not now." IDEA requires public agencies to provide the parents with a written notice refusing their requests and informing them of the reasons for that refusal. In this case, USD # [redacted] position was that it needed to conduct an AT and an OT evaluation to get more data before it could approve the parent's requests for the addition of a writing goal and OT and AT services. It was required to give the parents a PWN of this decision and the reasons for the decision. With this information, the parents would have been able to decide how to exercise their procedural safeguards by deciding whether to consent to and wait for the completion of the proposed evaluations and another IEP meeting, or to immediately exercise their right to request mediation or a due process hearing.

**ISSUE SIX:** The USD # [redacted] in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to the requests from the parents of the student for an Occupational Therapy (OT) and Assistive Technology evaluation during the 2015-16 school year IEP team meeting.

Findings:

Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action. Federal regulations, at 34 C.F.R. 300.301 provides for parents to request an evaluation for their child. If the public agency receives such a request, the district shall either accept the request and proceed with the evaluation process in accordance with the timelines and requirements set forth in the IDEA or refuse the request and provide the parent with written notice refusing the request.

The parents believe the USD # did not respond to their requests for an AT evaluation and an OT evaluation during the 2015-16 school year. The parents reported they obtained a Comprehensive Speech/Language Evaluation and an OT evaluation of the student at Children's Mercy Hospital at private expense in spring 2016. These evaluations were conducted to provide data regarding the student's need for OT and AT services. Copies of both evaluations were shared with USD # staff along with the request that the school staff, specifically the OT and the AT consultant, be provided with copies to review and discuss at the May 12, 2016 IEP team meeting. The parents and the advocate believe USD # should have conducted their own evaluations to provide additional data if the school staff did not accept the Children's Mercy Hospital evaluation results. The mother, parent, acknowledged that she did not request an evaluation until the IEP meeting held on May 12, 2016.

The findings of Issues One, Four, and Five are incorporated herein by reference.

Documentation shows USD # conducted three IEP team meetings during the 2015-16 school year. IEP team meeting notes from the August 22, 2015 and October 22, 2015 IEP team meetings and interviews with parents and school staff do not reflect a parent request for an AT and/or OT evaluation at either meeting.

Interviews, IEP Team Meeting notes and the audio recording of the May 12, 2016 IEP meeting show the Children's Mercy evaluation reports were discussed by the IEP team as well as the data collected by the school staff on the student's performance in the classroom setting. The parent did make a specific request

for an AT evaluation and an OT evaluation during the IEP team meeting and the school staff proposed to conduct both AT and an OT assessment based on this discussion.

Documentation and interviews show the parents were provided with PWN on May 19, 2016 proposing to conduct a reevaluation of the student in the areas of health/motor and assistive technology to include both an AT and OT evaluation.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as evidence shows USD # did appropriately respond to the parent request for an AT and OT evaluation made at the May 12, 2016 IEP team meeting. USD # provided the parent with PWN including a description of the action proposed as "to obtain consent for a reevaluation of the student in the areas of health/motor and assistive technology to include both an AT and OT evaluation" and indicating the explanation for the action was to conduct an evaluation to assess how the student functions in the academic setting and to assess whether he has any educationally relevant needs in the areas supported by OT or AT.

### **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 one area:

- 34 C.F.R. 300.503 require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action. Specifically, USD # failed to provide the parent with written notice refusing the request for ESY services for the student, refusing to add a goal for writing, refusing to add AT services, and refusing to add OT services following the May 12, 2016 IEP team meeting.

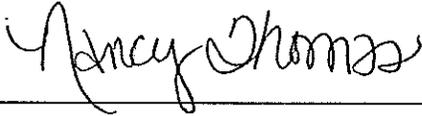
As a result of these violations, the student was denied a free appropriate public education during the 2015-16 school year.

Therefore, 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 Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.503 by providing the parent with written notice when refusing any requested change in placement or services.
2. No later than October 1, 2016, special education staff at        Elementary School will be trained on the special education requirements, regarding when to provide written notice to parents when refusing any requested changes in services. USD #        will document who provided the training, the content of the training, and who attended the training and send that documentation to Early Childhood, Special Education and Title Services.
3. Within 30 calendar days of the receipt of this report, USD #        shall provide the parent with written notice regarding the IEP team decision to refuse ESY services for the student during the summer 2016; AT services; OT services; and a writing goal.
4. Further, USD #        shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.



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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)

# 16FC02A

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

## DECISION OF THE APPEAL COMMITTEE

### APPEAL PROCESS

The appeal procedure is a review process. The Appeal Committee does not conduct a new or separate investigation, or independently determine the weight of evidence or the credibility of witnesses. Rather, the Appeal Committee reviews the findings and conclusions of the investigator that are being appealed, to determine whether the evidence presented is strong enough to support the findings and conclusions in the report.

### BACKGROUND

This matter commenced with the filing of a complaint on May 17, 2016, by \_\_\_\_\_, on behalf of their son, \_\_\_\_\_, against Unified School District No. \_\_\_\_, \_\_\_\_\_ Public Schools. Mr. and Mrs. \_\_\_\_\_ will be referred to as the “parents” in the remainder of this decision, and \_\_\_\_\_ will be referred to as the “student.” The complaint (16FC\_\_-001) alleged that USD \_\_\_\_ failed to comply with the requirements of special education laws and regulations.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the Early Childhood, Special Education, and Title Services section of the Kansas State Department of Education (KSDE). Following the investigation, an Initial Report was issued on June 17, 2016. That report concluded that there were violations of special education laws and regulations.

Thereafter, on June 23, 2016, the school district filed an appeal regarding three of the issues addressed in the Initial Report, and a finding that the district was in violation of the requirement to provide the student with a Free Appropriate Public Education (FAPE). Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the original complaint, the investigator’s report, the district’s notice of appeal, including all exhibits, and other information collected by the Appeal Committee. The parents did not submit a response to the district's notice of appeal.

The issues in the complaint report under appeal are Issue 2, Issue 3, Issue 5, and the finding of a violation of FAPE. Each will be addressed separately.

## DISCUSSION OF ISSUES ON APPEAL

ISSUE 2: The district failed to include the required members of an IEP team at the May 12, 2016 IEP meeting, specifically the 5th grade teacher for the 2016-2017 school year.

The investigator concluded that there was no violation of law regarding this issue because all of the required IEP team members attended the May 12, 2016 IEP meeting. The appeal does not address this conclusion. Rather, the appeal challenges a finding of the investigator that the Notice of Meeting for the May 12, 2016 IEP meeting contained incorrect information because it stated that a "5th Grade Teacher" would attend the meeting and the meeting was actually attended by the student's 4th Grade teacher. Page 2 of the Notice of Meeting provided to the investigator by both the parents and the school district included a handwritten note indicating that a 5th Grade teacher would attend the meeting (Exhibit D) of Appeal. However, the district provided evidence to the Appeal Committee to substantiate that the handwritten note was added by the parent and was not part of the Notice of Meeting the district sent to the parents (Exhibit C). Page 1 of both Exhibit C and Exhibit D show that the Notice of Meeting, included a typewritten statement that stated: "As required by federal and state law, in addition to you, we will have the following people at our IEP meeting:" Directly below that statement is another typewritten statement stating, "1. A general education teacher of your child."

With this additional evidence (Exhibit C), which the district did not present to the complaint investigator, the Appeal Committee finds that the Notice of Meeting provided to the parents by the district did not include the handwritten statement indicating that a 5th Grade teacher would attend the meeting. The evidence indicates that this statement was added by the parent on the version the parents returned to the school district (Exhibit D). Therefore, the Appeal Committee concludes that the finding of the investigator that the Notice of Meeting contained incorrect information is hereby removed from the report.

ISSUE 3: The district failed to appropriately respond to the parent's request for extended school year (ESY) services during summer 2016.

The investigator found a violation of law with regard to this issue on page 9 of the report, where she stated:

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD #\_\_\_ failed to appropriately respond to the parent request for ESY services at the May 12, 2016 IEP meeting. USD #\_\_\_ failed to provide written notice of the refusal of the parent request for ESY services and explain why USD #\_\_\_ refused to provide ESY services during summer 2016.

The district presented three challenges to this conclusion:

(1) On appeal, the district asserts that the failure to provide a Prior Written Notice (PWN) was not an issue raised by the parents in their complaint and that state law does not grant complaint investigators the authority to expand the investigation to include allegations not raised in the complaint.

The Appeal Committee disagrees. Issue 3 of the complaint specifically alleged that the district failed to appropriately respond to the request from the parents for ESY services. As noted above, the investigator found that the district failed to appropriately respond to the parents' request for ESY services, and explained that the district failed to appropriately respond to the request because it did not provide the parents with a Prior Written Notice. It was the conclusion of the investigator that the only appropriate response would have been for the district to respond with a Prior Written Notice. The Appeal Committee agrees with this conclusion and finds that that the conclusion directly addresses the issue specified in the parents' complaint.

In addition, the Appeal Committee notes that there is nothing in state or federal law or regulation that would prohibit a state complaint investigator from addressing potential violations of law that the investigator finds during an investigation, even though those potential violations were not specified in a formal complaint. It is the opinion of the Appeal Committee, pursuant to its general supervision responsibility under 34 C.F.R. 300.149, that a state department of education has a duty to address substantial evidence of any potential violation of special education laws and regulations. That duty includes instances in which a state investigator is investigating allegations specified in a complaint. In instances in which a state investigator determines that additional violations need to be addressed in the complaint process, the investigator must notify the district of the additional issues. In this instance, however, the investigator did not need to notify the district of additional issues because no additional issues were addressed by the investigator.

(2) On appeal, the district asserts that it appropriately responded to the parents' request for ESY services, including Assistive Technology (AT) and Occupational Therapy (OT) services with a Prior Written Notice (PWN) offering to evaluate the student to determine whether he qualified for these services.

The Appeal Committee disagrees. These parents did not just request a reevaluation at the May 12, 2016 meeting, but they also requested services both during ESY and to continue during the school year. The PWN proposing a reevaluation did not respond to the parents' request for ESY services. The district asserts that it did not provide a PWN regarding the request for services because it neither approved or denied the request. Instead, the district appears to be saying it suspended the meeting, and thus the response to the parents' request for services, to a future date by which a reevaluation would have been completed. Special education law provides two options for a school district when a parent requests to change the provision of FAPE to their child. In this instance, the change to the provision of FAPE was a request to add ESY services. K.S.A. 72-988 states that in this instance the district must provide a PWN stating either that the district will change the provision of FAPE to the child by adding ESY services or refuse to change the provision of FAPE to the child and will not add ESY services. The law does not provide for a third option, as advocated for by the district, to not directly respond to the parents' request for ESY services and instead to offer to evaluate the student during the next school year. The district was required to provide a direct response to the parent's request for ESY services. The Appeal Committee agrees with the investigator's conclusion that this was a failure to appropriately respond to the parents' request for services.

Evidence presented to the investigator, and recorded in the report, indicates that at least some school personnel believed current student data did not support the parents' request for this service. Ultimately, at the request of the parent, the team proposed a reevaluation to obtain more data. It may have been completely reasonable for the team to take this action. However, it still needed to respond to the parents' request for ESY services with a PWN. In this instance, a PWN should have been provided informing the parents that the team was refusing the request for services at the current time due to insufficient data, but that the team was also proposing a reevaluation to obtain additional data and reconsider the request at a later date. On page 12 of the report, in Issue 5, addressing the same issue with regard to the parents' request for AT and OT services, the investigator said "When these parents left the meeting, the answer to their proposals to add a goal for writing and to add AT and OT services was 'No', at least not now." The Appeal Committee agrees with that conclusion in Issue 5 and finds that it applies equally here in Issue 3. The district was required to respond to the parents' requests for services with a PWN. The PWN notice provided to the parents related to the district's proposal to conduct a reevaluation did not meet this requirement.

(3) On appeal, the district asserts that the meeting at which the parents' request for services was considered was May 12, 2016, that it has 15 school days to respond to a parent's request for services, and that the end of the 15 school-days would fall on August 23, 2016. Accordingly, the district asserts that it cannot yet be found in violation of a failure to appropriately respond to the parents' request.

In support of this position, the district cites the Kansas Special Education Process Handbook statement that 15 school days is a reasonable time in which to respond to a parent's request for evaluation or services. The Appeal Committee agrees that the statement referred to by the district is in the Process Handbook. However, the Process Handbook is a guidance document developed to provide an explanation of the legal requirements of special education. It is not, and was not intended to be, a statement of law, regulation or official policy. Furthermore, the statement referred to in the Process Handbook is followed by this statement, in parenthesis: "See KSDE Memo, 'Reasonable Time' to respond to parent request for evaluation, January 8 2002..." That statement is followed by a link to the memo. The memo available at that link is a policy statement. The memo states that districts must respond to parents with a PWN within a reasonable time after a parent makes a request regarding any matter related to identification, evaluation, placement of the provision of FAPE, and that a reasonable time is 15 school days, unless there is some unusual circumstance.

If there are no unusual circumstances, then school districts may apply the 15 school days' time limit referred to in the Process Handbook. However, the Appeal Committee finds there is an unusual circumstance in this case. At the May 12, 2016, meeting, these parents were requesting ESY services to be provided during the summer of 2016. The IEP team was present at that meeting and should have provided a response to the parents' request. Instead, it suspended the meeting, and in doing so, suspended any response to the parents' requests for services during the summer, until sometime after the end of the summer break. Delaying a response to a parent's request for ESY services to a time after the end of summer is clearly unreasonable. The Appeal Committee finds that action by the district constituted a failure to provide the parents with an

appropriate response to their request for services during the summer, through a PWN, within a reasonable time.

ISSUE 5: The district failed to appropriately respond to the parents' request for Occupational Therapy (OT) and Assistive Technology (AT) services.

(1) On appeal, the district asserts that the failure to provide a PWN was not an issue raised in their complaint and complaint investigators do not have authority to expand investigations to include issues not raised in the formal complaint.

For the reasons stated previously in this appeal decision in Issue 3, part (1), the Appeal Committee concludes: (a) that the investigator has authority to expand an investigation to include issues not raised in the formal complaint; and (2) that this investigator addressed only the specific issue stated by the parents in their complaint, and did not expand the investigation to include other issues.

(2) On appeal, the district asserts it did not "effectively" reject the parents' request for OT and AT services or for a writing goal.

The Appeal Committee notes that the parents' request for AT and OT services also included a request that these services be provided during ESY [See page 9 of the Investigator's decision and page 2 of the district's notice of appeal]. Because the parents requested these services to begin during ESY, the district was required to provide a PWN agreeing with or rejecting the parents' request in time for the student to receive ESY services, if the student qualified. For this reason and the reasons stated previously in this appeal decision in Issue 3, parts (2) and (3), the Committee upholds the investigator's finding on this issue.

(3) On appeal, the district asserts that the investigator's suggestion that parents could not have made a decision to mediate or file for due process without a PWN regarding OT and AT services and a writing goal is not supported by law.

The Appeal Committee does not believe the investigator's "suggestion" on this matter was indicating that the failure to provide a PWN physically prevented these parents from exercising their procedural safeguards. Indeed, the parents filed this complaint, which is a clear recognition by the parents that they knew they had the right to exercise procedural safeguards. Further, the district is correct that a district providing a PWN does not create a new right for parents to exercise procedural safeguards. However, the evidence in this case is that when the parents left the May 12, 2016, IEP meeting, the status of their request for OT and AT services during ESY was unclear. They believed their request for OT and AT services during ESY had been denied because the district's agreement to reevaluate the student would not take place until ESY for summer of 2016 had concluded. School officials believed the request was on hold. The value of a PWN is to provide information that puts a parent in a better position in which to make decisions about how to proceed. Putting aside the practical value of a PWN to a parent, it is a procedural requirement that must be implemented even if it ultimately provides no value to the parent.

## FINDING REGARDING FAPE:

On appeal, the district asserts that the investigator's finding on page 14 of the report that the violations identified in the report resulted in a violation of a FAPE is error because there was no specific finding that any action of the district impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process or caused a deprivation of educational benefits.

The applicable regulation is 34 C.F.R. 300.513(a)(2), which states:

*(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--*

*(i) Impeded the child's right to a FAPE;*

*(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or*

*(iii) Caused a deprivation of educational benefit.*

*(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Sec. Sec. 300.500 through 300.536.*

The Appeal Committee notes that this provision applies to due process hearing officers. However, the Committee also believes a state complaint investigator should also use this standard when addressing procedural issues. The Committee agrees with the district that the issues involved in this complaint are procedural in nature and that there was no specific finding or conclusion made by the investigator indicating that educational deprivation or impediment to parent participation occurred as the result of the violations specified in the report. Therefore, the Committee reverses this conclusion, and it is removed from the report.

However, the Committee also notes that paragraph (3) of the applicable regulation permits the issuance of an order to the district to comply with procedural requirements even where there is no finding of a failure to provide FAPE. Accordingly, the district's request to find that the district is not obligated to comply with the corrective action ordered in the complaint report is denied.

## CONCLUSION

The finding of the investigator in Issue 2 that the Notice of Meeting contained incorrect information is hereby removed from the report. The finding on page 14 of the report that the violations identified in the report resulted in a violation of a FAPE is reversed and is removed from the report. The remainder of the findings, conclusions and corrective actions in the investigator's report are sustained.

This is the final decision in this matter. Kansas special education regulations provide no further appeal.

This Final decision is issued this 8th day of July, 2016.

APPEAL COMMITTEE:

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

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

\_\_\_\_\_  
Julie Ehler

RECEIVED FEB 16 2016

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON JANUARY 11, 2016

DATE OF REPORT: FEBRUARY 9, 2016

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 \_\_\_\_\_, Special Services Coordinator for USD # \_\_\_\_\_ on January 19, 2016. On January 19, 2016, the investigator also spoke by telephone with \_\_\_\_\_, Assistant Director of Special Services for the district. The investigator again spoke with the Assistant Director of Special Services on January 25 and 28 and February 2, 3, 4, 5, and 8, 2016. The investigator spoke with the Director of Special Services, \_\_\_\_\_, on February 3, 2016.

The investigator spoke by telephone with the student's mother on January 29, 2016. On February 1, 2016, the investigator met with the student's mother in the family home.

On February 9, 2016, the investigator made an on-site visit to the special education classroom at the center of this complaint.

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

- IEP for this student developed on September 28, 2014
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated February 24, 2015
- Email from the student's special education teacher to other staff dated February 24, 2015 regarding milk and dairy limitations
- *Emergency Safety Intervention (ESI) Notice of Incident* dated April 10, 2015
- IEP for this student developed on September 28, 2014
- Home/School Communication Notes covering the period of March 9 – October 20, 2015

- Interim IEP for this student dated March 10, 2015
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated March 10, 2015
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated March 10, 2015
- Home School Communication Notes dated April 10, 20, and 30, 2015; August 21, 2015; and October 19 and 23, 2015
- Evaluation/Eligibility Report including a Functional Behavior Assessment dated May 7, 2015
- Behavior Intervention Plan and Functional Behavior Assessment dated May 7, 2015
- IEP for this student dated May 14, 2015
- Notice of Emergency Safety Intervention (ESI) dated September 18, 2015 – first ESI intervention for the 2015-16 school year
- Parent Notice of Emergency Safety Intervention dated September 18, 2015 – second ESI intervention for the 2015-16 school year
- Photographs of staff injuries related to the ESI incident of September 23, 2015
- ESI Documentation Form for September 18 and October 23, 2015
- Behavior data sheet dated September 23, 2015
- Meeting Notes dated October 8, 2015
- Parent Notice of Emergency Safety Intervention dated October 23, 2015 – third ESI intervention for the 2015-16 school year
- Parent Notice of Emergency Safety Intervention dated October 23, 2015 - fourth ESI intervention for the 2015-16 school year
- Email correspondence from the parent to the special services coordinator and the parent dated October 28, 2015
- Email correspondence from the special services coordinator to the parent dated October 29, 2015
- Email from the building principal to the parent dated October 30, 2015
- Email from the parent to the principal and special services coordinator dated October 30, 2015
- Email from the parent to the principal and special services coordinator dated November 2, 2015
- Email from the special services coordinator to the parent dated November 2, 2015
- Email dated November 4, 2015 from the Director of Special Services to the parent
- Notice of Department Findings dated January 19, 2016
- District ESI Parent Information packet
- District A-E Schedule for the 2015-16 school year
- Daily schedules for the student
- Written statement from the special education teacher regarding the ESI information provided to the parent on September 18, 2015

- Notebook provided by the parent containing email correspondence with district staff as well as copies of special education records and student schedules
- Additional materials provided by the parent including a photograph of the classroom and personal emails to and from individuals outside the school district
- Audio files provided by the parent

### **Background Information**

This investigation involves a 10 year-old boy who first received special education support through Infant Toddler Services of Johnson County starting in November of 2007. The student subsequently moved to Missouri in February of 2008 but no services were provided to him while there. In April of 2008, the Developmental Diagnostic team at Children's Mercy Hospital completed a full evaluation of the student, and he was given a diagnosis of severe autism.

The student entered an Early Childhood Disabilities program in [redacted] in August of 2008. The district completed an assessment – including an extended classroom evaluation – in order to determine the most appropriate placement for the student. Following the evaluation, the student was transferred to an Early Childhood Autism classroom where he spent 2 years in an intensive 1:1 environment.

In the Fall of 2010, the student began attending an Autism program in a district elementary school where he was enrolled as a Kindergarten student. He transferred to another school district in August 2011 as a first grader and remained in that district until April of 2014 at which time his mother withdrew him from school and began home schooling.

The student was then re-enrolled in the neighboring district at the end of September 2014 but stopped attending school on February 2, 2015. He returned to the [redacted] district on February 24, 2015 and was placed in the Autism Program and enrolled as a 4<sup>th</sup> grade student. The student was also provided Speech/Language services and indirect support from an Occupational Therapist.

The student has not attended school since October 23, 2015. The parent has not withdrawn the student from school, but she has indicated she will not agree to return the student to his previous classroom because of the concerns expressed in her complaint.

### **Issues**

In her complaint, the parent outlines sixteen concerns.

**Issue #1: The student has on numerous occasions been given food containing dairy and/or chocolate even though his IEP specifically prohibits him from having these types of foods.**

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

The student entered the district on February 24, 2015. Services were initially provided under the IEP developed by the student's previous district on September 28, 2014. The September 2014 IEP did not specify any dietary restrictions and did not include any reference to the student being lactose intolerant. No list of restricted foods was included in the September 2014 IEP. However, a February 24, 2015 email from the student's special education teacher to other staff members stated that the parent had said the student "cannot have milk and dairy should be limited."

The district developed an *Interim IEP* for the student on March 10, 2015. A reevaluation was conducted, and an IEP Team subsequently developed a new IEP for the student on May 14, 2015,

The "Relevant Medical Issues" sections of both the student's March 10, 2015 IEP and his May 14, 2015 IEP contain the following statement:

"Mom reports lactose intolerance but no known allergies."

The "Additional Supports" sections of the March 2015 IEP and the May 2015 IEP contain this additional statement:

"Parent does not want (the student) to eat dairy products or chocolate."

The parent asserts that the student was given prohibited foods on the dates listed below:

10/20/2015 – goldfish  
10/19/2015 – goldfish x 2  
10/12/2015 – cheese bread  
10/2/2015 – goldfish  
10/1/2015 – goldfish  
9/29/2015 – goldfish, cheese-its  
9/28/2015 – ...cheesy bread...  
9/23/2015 – cheese-its  
9/17/2015 – goldfish x 2, cheese-its  
9/15/2015 – goldfish  
9/14/2015 – goldfish x 2, cheese-its x 2, cheese bread  
9/11/2015 – goldfish, cheese-its  
9/9/2015 – goldfish 2 x, cheese-its

9/8/2015 – goldfish, cheese-its  
9/3/2015 – goldfish, cheese-its  
9/2/20015 – goldfish  
6/30/2015 – cupcake  
5/19/2015 – cupcake  
5/18/2015 – cake  
5/8/2015 – cupcake, cheese-its  
5/5/2015 – cake  
5/4/2015 – cheese-its  
4/30/2015 – cheese-its  
4/28/2015 – goldfish x 2  
4/27/2015 – goldfish  
4/23/2015 – goldfish  
4/22/2015 – goldfish  
4/21/2015 – goldfish  
4/20/2015 – goldfish  
4/16/2015 – goldfish  
4/7/2015 – stuffed crust pizza  
3/27/2015 – goldfish  
3/25/2015 – cheese-its  
3/9/2015 – chocolate chip muffin”

It is the parent’s contention that she has repeatedly emphasized that the student should never be given any foods containing dairy or chocolate.

In order to develop the above list, the parent reviewed daily home/school communication forms sent to her by the student’s special education teacher. These daily notes contained sections that specified the food provided to the student while he was at school.

During a meeting with the investigator on February 1, 2016, the parent stated that while the student’s doctor “may” have a record of the student being unable to have dairy products, the decision to limit his intake of these foods was made by the parent herself as a means of addressing behavioral and physical needs of the student. The parent reported that it was her belief that the student benefitted from these restrictions, a theory she contends she has repeatedly validated through her own in-home trials.

The parent defines a “dairy” product as anything that contains or is made from milk or cheese. She points to the product label on Goldfish crackers that shows that the product contains “pasteurized cultured milk.” Packaging for Cheez-its states that they “contain real cheese.”

When asked by the investigator why she had not contacted the school prior to October 23, 2015 regarding her concerns about the student’s dairy intake at

school, the parent stated that she had "picked her battles" and had chosen not to say anything until the filing of this complaint.

It is the district's position that the analysis of this allegation needs to be what the intent of the IEP team was when the IEP was written since this portion of the IEP is unclear. The Health Intake form for the student does not include any limitations for the student's diet. The district contends that the intent of the IEP team was that "dairy products" only included milk, cheese, yogurt, ice cream and products directly derived from milk. This did not include limitations on Gold Fish, Cheese-Its, muffins, cake, or any other processed food or baked good containing a small amount of dairy.

The district insists that it has been very transparent in communicating with the parent regarding the nature of school snacks, and at no time during the seven months between the development of the IEP and the filing of this complaint has the parent notified the school that she had any concerns about the snacks being provided to the student. It is the district's position that the parent did not report having removed dairy from the student's diet until a meeting on October 8, 2015.

It is the district's contention that the parent has never provided clarification to the IEP Team regarding which products contain dairy and has by her own actions contributed to confusion over what should or should not be considered acceptable food. According to the district, the parent has on more than one occasion given permission to staff to provide the student with pizza if the cheese was removed. The district cited a team meeting on October 8, 2015 when the parent told the team that the student could be allowed to choose pizza for lunch "if the cheese is pulled off." The district also reports that on a second occasion in October 2015 the parent objected to the student being guided to make a lunch selection other than cheese pizza.

The district states that the parent has sent snacks to school that contain dairy and chocolate and has directed the staff to allow the student to eat any snack (including those containing dairy or chocolate) that have been brought to school by other parents for classroom celebrations and snacks. The district has provided the investigator with written statements from staff regarding the parent's position on dairy. Those statements include the following:

- "(The parent) told me in person that cheez-its and goldfish crackers were fine for (the student) to eat. She stated that she really didn't think there was even dairy in cheez-its or goldfish crackers."
- (At a meeting on March 10, 2015, the parent) stated that (the student) should not be limited from eating treats that contain dairy or chocolate during birthday parties, class parties or other special treat days. She explained that she did not want (the student) looking different from others or feel left out...Her main concern was to limit dairy and chocolate as much as possible without it impacting (the student)".

- “During (a meeting in March 2015) it was mentioned that (the parent) would like to limit (the student’s) dairy intake as much as possible, however, she did not want him to feel badly if he was unable to receive a birthday treat or special snack being given out to classmates. She said that in this type of circumstance, (the student) should be allowed to receive these types of snacks, so that he did not feel different from the other kids.”

In the opinion of the investigator, there has not been a meeting of the minds with regard to the dietary exclusions for this student. District staff understood that it was the parent’s desire that the student’s intake of dairy be limited, but the parent has directed staff to loosen those restrictions under certain special circumstances. There is also a disagreement between the parties as to what was intended by the term “dairy products.” The fact that the parent did not voice any objections when notified via daily note that goldfish crackers and cheez-its were being given to the student lends credence to the district’s position that the parent did not expect those foods to be made unavailable to the student. Finally, a literal reading of the two provisions in the IEP regarding this issue is that the parent reported lactose intolerance and the parent did not want the student to eat dairy products. There is no statement in the IEP that directs school personnel to withhold dairy products from the student. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue. However, because this involves a situation where there appears to be a disagreement regarding the needs of the student and how to meet those needs, a corrective action is still needed.

**Issue #2: By not providing him with 1:1 paraeducator support on September 18, 2015, the district failed to comply with the student’s IEP. Because the student did not have this required support, he was subsequently placed illegally in a seclusion room.**

### **1:1 Paraeducator Support**

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

The parent contends that on September 18, 2015, the student was allowed to leave the classroom without any adult supervision. According to the parent, the student’s teacher told the parent that because there were three other students in the classroom at the time the student exited the room, the teacher could not leave those students unsupervised while she followed the student.

It is the parent’s position that the staff to student ratio of 1:4 was a direct violation of the requirements of the student’s IEP. The parent asserts that the student was to have 1:1 paraeducator support **at all times** throughout his school day due to the risk of his elopement.

The district contends that an Autism Instructional Assistant (AIA) standing just outside the classroom door halted the student's departure. The district has established a support staff to student ratio for this Autism classroom of 1:1 (paraeducators and AIAs) in addition to the special education teacher.

However, it is the district's assertion that none of the IEPs directing services to the student between his reenrollment on February 24, 2015 and the date the student last attended school on October 23, 2015 require that he be provided with 1:1 paraeducator support at all times throughout his school day. Both the *March 2015 Interim IEP and the May 2015 IEP state that the "parent wants adult supervision **during restroom breaks** at all times,"* and that the "parent wants an adult in close proximity (near enough for safety but not holding hands) while accompanying him **to and from the bus** and vice versa (emphasis added)." Neither document requires additional 1:1 support for the student at all times.

Because the May 2015 IEP in effect at the time of this incident does not specify that 1:1 paraeducator support be provided to the student throughout his school day, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

### Use of Seclusion

The parent contends that the district's use of seclusion on September 18<sup>th</sup> was illegal.

The Kansas Emergency Safety Interventions Law (also known as the Freedom From Unsafe Restraint and Seclusion Act) was enacted in July of 2015. Section 2(f) of the Act defines "seclusion" as "placement of a student in a location where all the following conditions are met:

- (1) The student is placed in an enclosed area by school personnel;
- (2) the student is purposefully isolated from adults and peers; and
- (3) the student is prevented from leaving, or the student reasonably believes that such student will be prevented from leaving, the enclosed area."

Section 3 of the Act states that emergency safety interventions – including seclusion – shall be used only when a student presents a reasonable and immediate danger of physical harm to himself or others. The school employee witnessing the student's behavior prior to the use of any emergency safety interventions must deem less restrictive alternatives to emergency safety interventions, such as positive behavior interventions support, to be inappropriate or ineffective under the circumstances. The use of emergency safety interventions must end as soon as the immediate danger of physical harm ceases to exist. Violent action that is destructive of property may necessitate the

use of an emergency safety intervention. Use of an emergency safety intervention for purposes of discipline, punishment or for the convenience of a school employee does not meet the standard of immediate danger of physical harm.

When a student is placed in seclusion, a school employee shall be able to see and hear the student at all times.

If a seclusion room has a locking door it must be designed to ensure that the lock *automatically disengages when the school employee viewing the student walks away from the seclusion room*, or in cases of emergency, such as fire or severe weather.

A seclusion room must be a safe place. The room must have good ventilation and lighting, and be free of any condition that could be a danger to the student. The room must also be similar to other rooms where students frequent.

Section 4 of the Act outlines the actions a district must take once a student has been subjected to seclusion. The school must – on the same day the seclusion was implemented – notify the parent that an emergency safety intervention was used. The parent must be provided the following information in written form after the first incident in which any emergency safety intervention is used during the school year:

- (1) A copy of the standards of when emergency safety interventions can be used;
- (2) a flyer on the parent's rights;
- (3) information on the parent's right to file a complaint through the local dispute resolution process and the complaint process of the state board of education; and
- (4) information that will assist the parent in navigating the complaint process, including contact information for the parent training and information center and protection and advocacy system.

Upon the second or subsequent incident where any emergency safety intervention is used, the parent must be provided with a full website address containing such information.

Section 5 of the Act outlines actions required of districts if a ***third*** emergency safety intervention is used for a third time during a school year for a student who has an IEP. The student's IEP Team must meet within 10 days after the third incident to discuss the incident and consider the need to conduct a functional behavioral analysis, develop a behavior intervention plan or amend either if already in existence, unless the IEP Team has agreed on a different process. The time for calling a meeting pursuant to this section can be extended beyond the 10-day limit if the parent of the student is unable to attend within that time

period.

According to the district, parents are given a copy of the Student Code of Conduct at enrollment every year, which includes the district policy for ESI. The district has established procedures for subsequent distribution of ESI-related materials in the event that an emergency safety intervention such as seclusion is implemented. Those procedures were developed to align with the requirements of the statute. On-site compliance visits – including one made during this school year – have confirmed that the district procedures are legally compliant.

The district contends that all required procedures were followed when an emergency safety intervention was implemented with this student on September 18<sup>th</sup>. It is the district's position that the special education teacher's decision to place the student in seclusion was made because his behavior created the reasonable and immediate danger of physical harm to self and others as required by the Kansas Freedom From Unsafe Restraint and Seclusion Act. According to the district, the student injured school staff during this episode despite their efforts to implement his Behavior Intervention Plan, (BIP), to utilize positive behavioral interventions, and to deescalate the student.

The district provided the following description of the September 18<sup>th</sup> incident:

"(The special education teacher) was in the classroom with three students and the Autism Instructional Assistant (AIA) assigned to the classroom was standing just outside the door. Student had just returned from lunch with his general education peers. When the teacher gave Student the instructional prompt to check his agenda for his next activity (ie; "What is it time for?"), Student shouted "no" and ran to the break area in the classroom. As part of implementing the BIP, the teacher continued to communicate with the student and attempted to deescalate him by asking questions such as, "What would you like to work for? Would you like to work for break?" Student then hit the teacher, attempted to push the bookcase over, and attempted to run from the classroom. The AIA at the door immediately stopped the student and guided him back into the classroom. At no time was it necessary to pursue the student.

When Student reentered the classroom with the AIA, he began hitting, kicking, and biting staff. A paraeducator also entered the classroom during this episode to assist. Student turned over furniture, threw chairs at staff, and attempted to go under tables. When staff attempted to block the student from the furniture, he turned his focus back to hitting, kicking and biting them. Staff attempted to back away from the student to give him space, but Student pursued them and continued to hit, kick, and bite. During this time, staff attempted to use their arms to block the student to prevent him from injuring them, but these attempts were unsuccessful and staff were injured (Photos of these injuries were provided). At this point,

the teacher called for the Principal to provide additional support. Because of the danger created by the student's on-going behavior and the risk of injury to Student and additional injury to staff, it became necessary to place the student in seclusion at 1:14 p.m. At the end of two minutes, when Student stopped charging at the door, hitting and kicking the door, and displaying aggressive behavior, the teacher opened the door and attempted to communicate with the student and help him process and deescalate. As soon as the door was opened, the student charged at the teacher and resumed his attempts to hit, kick and bite her. To prevent further injury to herself and possible injury to the student, it was necessary for the teacher to close the door again, placing the student in seclusion at 1:17 p.m. After three minutes, Student once again stopped charging at the door, hitting and kicking the door, and displaying aggressive behavior, and the teacher opened the door. The student continued aggressing toward the teacher, but she was able to implement the BIP and successfully deescalate the student without the need for further seclusion. During these events, the teacher, AIA, paraeducator, and Principal were all present and witnessed the behavioral episode and seclusions."

The seclusion room at this elementary school is located in one of two special education classrooms used by the Autism program. The seclusion room is well ventilated and free of any item that would put the student in danger. The door to the classroom has a window that allows staff to monitor the student at all times. The lock on the door automatically disengages unless a person standing at the door presses on a button immediately adjacent to the door.

When the parent came to the school on September 18, 2015 to pick up the student, the special education teacher presented the parent with a packet of information regarding ESI and written notice that the student had been placed in seclusion two times. All required documents were included in that packet.

The student was placed in seclusion for a total of 5 minutes after he had hit, kicked, and bitten staff. There was reason to believe that he posed a danger of additional physical harm to himself or others. The use of less restrictive alternatives to emergency safety interventions had proven unsuccessful in deescalating the student's behavior. The physical structure of the seclusion room met the standards outlined in the Freedom From Unsafe Restraint and Seclusion Act. The use of seclusion ended as soon as the immediate danger of physical harm ceased to exist. The parent was notified of the first and second use of an emergency safety intervention on September 18, 2015 and was provided with copies of all required documents. This investigator is not investigating, and does not have authority to investigate allegations regarding a violation of the Freedom From Unsafe Restraint and Seclusion Act (FFURSA). That law contains its own complaint process. However, in examining this special education issue, this investigator finds that the evidence presented indicates that this use of seclusion complied with the requirements of the FFURSA. In addition, no evidence was

presented to indicate that this use of seclusion hindered, in any significant way, the student's progress toward his annual IEP goals. For these reasons, a violation of special education laws and regulations is not substantiated on this issue.

**Issue #3: The district failed to follow the student's Behavior Intervention Plan (BIP) on September 18, 2015.**

The parent contends that because on September 18, 2015 the teacher was at *one point supervising a total of four students in the classroom*, it would have been impossible for the teacher to appropriately implement the student's BIP. It is the parent's position that the plan could only have been properly implemented if the student had been provided with 1:1 paraeducator support at the time his behavior began to escalate. The parent specifically asserts that the special education teacher failed to "communicate" with the student as his behavior began to escalate.

It is the district's position that 1:1 paraeducator support was neither required by the student's IEP nor necessary for proper implementation of the student's BIP. The district contends that the special education teacher was following the student's BIP at the time of the September 18<sup>th</sup> incident.

The BIP developed by the student's IEP Team and incorporated into his IEP on May 14, 2015 includes three pages outlining the function of his behaviors (Automatic Reinforcement, Negative Reinforcement, and Positive Reinforcement). The "Antecedent Strategies" portion of the form related to each of these functions – designed to "alter the specific events that may 'trigger the target behavior to occur" – contains the following statements:

- "At the first signs of noncompliance, staff will support (the student) by asking questions to identify any unmet needs that could be triggering his noncompliance and prevent escalation of behavior."
- "Present choices of activities/tasks whenever possible to allow (the student) a sense of control over the order of activities he would like to complete; staff may need to determine which choices are available at any given time."

As stated above under Issue #2, the district provided a written description of the September 18<sup>th</sup> incident. A portion of that description addresses the relevant question here:

"When the teacher gave Student the instructional prompt to check his agenda for his next activity (i.e, "What is it time for?"), Student shouted "no" and ran to the break area in the classroom. As part of implementing the BIP, the teacher continued to communicate with the student and attempted to deescalate him by asking questions such as, "What would

you like to work for? Would you like to work for break?"

As determined above, under Issue #2, the student's May 2015 IEP did not require 1:1 paraeducator support at all times during the student's day. The description of the incident provided by the district reflects attempts by the special education teacher to communicate with the student as his behavior was escalating and to provide him with activity choices. For these reasons, a violation of special education laws and regulations is not substantiated on this issue.

**Issue #4: The special education teacher failed to follow the student's BIP on October 23, 2015.**

The parent alleges that the special education teacher failed to follow the student's behavior plan at the first indication of his noncompliance, and that failure led to the student's illegal placement in seclusion.

Both the parent and the district have provided written descriptions of the events surrounding the October 23<sup>rd</sup> incident. According to the district, the teacher and three other staff members were in the classroom with this student and another child. The special education teacher was talking with the child when the student aggressively approached the other child. Staff intervened, stepping between the student and the other child, and the student returned to the table where he had previously been working. The Autism Instructional Assistant (AIA) placed a barrier between the other child and the student to keep them separated.

In an effort to de-escalate the situation, the special education teacher made the decision to remove a page from the student's activity schedule that had been observed in the past to cause the student to be frustrated. The student collected his activity schedule book and then attempted to leave the classroom but his path was blocked. The student responded aggressively by throwing the activity book at the teacher and by hitting and kicking her. The student's behavior continued to escalate. The other student was removed from the room. The teacher reported that she attempted to talk with the student about what he wanted, but the student did not respond.

The district's description of the incident continues as follows:

"Student began grabbing at the teacher's legs and attempted to bite her lower legs. The teacher was able to get free from his grasp, but he continued to come after her and the other two staff members (AIA and para) present. He threw his agenda at the staff and tried to crawl under the snack table. The staff blocked him from being able to crawl under the table (in the past he has tipped the table over and it has come very close to hitting him in the head when it fell). Student kicked the knees of the

staff members and continued to attempt to bite their lower legs while he was on the floor. The staff tried to move chairs and desks out of Student's reach, but he was able to grab a chair and throw it at the staff. As per the BIP, the AIA quickly left the classroom to get a large blue mat so that the staff could put it between themselves and Student. Again, the teacher asked (the student) what he needed, but he did not answer. He pulled on the barrier that had been put up to protect the other child that had been previously evacuated from the classroom and it fell to the ground, almost hitting Student in the head. The staff removed the barrier and gave Student space. He laid on the floor while rolling around tantruming. The teacher brought Student's agenda to him, slid the activity schedule book to him and asked him what he was working for (to earn after he moved his tokens). Student yelled "no", hit the teacher and grabbed and threw his agenda. Student grabbed the activity schedule book and tried taking pages out of his book.

At that time, the teacher realized that he was upset because of the page that had been taken out of his book to lessen his frustration at the instructional demands on him. The teacher put the page back in his book where it had originally been, but Student continued to yell and scream. Student kicked one of his shoes off and threw it at the AIA, hitting her with it. Staff then removed his other shoe to prevent him from throwing it at staff. Student stood up and once again ran at staff, hitting and kicking while growling. At this point, staff put the blue mat up because he was continuing to hit and kick. The mat was ineffective because it increased his agitation as he was not able to make as much contact with the staff and he continued to hit and scratch the hands of the staff members holding the mat. In addition, he pulled on the mat and it became difficult for the staff to keep the mat up to protect themselves. The teacher directed the AIA to call the Principal for additional support. Student was able to pull the mat out of the hands of the staff and ran at the staff, hitting, kicking and trying to bite. Student was able to bite the teacher's leg and staff were not able to deescalate his behavior.

(The student was placed in the seclusion room for 4 minutes and 10 seconds.) As soon as Student stopped displaying aggressive behavior by rushing at the door and hitting and kicking the door, the teacher opened the door. Student immediately ran at the teacher, attempting to hit and kick her. (The teacher then closed the seclusion room door for another 3 minutes and sixteen seconds.) The teacher opened the door and asked Student if he needed some time to calm down. He replied "yes" and he chose to stay in the safe room with the door open. The teacher informed him that he could come out whenever he felt he was ready. After about a minute, Student walked out of the safe room. The teacher again reminded Student that he could tell her what he wanted or needed. The student said "it's a mistake". The teacher asked Student to show her what the

mistake was and he said "donuts". The page with the picture of the donuts was the page that the teacher had originally taken out of the book to lessen his instructional demands. The teacher then allowed Student to move the donut page in the book to where he wanted it to be and verbally praised him for telling her what it was that he wanted."

On October 23, 2015, the special education teacher provided the parent with written notice that the student had been placed in seclusion two times. All required documents were provided to the parent along with the notice.

The BIP included in the student's May 2015 IEP contains three pages outlining the function of his behaviors (Automatic Reinforcement, Negative Reinforcement, and Positive Reinforcement). Several portions of the document appear relevant.

The "Environmental" portion of the forms related to Automatic Reinforcement and Negative Reinforcement contain the following statement:

"Strategic positioning of adults between (the student) and peers to block possible injuries (remove peers from area if necessary) during times when he appears agitated or frustrated."

The "Antecedent Strategies" portion of the form related to each of these functions – designed to "alter the specific events that may 'trigger the target behavior to occur" – contains the following statements:

- "At the first signs of noncompliance, staff will support (the student) by asking questions to identify any unmet needs that could be triggering his noncompliance and prevent escalation of behavior."
- "Regularly assess tasks to ensure they are within an appropriate level of difficulty for (the student) to achieve success and minimize unnecessary frustration
- "Present choices of activities/tasks whenever possible to allow (the student) a sense of control over the order of activities he would like to complete; staff may need to determine which choices are available at any given time."

In the course of any school day, special education teachers are called on to make many instructional decisions. While the decision to remove the "donuts" page from the student's book proved to have unintended effects, that decision was made with the student's BIP in mind and in a good faith attempt to minimize the student's frustration. The teacher and other staff members followed the student's plan by taking the following actions:

- strategically positioning themselves between the student and another child to block possible injuries
- removing other children from the classroom

- assessing the potential difficulty of tasks being presented to the student
- questioning the student in an attempt to determine the trigger for his noncompliance
- presenting choices of activities to allow a sense of control

The student was placed in seclusion because staff felt there was on-going, realistic and immediate danger of injury to the student or staff. As determined under Issue #2, the seclusion room into which the student was placed meets the standards outlined in the *Freedom From Unsafe Restraint and Seclusion Act*. The use of seclusion ended as soon as the immediate danger of physical harm ceased to exist. The parent was notified of the third and fourth use of an emergency safety intervention on October 23, 2015 and was provided with copies of all required documents. The student's BIP was implemented prior to the safety emergency that resulted in seclusion. For these reasons, a violation of special education laws and regulations is not substantiated on this issue.

**Issue #5: The district did not comply with the student's IEP because 1:1 paraeducator support was not provided to the student during recess on several occasions.**

The parent contends that 1:1 supervision was to be provided to the student while he was at recess because he lacks "poor safety judgment" and "tends to elope." According to the parent, no 1:1 paraeducator support was provided on six separate occasions (April 10, 20 and 30; August 21, and October 19 and 23, 2015.)

The "Additional Supports" section of the student's March 2015 IEP and his May 2015 IEP state the following:

- "Parent wants adult supervision **during restroom breaks at all times** (emphasis added)."
- "Parent wants an adult in close proximity (near enough for safety but not holding hands) while accompanying him **to the building and from the bus and vice versa** (emphasis added)."

It is the district's position that while not required by the student's IEPs, supervision was provided to the student at recess on every date specified by the parent. In support of that contention, the district provided Home School Communication forms for 5 of the 6 dates in question. The student was picked up from school by the parent on October 23, 2015; no Home School Communication Note was completed on that date. Each of these forms includes a line item for "Recess" wherein the student's activities during that portion of the day are recorded.

On April 10, 2015, it was noted that the student played with general education peers, used the slide and ran. It was also noted that the student struggled with the transition from recess to lunch but had a successful transition from recess to afternoon snack.

On April 20, 2015, the student was again observed to play with general education peers and use the slide. On that date, the student was reported to "struggle with transitioning away from recess" and "had some aggression then but we were able to work through it."

On April 30, 2015, played with both general education and special education classroom peers, engaged in soccer, and used the slide. It was noted that he "had an incident of not keeping hand to self at recess."

The August 21, 2015 Home School Communication Note shows that the student played with general and special education peers, used the slide, and ran. The "Comments" section contains the notation that "(The student) came to us @ recess and said, 'medic' and told us he scratched the back of his head on the swing. We checked it out and gave him TLC."

The October 19, 2015 note shows that the student engaged in sports with general education peers. In the "Comments" section, it is noted "the para saw him fall while playing (during recess before lunch) but he got right back up."

Neither the March 2015 IEP nor the May 2015 IEP contains any specific requirement for 1:1 paraeducator support for the student during recess. However, in the opinion of the investigator, the Home School Communication forms supplied by the district support the district's contention that the student was under adult supervision during recess on 5 of the 6 dates in question. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #6: On April 7, 2015, the district failed to follow the student's BIP.**

The parent contends the teacher failed to question the student in order attempt to identify the antecedent to the student's noncompliant behavior and to communicate with the student prior to and during an incident that occurred on this date and therefore did not follow the student's BIP.

The district asserts that no behavior plan was in place for the student on the date in question. The student transferred into the district on February 24, 2015 with an active IEP from his previous Kansas district. That IEP did not include a behavior plan and stated, "Behavior is addressed through goal(s) and accommodations. The parent gave her written consent for the district to "immediately begin providing services comparable to those described in (the student's) current out-of district IEP..."

On March 10, 2015, the IEP Team determined that a re-evaluation would be needed and adopted an interim IEP for the student during the pendency of the re-evaluation. The parent gave written consent for the Interim IEP to be implemented while a re-evaluation was completed and provided her written consent for the re-evaluation.

Although the "IEP Team Considerations" page of that March 10<sup>th</sup> IEP states that a BIP was attached, that statement was incorrect. The district states that the team developed no BIP at that time because it was believed that no plan could be developed until the re-evaluation – which included a Functional Behavioral Assessment – was completed.

The results of the re-evaluation were reviewed with the parent on May 7, 2015. A completed BIP was added to the student's IEP at an IEP Team meeting on May 14, 2015.

No BIP was in place at the time of the April 7, 2015 incident, and the elements referred to by the parent were not made a part of the student's IEP until May 14, 2015. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue #7: Placement of the student in seclusion on September 18, 2015 constitutes a violation of FAPE under the IDEA because these actions were not in compliance with the student's IEP. Further, a special services coordinator sanctioned the actions of the teacher.**

Federal regulations, at 34 C.F.R. 300.101 state that a "free appropriate public education (FAPE) must be available to all students residing in the State between the ages of 3 and 21." The regulations define FAPE as "special education and related services...that are provided in conformity with an individualized education program..." Federal regulations, at 34 C.F.R. 300.101 state that a student's IEP must be implemented as written.

This incident was previously addressed under Issue #2. Some of the allegations presented by the parent under this issue are identical to those already addressed earlier in this report. Those include:

- failure of the district to provide 1:1 paraeducator support
- inappropriate use of the seclusion room

As noted under Issue #2, a violation of special education laws associated with these elements was not substantiated. These allegations will not be re-addressed under this issue.

In her filing, the parent has, however, raised two additional elements:

1. the absence of specific safeguards in the classroom to prevent the student from exiting the classroom (such as signage on the door or "stop" footprints on the carpet), and
2. the personal responsibility of a district employee (specifically a special services coordinator).

Under this issue, the parent contends that the allegations represent a violation of FAPE.

### **Absence of Specific Safeguards**

The student's May 2015 IEP does not require the use of the type of visual cues the parent specifies. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

### **Personal Responsibility for Alleged Procedural Violations**

Kansas regulations, at 91-40-2 require each **agency** to provide a Free Appropriate Public Education by implementing IEPs. The regulations, at K.A.R. 91-40-51, also state that "any person or organization may file a written, signed complaint alleging that **an agency** (emphasis added) has violated a state or federal special education law or regulation."

Accordingly, the legal responsibility for implementing IEPs is an agency responsibility, not an individual responsibility. Therefore, it is not within the jurisdictional authority for a complaint investigator to make conclusions regarding individuals. An individual may fail to implement an IEP, but any finding of non-compliance with special education requirements must be directed at the agency involved (the school district).

During the investigation of the parent's complaint, no violation of special education laws and regulations was substantiated with regard to the concerns identified under this issue (i.e. 1:1 paraeducator support, use of the seclusion room, and the absence of specific visual safeguards. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

**Issue #8: The building principal is accountable for the teacher's failure to follow the student's BIP on September 18, 2015.**

Under this issue, the parent asserts that the building principal should be held accountable for failing to take action regarding the teacher's alleged failure to follow the student's BIP.

As stated above, under Issue #7, the legal requirement to implement an IEP is an agency requirement. In addition, no violation of special education laws and

regulations has been established with regard to the incident of September 18, 2015. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #9: Placement of the student in seclusion on September 18, 2015 constitutes a violation of FAPE under the IDEA because these actions were not in compliance with the student's IEP. Further, the building principal was aware that 1:1 paraeducator support was not being provided and endorsed the actions of the teacher.**

The parent again alleges that the circumstances surrounding the September 18<sup>th</sup> incident represent a violation of FAPE because 1:1 paraeducator support was not being provided to the student at all times, seclusion was implemented, and safeguards (signage and footprint on the carpet) were not in place. The parent singles out the building principal for complicity with these alleged FAPE-related violations.

As previously stated above, under Issue #7, the requirement to provide a FAPE is an agency requirement, and no violation of special education laws and regulations has been established with regard to the September 18, 2015 incident. The student's IEP does not require the use of the type of safeguards the parent specifies in her complaint. There is no evidence of bad faith or gross misjudgment on the part of the building principal. A violation of special education laws and regulations is not established on this issue.

**Issue #10: The Special Services Coordinator is accountable for the district's failure to appropriately implement the student's BIP on September 18, 2015.**

Under this issue, the parent alleges personal responsibility on the part of the special services coordinator for the "covering" for violations regarding the failure of the special education teacher to follow the student's BIP on September 18, 2015.

As was established under Issue #7, implementation of an IEP is, legally, an agency requirement, not an individual requirement. A violation of special education laws and regulations was not substantiated with regard to the implementation of the student's BIP on September 18, 2015. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #11: The student was inappropriately removed from the Least Restrictive Environment (LRE) on three occasions when he was placed in the seclusion room.**

Least restrictive environment (LRE) means the child is provided special education and related services with peers who are not disabled, to the maximum extent appropriate (K.A.R. 91-40-1(II)).

The May 14, 2015 IEP for this student contains the following statement with regard to LRE:

“(The student will participate with his general education class to the fullest extent appropriate. This includes lunch, **recess** (emphasis added), partial math, partial science, spelling tests, music, art, p.e., computer and library...”

The “Service Delivery” section of the May 2015 IEP states that the student was to receive 1510 minutes of special education services per A-E schedule.

The parent alleges violation of LRE on three separate occasions.

#### **Removal From Recess**

The parent contends that the student was inappropriately punished by a removal from recess on October 22, 2015. The parent alleges that instead of participating in recess with general education peers, the student was made to remain in his special education classroom where he was to work on his iPad. The Home/School Communication Note provided by the district shows that the student participated in recess on October 22<sup>nd</sup> and was engaged in “sports” with general education peers. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

#### **Removal From the LRE Due to the Use of Seclusion**

The parent contends that by placing the student in seclusion on September 18, 2015 and October 23, 2015, the district removed the student from the LRE.

According to the district A-E schedule for the 2015-16 school year, September 18<sup>th</sup> was an “A” day. The daily schedule for the student shows that the student was to be in the special education classroom at 1:14 PM – the start of a 2-minute period of seclusion. The schedule shows that the student was still to be in the special education classroom at 1:17 PM and was not expected to move to a general education classroom setting until 1:30. The student exited the seclusion room after 3 minutes. This 5-minute period represents less than 1% of the student’s scheduled A-E special education service time.

The student was to be receiving special education services in a special education classroom setting at the time of the September 18<sup>th</sup> incident. The seclusion room is located within the special education classroom, and for the entirety of the seclusionary period the student was under the supervision of a special education

teacher. Seclusion did not alter the amount of special education support provided to the student on this date.

A data sheet provided by the district shows that the student continued to exhibit inappropriate behaviors that led to his being kept in the special education classroom until 2:05 PM when he would have been sent on to music with general education peers. While the student did miss a 30-minute integration opportunity on September 18<sup>th</sup>, the student was not held in seclusion at any point during that time. The decision that the student remain in the classroom was made because *the student continued to exhibit a high level of aggressive behaviors for 20 minutes after exiting the seclusion room.*

The district A-E schedule for 2015-16 shows that October 23<sup>rd</sup> was a "B" day. On that date, the student began a 4-minute and 10-second period of seclusion at 11:36 AM. Seclusion was reinstated for 3 minutes and 16 seconds at 11:42 AM. The student's schedule shows that he would have been in the special education setting throughout this period. The student's behavior report for this date indicates that the student was still in the special education setting at 11:55 AM. The total 7-minute and 26-second period represents less than 1% of the student's scheduled A-E special education service time.

The use of seclusion in accordance with the Freedom from Unsafe Restraint and Seclusion Act, when a student presents an immediate danger of physical harm to self or others, applies to all Kansas students who are in a learning environment that receives public funding or which is subject to the regulatory authority of the state board of education. It includes children with disabilities. When seclusion is used in accordance with this Kansas statute, it will almost certainly result in a brief, but different environment than the educational placement specified in an IEP. Whether the use of seclusion, as authorized by this law results in a change of the placement specified in an IEP will have to be made on a case by case basis.

With regard to this specific allegation, the student's placement in seclusion on September 18 and October 23, 2015 did not significantly deny him an opportunity for general education integration. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #12: The district has failed to provide a free appropriate public education (FAPE) for the student because the classroom environment is inappropriate.**

*The parent contends that the special education teacher has failed to properly manage the classroom and has consistently created a hostile environment.*

The parent asserts that the student's schedule has frequently been altered and that he has been removed from classroom activities. Specifically, the parent

alleges that his schedule included two hours of "idle" time at the end of the day and that "movie" was part of that time. The parent reports that an extra recess was added to the student's day, and iPad breaks were also added to his schedule.

Additionally, the parent contends that the student was placed in the seclusion room on October 22, 2015 and that the use of the seclusion room was not reported to the parent and concealed during a meeting on October 23, 2015. The parent further asserts that the teacher has failed to report other incidents when *seclusion was used in the classroom*.

The district strongly disputes the parent's allegations regarding a "hostile environment" in the special education classroom. Staff provided feedback during an internal investigation conducted by the district in October 2015. Two AIAs (Autism Instructional Assistants) and eight paraeducators were interviewed. All of these staff members had observed the teacher working with the student on a regular basis. All denied seeing the special education teacher engage in any harassment or bullying of the student. All denied having ever seen the teacher use seclusion as a punishment or as a tool for behavior management.

The parent's complaints regarding harassment and bullying have also been investigated by the Police Department and the Kansas Department for Children and Families. These investigations have found the parent's allegations to be unsubstantiated.

With regard to the student's schedule, the district maintains that while changes have been made to the schedule, those changes were put in place to better serve the student. The district asserts that it has consistently been the desire of district staff to have the student successfully integrated with age/grade peers. Any changes made to the student's schedule have been executed with that goal in mind.

There is no evidence to support the parent's contention that the student spent extended periods of time working on an iPad. On the contrary, because the use of the iPad was a very rewarding activity for the student, his time on the device was limited as an earned reinforcer.

A review of the student's schedule shows it did not include two hours of "idle" time, and movies were not built into his schedule. The student only participated in one general education recess; any additional "recess" periods during the student's time in the special education classroom were in fact movement breaks.

Investigations into the classroom environment in the Autism program have failed to support the parent's assertions. Additionally, the parent has provided no evidence to support her contention that incidents of seclusion have gone

unreported by the special education teacher. Violations of special education laws and regulations are not substantiated on these issues.

**Issue #13: The district permitted the student to watch *Harry Potter*, which violates his May 2015 IEP.**

The "Additional Supports" section of the student's May 2015 IEP contains the following statement:

"Parent does not want (the student) to participate in curriculum that involves information/stories/activities related to ***witchcraft*** (emphasis added), ghosts, Zodiac signs, or Halloween."

The parent contends that the student reported he had seen "Aunt Marge" – a character from the movie *Harry Potter* – while at school.

The district denies that the student has ever been shown *Harry Potter* movies at school. While building policy permits G rated movies to be shown to students, the *Harry Potter* movies are rated PG or PG13. No PG rated movie may be shown unless a parent gives written permission for their child to view such a movie.

Any movie shown to students is expected to support the curriculum being taught, and the district states that *Harry Potter* movies would not be approved for any classroom at the school.

There is no evidence that the student was shown the movie *Harry Potter* while at school. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #14: The district failed to provide a plan of action with positive behavior supports following the use of the seclusion room.**

The parent asserts that a plan of action with positive behavior supports has never been presented subsequent to the implementation of seclusion. According to the parent, she has not been provided with any data to indicate that the team had assessed the behavior leading to the student's placement in the seclusion room nor has she been given any indication of specific actions that would be taken to prevent future seclusionary placement.

The student was placed in seclusion twice on April 10, 2015 – the only times that seclusion was used with this student during the 2014-15 school year. At the time seclusion was used, the district was in the process of completing a re-evaluation. Data from the April 10<sup>th</sup> incident and other detailed behavior data was utilized during the assessment process. A Functional Behavior Assessment (FBA) was incorporated into the re-evaluation, and the results of the full evaluation were

reviewed with the parent on May 7, 2015. The FBA report reflects data collected over the period of March 25 – May 5, 2015 and identifies three student behaviors – “property destruction,” “invasive personal space,” and “aggression.” For each of the target behaviors, the FBA lists common antecedents, behavioral context, and other behavior-related features.

On May 10, 2015, a Behavior Intervention Plan was developed for the student and incorporated into his IEP. The student’s BIP contains a detailed listing of “Positive Behavior Supports.”

The first and second seclusionary episode for this student for the 2015-16 school year occurred on September 18, 2015. An informal meeting was held on October 8, 2015; the parent provided the investigator with an audiotape of that meeting. On the tape, the participants are heard discussing a variety of topics including adjustments the teacher has made to try to avoid “melt-downs” on the part of the student. The teacher is heard telling the parent that she is using the strategies outlined in the student’s BIP and has built “breaks” into the student’s day to see if those breaks reduce student frustration during the afternoon – the time of day when the student’s behavior has been most challenging. The parent and staff discuss strategies that have and have not worked. Detailed behavioral data was collected on the student on a daily basis; staff did not review specific data with the parent during the meeting, but the parent also did not ask for such a review.

As stated above, under Issue #2, Section 5 of the Freedom From Unsafe Restraint and Seclusion Act outlines actions required of districts if a ***third*** emergency safety intervention is used for a third time ***during a school year*** for a student who has an IEP. The student’s IEP Team must meet within 10 days after the third incident to discuss the incident and consider the need to conduct a functional behavioral analysis, develop a behavior intervention plan or amend either if already in existence, unless the IEP Team has agreed on a different process. The time for calling a meeting pursuant to this section can be extended beyond the 10-day limit if the parent of the student is unable to attend within that time period.

An Emergency Safety Intervention (in this case, seclusion) was used for the third time during the 2015-16 school year on October 23, 2015. The student left school on that date and has not returned. On October 29, 2015, the special services coordinator sent an email to the parent asking the parent to meet with the team. That same date, the parent responded to the special services coordinator via email indicating that she was “finished meeting with (the special education teacher).” On October 30, 2015, the coordinator emailed the parent to offer a meeting with the building principal to discuss her concerns; the building principal also sent an email to the parent proposing a meeting with the coordinator and herself on November 2, 2015. The parent declined that meeting via email on October 30<sup>th</sup> citing a schedule conflict, and the principal then offered

to meet on November 3, 2015. In an email on November 2, 2015, the parent stated that she saw "no point in meeting again."

On November 4, the Director of Special Services sent an email to the parent suggesting that the student be returned to school and asking the parent to provide dates for a team meeting. Correspondence continued between the district and the parent between November 9, 2015 and January 20, 2016, but a meeting of the parties has never successfully been scheduled.

*Evidence provided by the parent and the district shows that positive behavioral supports were initially put in place under a BIP on May 14, 2015. Following the first use of seclusion for the 2015-16 school year, changes were made to the student's instructional day in an effort to reduce the incidence of behaviors that might result in seclusion. Following the third time an emergency safety intervention was implemented on October 23, 2015, the district attempted to meet with the parent as required by state regulations, but the parent has not yet agreed to meet. Under these circumstances, a violation of special education laws and regulations is not substantiated.*

**Issue #15: The district falsifies data.**

The parent alleges that data has been falsified. Specifically she reports that data regarding the student's removal from recess opportunities with general education peers has been altered. The parent did not, however, provide the investigator with sufficiently specific details regarding this allegation to allow for a meaningful investigation. A violation of special education laws and regulations is not substantiated on this issue.

**Issue #16: The student's classroom lacks the structure called for in his IEP, and changes to his general education classroom placements have been made without regard to the student's diagnosis.**

The parent contends that the special education classroom was "chaotic" and had a negative impact on the student. The parent further alleges that changes were capriciously made regarding into which general education classrooms the student would be integrated. The parent asserts that the schedule for the student was changed daily to meet the needs of the teacher.

**Classroom Environment**

The Autism Classroom is, as observed by the investigator during an on-site visit on February 9, 2015, well-structured and highly organized. The program is housed in two classrooms in an elementary school. One classroom is set up with individual work areas for the students. The work areas are defined by bookcases or file cabinets so that the students are not distracted while working on individual programming. Students participate in individual programming during different

parts of the day depending on their individual schedules. The other classroom is set up with clusters of desks so that students can adapt to sitting in a desk for small group instruction. The room also has tables where students eat snacks and/or work together in small groups (games, leisure time, etc.). The seclusion room is located in this second classroom.

The area outside the two classrooms is structured to facilitate easy access to student lockers and to a check-in board where students make lunch selections and prepare for the start and end of the school day. Each student has an *individual visual schedule*. *The structure of the schedule varies based upon the needs of the students.* Some students have written agendas; others have picture schedules. As each activity is completed, the student removes the picture from the schedule and places it in the "finished" box. The schedules indicate activities in general education as well as those in the special education classroom.

The staff members in the classroom are trained to work with each student as they rotate among the students on a set schedule determined by the teacher. While working with a student, the staff member has the student's schedule and follows the schedule as indicated. They know the students' BIP and implement the positive supports throughout the day as well as intervene with inappropriate behavior as needed. The students have individualized reinforcement systems that are implemented by staff. Each student determines the reinforcer he is going to work for during that period of time and is reminded of that reinforcer as needed.

During the course of the February 9<sup>th</sup> classroom observation, the investigator saw students pass into and out of the classrooms in a structured manner under the supervision of an AIA or paraeducator.

### **Daily Schedules**

The district contends that while minor changes to the student's daily schedule were made between the start of the school year and October 23, 2015, none of those changes were made in response to the needs of the teacher. One of the changes noted by the investigator was made to reflect the student's participation in band.

### **Changes to Assigned General Education Classrooms**

The district states that the student's general education classroom assignment was changed only once between the start of the 2015-16 school year and October 23, 2015. That change was made by the building principal in mid-September. The student was integrated with 5<sup>th</sup> grade peers both before and after the change.

According to statements made by staff in an audiotape of a team meeting on October 8, 2015, the classroom into which the student was being integrated was a "better fit" for the student. Benefits of the change were outlined – including the increased availability of support staff, the presence of good role models for the student, and the supportive/inclusive nature of the new peer group. The parent is heard saying that the change had been "effective" and was a "good move." The parent is also heard observing that the student's "spirits are lifting" since the move.

*The Autism classroom appears to be well-structured and organized. There is no evidence to support the parent's contention that the student's classroom schedule was changed on a daily basis or that changes to the general education classroom assignment were capriciously made with no concern for the needs of the student. For these reasons, 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 not substantiated noncompliance with special education laws and regulations on issues presented in this complaint. However, USD #      is directed to take the following actions within 10 school days of the receipt of this report:

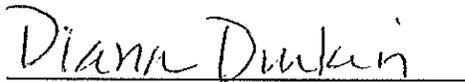
- 1) Schedule a date for an IEP meeting for the purpose of clarifying the dietary restrictions needed for this student, if any. If dietary restrictions are specified in the IEP as a result of this meeting, they shall be stated in a manner that is clear that the restrictions must be implemented.
- 2) Submit to Early Childhood, Special Education and Title Services, within 5 days after the meeting described in paragraph 1, above, a copy of: (a) the any revised IEP and (b) Prior Written Notice of any proposed changes to the students IEP, if any.

Further, USD #      , shall, within 14 calendar days of receipt of this report, submit to Special Education Services one of the following:

- 1) A statement verifying acceptance of the action or actions specified in this report;
- 2) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- 3) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (f).

### Right to Appeal

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

  
Diana Durkin  
Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

# 16FC03A

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

## DECISION OF THE APPEAL COMMITTEE

### PRELIMINARY CONSIDERATIONS

The Appeal Committee will address only the issues appealed by the parent that were specified in the original complaint report, dated February 9, 2016. New issues cannot be addressed in an appeal. In addition, the committee recognizes that, by both state and federal regulation, the timeline for considering state complaint allegations is one year from the date the complaint is filed. Therefore, although the Committee may consider any information it deems relevant, it will restrict any findings of non-compliance with law to the one-year timeline from the date of filing. This complaint was filed on January 11, 2016.

In an appeal, such as this one, where legal requirements outside of special education requirements are involved, the Appeal Committee only has jurisdiction to address the legal requirements of special education. This appeal involves a complaint in which emergency safety interventions (ESI) were used. K.S.A. 2015 Supp. 72-89d01 et seq., the Freedom from Unsafe Restraint and Seclusion Act, provides the complaint process available for allegations regarding whether a particular use of an emergency safety intervention was used in accordance with law. Therefore, the Committee cannot make any conclusions regarding whether any actions of the district were in compliance with the Freedom from Unsafe Restraint and Seclusion Act. The committee understands how important it is to all of the parties that seclusion be implemented in accordance with law. This is simply not the venue to challenge whether specific instances of seclusion conform to the Freedom from Unsafe Restraint and Seclusion Act. Under the Act, a parent may file a complaint regarding the use of an ESI through the local dispute resolution process. The statute requires that the complaint be filed within 30 days of notification of the use of an ESI. With regard to the allegations in this complaint that are connected with the use of seclusion, the committee will restrict its review to consider only whether the district's use of seclusion resulted in a failure of the district to comply with special education laws and regulations.

With regard to the reference on page 2 in the parent's letter of appeal of an ESI on September 23, 2015, the Committee notes that the complaint investigator sent an e-mail explanation to the parent and to the Kansas State Department of Education (KSDE) on February 16, 2016, stating: "To be clear, I did not investigate any ESI incident with a September 23, 2015 date. There is a typographical error under the listing of documents I reviewed (i.e. 'Photographs of staff injuries related to the ESI incident of September 23, 2015'). The correct date is September 18, 2015." This information was sent electronically to the parent six days prior to the parent's submission of the complaint appeal to KSDE. Accordingly, the committee concludes there was no ESI with this student on September 23, 2015, and further consideration of any part of the appeal related to this date is unnecessary.

Finally, this appeal procedure is a review process. The committee does not conduct a new or separate investigation, or independently determine the weight of evidence or the credibility of witnesses. Rather, the committee reviews the findings and conclusions of the investigator, that are being appealed, to determine whether the evidence presented is strong enough to support the findings and conclusions in the report. However, because the parent's appeal letter asserts that the investigator did not conduct a proper investigation, a member of the committee made an on-site visit to both the \_\_\_\_ district and the district where the student had previously attended. These visits consisted of interviews with school personnel and a review of pertinent records related to this appeal.

With regard to the parent's statements indicating an improper investigation, the committee finds that the complaint report itself documents that the investigator listened to the audio recordings submitted by the parent, reviewed all of the documents listed in the body of the report, interviewed relevant school personnel, and conducted an on-site investigation, which included a personal observation of the classroom where the student received educational services. The fact that the parent disagrees with the findings and conclusions of the investigator is not sufficient evidence to substantiate that the investigator did not conduct a proper investigation. Based on all the evidence submitted in the complaint investigation, the report of the investigator, the information in the appeal letter of the parent, the information in the response submitted by the school district, and the information obtained in the committee's on-site visit, the committee has determined that the complaint investigator conducted a thorough investigation of the facts related to this complaint, provided a report that included a detailed description of the facts uncovered in the investigation, and, except where this decision finds otherwise, reached conclusions that were reasonably derived from her findings of fact.

### BACKGROUND

This matter commenced with the filing of a complaint on January 11, 2016, by Toni \_\_\_\_, on behalf of her son, \_\_\_\_ \_\_\_\_, against Unified School District No. \_\_\_\_, \_\_\_\_ Public Schools. Ms. \_\_\_\_ will be referred to as the "parent" in the remainder of this decision, and \_\_\_\_ will be referred to as the "student." The complaint (16FC\_\_-001) alleged that USD \_\_\_\_ failed to comply with the requirements of special education laws and regulations.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the Early Childhood, Special Education, and Title Services section of the Kansas State Department of Education (KSDE). Following the investigation, an Initial Report was issued on February 9, 2016. Although some corrective action was required, that report concluded that there were no violations of special education laws and regulations.

Thereafter, on February 22, 2016, the parent filed an appeal regarding 15 of the issues addressed in the Initial Report, excepting only issue 13. Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the original complaint, the investigator's report, information contained in the KSDE file regarding this matter, the parent's notice of appeal, the district's response to the appeal; the student's IEPs and other information collected by the Appeal Committee.

## DISCUSSION OF ISSUES ON APPEAL

Issue 1: The student has on numerous occasions been given food containing dairy and/or chocolate even though his IEP specifically prohibits him from having these types of foods.

The reference to dairy and chocolate in the student's IEP appears in both the 3/10/15 and 5/14/15 IEPs. In the "Relevant Medical Issues" section, the IEPs state "Mom reports lactose intolerance but no known allergies." Under the title "Additional Supports," the IEP says: "Parent does not want [the student] to eat dairy products or chocolate."

In her appeal, the parent says the student's IEPs clearly state that the student is to have no dairy whatsoever. The district disagrees. Much of the controversy concerning this provision centers around previous conversations between the parties as to what the term "dairy" means and whether there were exceptions in which the student was allowed to receive dairy products or chocolate. The parties have significant disagreements about the content of these discussions.

The investigator found the language in the IEP on this subject was unclear. The investigator also found that the statement in the IEP that the parent did not want the student to eat dairy products or chocolate indicated a parent preference and not a directive to school personnel to withhold these products from the student. Accordingly, the investigator concluded that a violation of law had not occurred, but ordered the district to schedule an IEP meeting for the purpose of clarifying the dietary restrictions needed for this student, if any. The order said that if dietary restrictions are specified in the IEP as a result of this meeting, they are to be stated in a manner that is clear that the restrictions must be implemented.

The review committee looked at all the evidence presented on this matter, but determined that it was not necessary to make findings based on the history of previous conversations and interactions between the parties. There are two principles of law involved in this case that greatly simplify the analysis:

First, in Sytsema v. Academy Sch. Dist. No. 20, 538 F.3d 1306, 50 IDELR 213 (10<sup>th</sup> Cir. 2008), the United States Circuit Court of Appeals for the 10<sup>th</sup> Circuit has said that the IEP is the written document developed by the IEP team. Accordingly, when determining the content of an IEP, the review should be restricted to an examination inside the four corners of the document. Evidence outside of the document, including oral discussions, promises or compromises may not be considered. This decision by the 10<sup>th</sup> Circuit was made to prevent the very kind of unproductive arguments presented by both sides in this issue that are difficult to substantiate. The Appeal Committee notes that Kansas is in the 10<sup>th</sup> Circuit and the decisions of the Court of Appeals for the 10<sup>th</sup> Circuit are law in Kansas.

Second, the Office of Special Education Programs (OSEP), is the office within the United States Department of Education that writes the federal special education regulations. In guidance documents over the years, OSEP has consistently said that it is the school district that must ensure that services are specified in the IEP "in a manner that is clear to all who are involved in both the development and implementation of the IEP." See, Federal Register, Vol. 64, March 12, 1999, p. 12479.

Using these two principles, the committee makes its decision regarding this issue based on the language in the IEP, and assigning the duty of making that language clear, to the writer of the IEP – the school district.

As indicated previously, the investigator found that the language in the IEP did not clearly direct school personnel to withhold dairy products from the student, and ordered the district to conduct an IEP meeting to clarify the language. The committee agrees with the investigator that the statement “Parent does not want [the student] to eat dairy products or chocolate,” does not direct school personnel to withhold these foods from the student. If this statement had been in another section of the IEP, under the heading “Concerns of the Parent” for instance, the committee believes it would be clear to most readers that it was a statement of parental preference and not a mandate to school personnel. In this case, however, the statement appears in the IEP under the title “Additional Supports.” In addition, this statement is inserted into a service grid that also specifies a setting (all areas), a start date (5/14/15), an anticipated frequency (Daily) and an anticipated duration (5/14/16). If the statement was only intended to indicate a parental preference, there would be no need to provide this additional information. In addition, the district’s response to this appeal appears to indicate that the district also believes it is obligated to withhold dairy products and chocolate, at least to some extent. With regard to the controversy regarding the meaning of the term “dairy products,” in the IEP, it is the duty of the IEP team to craft an IEP that is clear to everyone involved in the process, including the parent. That did not happen in this case. When a team produces an IEP that is not clear, and a controversy such as this one arises, the committee will construe the ambiguity against the party with the obligation to write an IEP that is clear. Accordingly, the committee reverses the investigator’s conclusion on this issue, and concludes: first, that this student’s current IEP directs school personnel to withhold dairy products and chocolate from the student on all occasions, and without exception; and second, the term “dairy products” means all food items containing any amount of milk or milk products.

Although the committee has reversed the decision of the investigator on this issue, the committee believes the corrective action ordered by the investigator on this issue is the appropriate action to be taken. Accordingly, the committee directs the district to complete the corrective action specified in the complaint report, taking into consideration any right of the parent to grant or withhold consent. No additional corrective action is required by this committee.

Issue 2: By not providing him with 1:1 paraeducator support on September 18, 2015, the district failed to comply with the student’s IEP. Because the student did not have this required support, he was subsequently placed illegally in a seclusion room.

This is another issue involving a controversy regarding conversations between the parent and school officials. The parent’s appeal states that school personnel had told her that all the children assigned to the Prairie Center program would have 1:1 support. In its response to this appeal, school district officials denied making that statement to the parent. School officials stated that the program currently has a 1:1 staff to student ratio and provided literature to support that provision. However, school district officials also stated that the 1:1 staff to student ratio does not mean that every student will be accompanied by an adult for every minute of the day.

Rather, the ratio is only an administrative staffing designation. If a student is to have 1:1 support all day, school officials say that would need to be specified in an IEP.

The committee has determined it does not need to decide which party is more accurate in its description of these conversations. Again, relying on the direction provided by the United States Circuit Court of Appeals, in Sytsema v. Academy Sch. Dist. No. 20, the committee restricts its review to an examination of the IEP itself. After a careful review of this student's IEPs during the past calendar year, the committee finds that there is no mention of 1:1 support for this student.

The investigator concluded there had not been a failure to implement the IEP on this issue. The committee sustains the investigator's conclusion.

Issue 3: The district failed to follow the student's Behavior Intervention Plan (BIP) on September 18, 2015, because the teacher was supervising four students in the classroom.

The parent alleged that school personnel could not have implemented the student's BIP on September 18 because the teacher was alone with other students in the classroom. The investigator found that the IEP did not require 1:1 paraeducator support at all times during the day, and this committee has already sustained that finding. In addition, on page 12 of the report, the investigator cited a written description of the incident that led to seclusion of the student on September 18. A portion of that description supported the investigator's finding that the school did implement the BIP on September 18. Specifically, when the student's behavior began to change, the teacher gave him an instructional prompt. When the student ran to the break area, the teacher continued to communicate by asking him questions. Both of these actions are in accordance with the student's BIP.

The investigator concluded there had not been a failure to implement the IEP on this issue. The committee sustains the investigator's conclusion.

Issue 4: The special education teacher failed to follow the student's BIP on October 23, 2015.

The investigator found that the teacher and other staff members had taken the following actions specified in the student's BIP: (a) strategically positioning themselves between the student and another child to block possible injuries; (b) removing other children from the classroom; (c) assessing the potential difficulty of tasks being presented to the student; (d) questioning the student in an attempt to determine the trigger for his noncompliance; and (e) presenting choices of activities to allow a sense of control. There is no evidence to the contrary.

The investigator concluded that there had not been a failure to implement the BIP on October 23, 2015. The committee sustains the investigator's conclusion.

Issue 5: The district did not comply with the student's IEP because 1:1 paraeducator support was not provided to the student during recess on several occasions.

Again, following the direction of the United States Circuit Court of Appeals for the 10<sup>th</sup> Circuit, the committee restricted its review to an examination of the IEP. The committee finds that the IEP does not require 1:1 adult support for the student during recess. The investigator also found that the IEP did not require 1:1 paraeducator support at all times during the day, and concluded that there had not been a failure to implement the IEP on this issue. The committee sustains the investigator's conclusion.

Issue 6: On April 7, 2015 the district failed to follow the student's BIP.

This issue involves an unfortunate circumstance, which was uncovered when a member of this committee made a visit to the district where the student had previously attended. The committee member learned that this student had a BIP while attending school at the previous district. The BIP existed as a separate document. By error, the electronic copy of the BIP was not attached to the IEP. When the previous district forwarded the student's records to the \_\_\_\_ district, the IEP was sent but the BIP was not. Therefore, when the \_\_\_\_ district developed an interim IEP for this student on March 10, 2015, it was unaware that a BIP was supposed to have been attached to the previous IEP. The previous IEP sent to \_\_\_\_ only indicated that behavior would be addressed through the student's goals and accommodations.

The interim IEP dated March 10, 2015, under the heading "Behavioral Needs" has checked boxes indicating the student exhibits behaviors that impede his learning or that of other and that a BIP is attached. However, the district told the investigator those boxes were incorrectly marked and that there was not BIP developed or placed in the IEP because it was believed that an effective BIP could not be developed until completion of the on-going re-evaluation. An examination of the IEP by the investigator did not uncover a BIP and the parent did not produce one for the investigator. The investigator found that no BIP was in place on April 7, 2015, and therefore concluded that there had not been a failure to implement a BIP.

It was the failure of the previous district to transfer the full educational records of the student to \_\_\_\_, when the student returned to \_\_\_\_ in February of 2015, that resulted in the loss of a BIP for this student. This illustrates the important responsibility districts have to make sure the entire educational record is transferred. The previous district is voluntarily developing a plan to revise its procedures so that this does not happen again. The committee also notes that the student's current IEP does have a BIP. It is the committee's opinion that the \_\_\_\_ district cannot reasonably be held responsible for not implementing a BIP on April 7 that it did not know existed.

The investigator found that a BIP was not in existence on April 7, 2015, and concluded that there had been no violation of special education law. The committee overturns the finding of the investigator and finds, instead, that a BIP did exist on April 7, 2015, but that it had not been forwarded to the \_\_\_\_ district. However, the committee sustains the investigator's conclusion that a violation of special education law is not substantiated.

Issue 7: Placement of the student in seclusion on September 18, 2015 constitutes a violation of FAPE under the IDEA because these actions were not in compliance with the student's IEP. Further, a special services coordinator sanctioned the actions of the teacher.

Part of this allegation was based on the parent's belief that the student's IEP required 1:1 adult support throughout the day. The investigator found that the IEP did not require 1:1 para support at all times during the day, and this committee has already sustained that finding, in Issue 2 of this decision.

Included in this issue is the allegation of a failure to provide specified visual safeguards in the classroom to prevent the student from exiting the classroom (such as signage on the door or "stop" footprints on the carpet). The investigator found that the student's May 14, 2015 IEP did not require the use of these kinds of visual cues. The committee agrees and sustains this finding.

This issue also includes an allegation that a specified person employed by the district has a personal liability for alleged violations of special education laws and regulations. The investigator correctly noted that both state and federal law place the responsibility for providing a Free Appropriate Public Education and for following the procedural requirements related to special education squarely on public agencies, and not on individuals. The investigator also correctly noted that she did not have jurisdictional authority to investigate this kind of issue because both federal and state regulations specify that a special education complaint to a state department of education, such as this one, must allege a violation of law by a public agency. Allegations of a violation of law solely directed at an individual are not subject to the state complaint process. Accordingly, the investigator concluded that: (a) there was no failure to implement the IEP with regard to 1:1 para support or the use of visual cues; and (b) the investigator did not have authority to investigate the allegation or make conclusions regarding personal responsibility of school personnel. The committee sustains these findings and conclusions.

Issue 8: The building principal is accountable for the teacher's failure to follow the student's BIP on September 18, 2015.

As the committee discussed in Issue 7, above, both state and federal law place the responsibility for providing a Free Appropriate Public Education and for following the procedural requirements related to special education squarely on public agencies, and not on individuals. In addition, both federal and state regulations specify that a special education complaint to a state department of education, such as this one, must allege a violation of law by a public agency. Allegations of a violation of law solely directed at an individual are not subject to the state complaint process.

The investigator concluded she did not have jurisdiction to investigate the allegation in this issue. This committee sustains that conclusion.

Issue 9: Placement of the student in seclusion on September 18, 2015 constitutes a violation of FAPE under the IDEA because these actions are not in compliance with the student's IEP. Further, the building principal was aware that 1:1 paraeducator support was not being provided and endorsed the actions of the teacher.

Again, the investigator found that the IEP did not require 1:1 para support at all times during the day, and concluded that there had not been a failure to implement the IEP on this issue. And,

again, the investigator found that a complaint must allege a violation of law by a public agency, not an individual. The investigator concluded that the allegation of a violation of special education laws and regulations was not substantiated. For the reasons specified previously regarding the issue of 1:1 support, and personal liability, the committee finds the allegations presented in this issue to be duplicative and sustains the conclusion of the investigator that the allegation of a violation of special education laws and regulations is not substantiated.

Issue 10: The Special Services Coordinator is accountable for the district's failure to implement the student's BIP.

Again, the investigator found that a complaint must allege a violation of law by a public agency and concluded that the parent did not, in this issue, allege a violation by a public agency. For the reasons specified previously regarding the issue of 1:1 support and personal liability, the committee sustains the findings and conclusions of the investigator on this issue.

Issue 11: The student was inappropriately removed from the Least Restrictive Environment (LRE) when he was placed in the seclusion room.

On this important issue, the committee disagrees with the parent and the district.

In page 16 of her appeal, the parent states: "This was not my complaint. My complaint was that the seclusion room itself was a violation of [the student's] LRE, which would have been the SPED classroom." Under this view, any removal of a student from the educational setting specified in an IEP would be a violation of the LRE requirement, even when the removal was necessitated by an emergency, such as the removals that form the basis for much of this complaint. The committee respectfully disagrees.

On page 9 of the district's response to this appeal, it cites Kansas Administrative Regulation 91-40-1(11). That regulation defines the term "Least Restrictive Environment and LRE." The regulation says these terms mean "the educational placement in which, to the maximum extent appropriate, children with disabilities, including children in institutions or other care facilities, are educated with children who are not disabled..." The district's response then stated the district's interpretation of this regulation to mean that if a student was in a special education setting, and separated from students who are not disabled, and was then moved from the special education setting to another kind of setting that also did not have children who are not disabled, there could be no violation of the LRE requirement because such a move would have no impact on the student's access to nondisabled peers. Under this view, it appears a child could be removed from a resource room to a self-contained room, a special school, an institution or to a homebound program and such a move would not implicate the child's right to be educated in the least restrictive environment. The committee respectfully disagrees.

Addressing the district's position, the committee notes that the federal regulation regarding LRE adds that school must ensure the availability of a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (34 C.F.R. 300.115). The Office of Special Education Programs

(OSEP) has said “Historically, we have referred to ‘placement’ as points along the continuum of placement options available for a child with a disability...” The United States Circuit Court of Appeals has added “Placement options, such as regular classes, special classes, special schools and home instruction differ from each other by the extent to which they depart from a ‘mainstream’ assignment.” Wilson v. Fairfax County School Board, 372 F.3d 674 (4<sup>th</sup> Cir. 2004). The committee reads the regulation cited by the district in conjunction with this kind of guidance provided by OSEP and by the courts over time. Accordingly, it is this committee’s interpretation that any movement of a child from one educational environment to another, that is farther away from the regular education environment, is a change in placement to a more restrictive environment. Accordingly, the committee believes movement from a resource room to a self-contained room, for example, is a movement to a more restrictive environment.

The committee next addresses the parent’s interpretation that any removal of a student from the educational placement specified in the student’s IEP is a violation of a student’s right to be educated in the LRE. As indicated previously, the committee disagrees. There may be legitimate reasons for temporary removals of a child from the placement specified in the IEP. For example, the law permits a district to remove a child from the setting described in the IEP for up to ten school days in a school year for disciplinary reasons. However, in the three situations described in this complaint, the use of the seclusion room was not a disciplinary removal. These removals were emergency removals. The committee expects students to be protected in emergency situations. If there is a fire, the committee expects students will be moved outside of the building. If there is a tornado, the committee expects students will be moved to the designated safe area in the building. The committee expects that all students will be moved to these locations, regardless of whether they have an IEP. Those students who have an IEP, may, from time to time be involved in an emergency situation. In those instances, emergency procedures should be used, just as they would be used with children who do not have an IEP. In the same way, any child whose behavior presents a reasonable and immediate danger of physical harm to the student, or to others, with the present ability to effect such physical harm, may be subjected to an emergency safety intervention (ESI), as authorized by Kansas law. A challenge to whether a particular use of an ESI is in compliance with the Kansas Freedom from Unsafe Restraint and Seclusion Act, would need to be addressed in the manner prescribed by that law.

The investigator found that seclusion was used for a total of 5 minutes on September 18 and a total of 7 minutes and 26 seconds on October 23. Both of these instances of seclusion removed the student from the educational setting specified in the IEP for less than 1% of his service time. The investigator found, in these instances, the use of seclusion did not significantly deny the student an opportunity for general education integration, and concluded that a change in placement had not occurred. The committee agrees with this finding, but for a different reason.

That is, the committee agrees with the findings of the investigator on this issue, but not based solely on the short amount of time the student was removed from the educational setting specified in his IEP. As explained above, the three removals that form the basis of much of this complaint were emergency removals, not removals for convenience or disciplinary reasons. The committee sustains the investigator’s conclusion that a violation of special education laws and regulations is not substantiated on this issue.

Issue 12: The district failed to provide a free appropriate public education (FAPE) for the student because the classroom environment is inappropriate.

In this issue, the parent alleged that the classroom was poorly managed and that the teacher created a hostile environment. The investigator cited an internal district investigation in which two Autism Instructional Assistants and eight paraeducators were interviewed. All of these staff members had observed the teacher working with the student on a regular basis. All denied seeing the special education teacher engage in any harassment or bullying of the student, and all denied having ever seen the teacher use seclusion as a punishment or as a tool for behavior management. The investigator also observed the Autism classroom during an on-site visit on February 9, 2015, and described her observations in detail in Issue 16 of the report. The investigator found the classroom to be “well-structured and highly organized.” The investigator also found that the staff in the classroom know the contents of the student’s BIPs and implement them. In addition, the investigator found that there was no evidence to support the parent’s contention that the student spent extended periods of time working on an iPad or that there was scheduled “idle” time or that movies were built into the student’s schedule. The investigator concluded that there was not a failure to provide FAPE.

The committee finds the evidence presented supports the investigator’s findings on this issue. In addition, it is important to recognize that a child can receive a FAPE in a poorly organized classroom. Organization is not the key to a FAPE. The United States Supreme Court has ruled that a FAPE means special education and related services provided in conformance with an IEP that is reasonably calculated to provide educational benefit. Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176 (1982). The 10<sup>th</sup> Circuit Court of Appeals has clarified that within the 10<sup>th</sup> Circuit, the educational benefit mandated by the special education law must be only “more than de minimus.”

The member of this committee who conducted the on-site visit, obtained a copy of the student’s most recent quarterly progress reports. These progress reports show the student was making regular progress toward most of his annual IEP goals, until he was unilaterally removed from school by his parent on October 23, 2015. Under that circumstance, the committee finds that the student has received a FAPE even if there was some disorganization in the classroom, and, again, this committee believes that the evidence presented supports the investigator’s finding that the classroom is well-structured and highly organized.

The investigator concluded that the allegation of a violation of special education laws and regulations in this issue was not substantiated. The committee sustains that conclusion.

Issue 13: This issue was not appealed.

Issue 14: The district failed to provide a plan of action with positive behavior supports following the use of the seclusion room.

The investigator found: (1) the student was placed in seclusion twice on April 10, 2015 and this was the only instance of seclusion for this student during the 2014-2015 school year; (2) at the time of the April 10 seclusion the district was conducting a re-evaluation which included a

functional behavioral assessment (FBA); (3) the FBA identified three target behaviors and listed common antecedents, behavioral context and other behavior-related features for each of the targeted behaviors; (4) on May 10, 2015 the IEP team developed a behavior intervention plan (BIP) as part of the IEP; and (5) the BIP contained a detailed listing of positive behavior supports. These facts were uncontested, and these facts document that within 30 days of the first use of seclusion, the district completed a re-evaluation, including a FBA, and developed a new IEP with a new BIP. The committee finds that these facts support the investigator's conclusion that the school district did not fail to provide a plan of action with positive behavior support following the use of seclusion. The investigator concluded that a violation of special education laws and regulations did not occur with regard to this issue. The committee sustains the conclusion of the investigator.

Issue 15: The district falsifies data.

The parent alleged that certain data had been altered by school personnel. The investigator found that the parent did not provide sufficient facts to support this allegation, as required by federal regulations, at 34 C.F.R. 300.153, and concluded that the allegation was unsubstantiated.

One of the purposes of sending a committee member to the two districts where this student last attended was to address this issue on-site. No evidence was found to support the parent's allegation that school personnel had falsified data. The investigator's conclusion that a violation of special education laws and regulations is not substantiated on this issue is sustained.

Issue 16: The student's classroom lacks structure called for in his IEP, and changes have been made without regard to the student's diagnosis.

The allegation regarding a lack of structure in this issue was addressed in Issue 12, and will not be repeated here.

With regard to changes, the investigator found that the student's general education classroom was changed only once between the start of the 2015-2016 school-year and the date the parent removed the student from school. The change was a schedule change and did not involve a change of any educational setting specified by the IEP. The investigator found that the change did not result in any lack of structure required by the IEP, that the change had not been made without regard to the student's disability, and that the change was not a change of any placement specified in the IEP. The investigator concluded that the allegation of a violation of law was not substantiated. The committee finds that the evidence presented on this issue supports the findings and conclusions of the investigator. The conclusion of the investigator that a violation of special education laws and regulations is not substantiated on this issue is sustained.

## CONCLUSION

The conclusion of the investigator in Issue 1 is reversed. The corrective action required by the investigator on Issue 1 remains as specified by the investigator. The conclusion of the

investigator in Issue 11 is sustained, on other grounds. The remainder of the findings and conclusions in the investigator's report are sustained.

This is the final decision in this matter. Kansas Special Education Regulations provide no further appeal.

This Final decision is issued this 15th day of March, 2016.

APPEAL COMMITTEE:

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Colleen Riley

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Laura Jurgensen

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Julie Ehler

# 16FC04

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON OCTOBER 8, 2015

RECEIVED

NOV 23 2015

KSDE

DATE OF REPORT: NOVEMBER 16, 2015

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

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Director of the Special Education Cooperative, on October 23 and November 9, 2015. The investigator spoke by telephone with the student's mother on November 2, 2015.

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

- IEP for the student dated October 15, 2014
- Meeting Summary developed by the district
- Training Summary developed by the district
- List of interventions provided by the district
- Chronological Summary of Interventions/Instructional and/or Environmental Modifications
- Comparative Behavior Data summary for the 2014-15 and 2015-16 school years

### Background Information

This investigation involves an 8 year-old boy who resides in , Kansas. The student has diagnoses of Autism and ADHD.

The student and his twin brother are enrolled in a center-based Intensive Skills classroom in . He also receives services from a Speech/Language Pathologist.

## Issues

Federal regulations, at 34 C.F.R. 300.101 state that a "free appropriate public education (FAPE) must be available to all students residing in the State between the ages of 3 and 21." The regulations define FAPE as "special education and related services...that are provided in conformity with an individualized education program..." Federal regulations, at 34 C.F.R. 300.101 state that a student's IEP must be implemented as written.

*In her complaint, the parent raised four issues regarding the provision of services to this student:*

**Issue One: The district is not adequately addressing the safety needs of the student.**

The parent reports that she is very concerned about the student's safety in the school setting. According to the parent, the student is "a bolter" who has on several occasions run from the classroom. The parent reported the following incident as an indication of the lack of adult supervision:

The parent was meeting with the administrator and the student's teacher when a paraeducator from the classroom came to report that she couldn't find the student. The parent left the room to assist in finding the student. In a few minutes, classroom staff came to the parent to report that the Speech/ Language Pathologist had come to the classroom and had taken the student to her classroom for services.

The parent reported that on one occasion she came into the student's classroom to find he had climbed onto a shelf in the classroom. The parent also reported that there is a small area in the student's classroom that can be accessed by the student but not by the classroom staff. The parent fears that it might be impossible for staff to remove the student from the classroom in an emergency situation should he be in that small area.

*It is the district's position that it has made and is continuing to make a good faith effort to keep the student safe.*

Immediately after it occurred, the district investigated the incident involving the student's removal from the classroom by the Speech/ Language Pathologist. It was determined that the two paraeducators in the room at the time of the student's removal were well aware of the student's whereabouts. However, when those paraeducators changed places with other paraeducators and transitioned out of the classroom for lunch, they did not inform their replacements of the student's location. As a result of the incident, retraining and adjustments to the classroom protocol for staff were put in place to ensure effective communication regarding students.

The district reports that gym mats have been put in place to block the student's access to the space described by the parent. The student can no longer wedge himself into that area.

The district acknowledges that the student has run from staff and does climb on classroom furniture/equipment but contends that strategies have been put in place to address this concern. Those strategies include the following:

- Increasing the use of visual supports and prompts as outlined in the student's Behavior Intervention Plan (BIP) to assist with transitions and escape/avoidance behaviors..
- Training staff to maintain proximity supervision and to carry cell phones to secure assistance in all settings to address elopement issues.
- Specifically targeting climbing behaviors through the students BIP.
- Removing a sensory swing and other classroom items including furniture (i.e. movable storage shelves) to reduce the opportunity for the student to climb.
- *Rearranging the classroom to limit avenues for climbing.*

The district has met on several occasions with the student's parents and has solicited input from them regarding safety concerns and has reviewed and revised the student's BIP to address these issues.

Additionally, the district solicited assistance from the Kansas Technical Assistance System Network (TASN) to develop effective strategies to manage the student's behavior and keep him safe. TASN provides technical assistance to support school districts' systematic implementation of evidenced-based best practices. An initial request for a TASN on-site visit regarding the student's brother was faxed on August 26, 2015 and a follow-up meeting with TASN staff was scheduled for September 23<sup>rd</sup>. That meeting was subsequently postponed until October 9<sup>th</sup> so that TASN staff could also consult on-site regarding this student.

The investigator certainly recognizes that the risk of injury to his or her child is cause for concern for any parent. Districts must make every effort to respond to parental concerns and address safety issues. In the opinion of the investigator, this district does take the wellbeing of this student very seriously and is making ongoing efforts to address the safety concerns of the parent. Under these circumstances, a violation of special education laws and regulations is not substantiated.

**Issue Two: The student is missing educational opportunities because the classroom is inadequately staffed.**

According to the parent, she looked at the student's schedule on the occasion when she entered his classroom and discovered he had climbed onto a shelf.

The schedule indicated that he was to be in Music, but the paraeducator reportedly told the parent that he could not go to Music because the required number of paraeducators (2) necessary for his transition was not present. The parent contends that this incident indicates the student is not receiving one-to-one adult supervision as is called for in his IEP.

The parent further contends that the student is not consistently receiving twice-daily 15-minute Direct Instruction sessions with his supervising teacher. According to the parent, she has observed the teacher entering the classroom several minutes into the designated Direct Instruction time and ending the session before spending a full 15 minutes with the student.

The IEP for the student dated October 15, 2014 stated that he was to receive special education services outside of the regular education classroom setting 2 days per week for 280 minutes and 3 days per week for 265 minutes. He was to "receive adult support when he attends Lunch, Recess, and Music."

The district contends that its programs have provided the student with the special education services called for in his October 2014 IEP.

The district reports that an instructional approach called "Structured Teaching" is used in the student's classroom. The University of North Carolina developed the Structured Teaching intervention philosophy for use with students with communication delays including students with Autism. "Direct instruction" is one component of Structured Teaching. The approach recommends two 15-minute direct instruction sessions along with other rotations including structured play, sensory time, and independent work.

The student's October 2014 IEP does not require the use of Structured Teaching with this student. The IEP contains no requirement for "direct instruction," and does not call for the student to be given any specified level of one-to-one support. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Three: Staff is inadequately trained.**

The parent contends that much of the student's instruction is being provided by inadequately trained paraeducators.

The student's October 2014 IEP does not call for any specific training for staff.

The district contends that the paraeducators working with this student received training as follows:

- August 17, 2015: A 2-hour Classroom Orientation session was conducted. All of the classroom paraeducators attended. Training

focused on student needs, behaviors, and behavior management techniques.

- August 18 and 19, 2015: CPI training was conducted for paraeducators.
- August 20 through September 4, 2015: The Intensive Skills Consultant/Tertiary Support Specialist provided on-site classroom training and support. During this period, the consultant provided "on-the-job training" and assisted staff in getting to know the students and on how to handle situations as they arose. The consultant continues to *spend at least 2 days per week in the classroom offering support.*
- October 8, 2015: The CPI trainer provided a special session for the Intensive Skills classroom staff on new components of CPI and on strategies and techniques likely to be most effective in managing the behavior of students in the classrooms. Specific techniques reviewed included restraint, transport, and how to avoid or release holds when biting or hair pulling occurs.
- October 15, 2015: Paraeducators attended a 3-hour training session on Structured Teaching. Participants received an overview of the structured teaching model for children with significant needs in the areas of communication, behavior, and social interaction. The training provided an overview of the Structured Teaching model and information regarding the levels of Structured Teaching.
- Ongoing: The Intensive Skills teacher meets with paraeducators at the conclusion of each day to "debrief" and review effective and ineffective strategies/interventions, revisions/changes to student schedules, daily Behavior Intervention data, and other topics as deemed needed.

Across the state of Kansas certified teachers and paraeducators often work collaboratively to provide services to students in special education settings. Paraeducators working under the supervision of certified teachers must meet the personnel standards determined by the school district, be supervised by a professional, and receive a minimum of 20 hours per year of training.

The paraeducators who have provided support to this student have met district standards, *have received training, and work under the supervision of the certified teacher responsible for this student's primary instruction.* An allegation of a violation of special education laws and regulations is not substantiated on this issue.

**Issue Four: One teacher is split between two classrooms, and the student's access to instruction from professionally trained staff is inadequate.**

It is the parent's contention that the district's delivery model for special education services for this student is limiting his access to instruction from trained staff.

The student and his twin brother were provided special education services in a classroom in Neosho Rapids during the 2014-15 school year. One teacher who was supported by 3 paraeducators instructed the 5 students in that classroom.

For the 2015-16 school year, special education services for the student and his brother are delivered in an elementary school in \_\_\_\_\_, Kansas. At the start of the school year, all 8 students in the Intensive Skills program at this elementary school were in the same classroom. Eight paraeducators were assigned to the classroom.

On September 24, 2015, the district made the decision to split the class between two rooms in order to better serve the students. Those classrooms are situated in the same hallway but do not adjoin one another. One certified teacher supervises instruction to the 8 students in these classrooms. Four students were assigned to the student's classroom, as were 4 paraeducators. A consulting teacher – the student's teacher during the 2014-15 school year – came to the classroom twice a week.

At an IEP Team meeting held the week of November 19, 2015, it was determined that this student and his brother would remain in one Intensive Skills classroom. Three paraeducators are now assigned to support the twins. The remaining 6 Intensive Skills students will be grouped in the other classroom.

The ratio of students to teacher seen in the current instructional setting (8:1) is not outside of the norm for the state nor is the ratio of staff to students. Special education rules and regulations allow a certified teacher to move through educational settings overseeing the provision by paraeducators of the instruction he or she has designed. While the physical location of the two classrooms in this case may not be ideal, the arrangement is not prohibited. A violation of special education laws and regulations is not substantiated.

### **Corrective Action**

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is required.

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Early Childhood, Special Education and Title Services, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

Diana Durkin  
Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

# 16FC05

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON OCTOBER 8, 2015.

DATE OF REPORT: NOVEMBER 16, 2015

RECEIVED

NOV 23 2015

KSDE

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

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_, Director of the \_\_\_\_\_ Special Education Cooperative, on October 23 and November 9, 2015. The investigator spoke by telephone with the student's mother on November 2, 2015.

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

- IEP for the student dated October 20, 2014
- Meeting Summary developed by the district
- Training Summary developed by the district
- List of interventions provided by the district
- Copies of daily schedules for the student dated September 3, 21, 22, and 24, 2015
- Chronological Summary of Interventions/Instructional and/or Environmental Modifications
- Comparative Behavior Data summary for the 2014-15 and 2015-16 school years

### Background Information

This investigation involves an 8 year-old boy who resides in \_\_\_\_\_, Kansas. The student has diagnoses of Autism and ADHD.

The student is enrolled in a center-based Intensive Skills classroom in \_\_\_\_\_. He also receives services from a Speech/Language Pathologist.

The district supplied the investigator with behavioral data for this student for the first nine weeks for both the 2014-15 and 2015-16 school years. That data

shows that the rate of the student's inappropriate physical and verbal behavior incidents for both years spiked in the first few weeks of the school year and then began to reduce about week 5. The incidence of inappropriate physical behaviors appears to be about 45% less at the end of 9 weeks of the 2015-16 school year than at the same time last year. The rate of inappropriate verbal behavior this year appears to be about equal to what was seen at the end of the first 9 weeks of last year.

The student's off-task behaviors reduced to 7% at the 9-week mark during the 2014-15 school year after the student began taking medication for ADHD. Off-task behaviors are occurring at a higher rate this year (18% at the 9-week mark), but the student is not currently taking any medications to address attention issues. The rate of off-task behavior is shown to have dropped this fall from 39% to 18%.

### **Issues**

Federal regulations, at 34 C.F.R. 300.101 state that a "free appropriate public education (FAPE) must be available to all students residing in the State between the ages of 3 and 21." The regulations define FAPE as "special education and related services...that are provided in conformity with an individualized education program..." Federal regulations, at 34 C.F.R. 300.101 state that a student's IEP must be implemented as written.

In her complaint, the parent raised four issues regarding the provision of services to this student:

#### **Issue One: The district is not adequately addressing the safety needs of the student.**

The parent reports that she is very concerned about the student's safety in the school setting. According to the parent, the student is "a bolter" who often runs out of the sight of staff when he is returning to class from gym or recess. While he has on every occasion to date returned to his classroom, the parent has observed that he passes many doors during the transition and she fears that he may at some point run out into the street. The parent also reports that the student has run from his classroom in the past and staff has been unable to catch up to him quickly.

Further, the parent states that the student has climbed up on furniture in his classroom (bookcases, a toy horse, etc.) and on at least one occasion has fallen and injured himself. The teacher was reportedly not in the classroom at the time of that fall.

According to the parent, the attention of staff is drawn away from this student when staff is focusing on the behavior of another student in the classroom. The

parent fears that her son might injure himself when he is not under direct supervision of staff.

Recently, the student was taken from school to the emergency room after it was discovered that he had placed a water bead in his ear. At the hospital, it was determined that the student had three water beads in his ear. The parent contends that it would have taken several minutes for the student to carry out this action and that he must have been unsupervised for an extended period.

*By report of the parent, she has expressed concern over this situation numerous times to classroom staff and administrators, but she feels that the district has failed to address her concerns.*

It is the district's position that it has made and is continuing to make a good faith effort to keep the student safe.

The district acknowledges that the student has run from staff and does climb on classroom furniture/equipment but contends that strategies have been put in place to address this concern. Those strategies include the following:

- Utilizing two adults to support the student's transition between the gym and the classroom, one ahead of the student and the second behind him.
- Increasing the use of visual supports and prompts as outlined in the student's Behavior Intervention Plan (BIP) to assist with transitions and escape/avoidance behaviors and to address climbing.
- Training staff to maintain proximity supervision and to carry cell phones to secure assistance in all settings to address elopement issues.
- Specifically targeting climbing behaviors through the students BIP.
- *Removing a sensory swing and other classroom items including furniture (i.e. movable storage shelves) to reduce the opportunity for the student to climb.*
- Rearranging the classroom to limit avenues for climbing.

The district has met on several occasions with parents and has solicited input from them regarding safety concerns and has reviewed and revised the student's BIP to address these issues.

Additionally, the district solicited assistance from the Kansas Technical Assistance System Network (TASN) to develop effective strategies to manage the student's behavior and keep him safe. TASN provides technical assistance to support school districts' systematic implementation of evidenced-based best practices. An initial request for a TASN on-site visit was faxed on August 26, 2015 and a follow-up meeting with TASN staff was scheduled for September 23<sup>rd</sup>. That meeting was subsequently postponed until October 9<sup>th</sup> so that TASN staff could also consult on-site regarding the student's brother.

The investigator certainly recognizes that the risk of injury to his or her child is cause for concern for any parent. Districts must make every effort to respond to parental concerns and address safety issues. In the opinion of the investigator, this district does take the wellbeing of this student very seriously and is making ongoing efforts to address the safety concerns of the parent. Under these circumstances, a violation of special education laws and regulations is not substantiated.

**Issue Two: The student is missing educational opportunities because the classroom is inadequately staffed.**

The IEP for the student dated October 20, 2014 stated that he was to receive special education services outside of the regular education classroom setting 2 days per week for 285 minutes and 3 days per week for 270 minutes. He was to "receive adult support when he attends Lunch and Recess."

The parent contends that the student is not receiving the one-to-one support that is called for in his IEP and has missed gym classes because of inadequate classroom staffing.

One-On-One Support

According to the parent, the student is – as shown on copies of daily reports submitted with her complaint – to receive direct instruction for 2 fifteen-minute sessions per day, but because the teacher is often delayed in coming to the classroom, the student's direct instruction time is reduced.

The district contends that its programs have provided the student with the special education services called for in his October 2014 IEP.

The district reports that an instructional approach called "Structured Teaching" is used in the student's classroom. The University of North Carolina developed the Structured Teaching intervention philosophy for use with students with communication delays including students with Autism. "Direct instruction" is one component of Structured Teaching. The approach recommends two 15-minute direct instruction sessions along with other rotations including structured play, *sensory time, and independent work.*

The student's October 2014 IEP does not require the use of Structured Teaching with this student. That IEP contains no requirement for "direct instruction," and does not call for the student to be given any specified level of one-to-one support. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

Gym Classes

The parent contends that daily reports show that the student is missing gym classes because of inadequate staffing. As evidence of her concern, the parent provided a daily note dated September 11, 2015 that contains the statement, "No gym today, staff out of building." A September 22, 2015 daily note includes the statement, "No gym. Short on staff." The note, "No gym time" is written on a daily note dated September 24, 2015.

The district contends that the student participates in Physical Education (P.E.) with his peers during the morning. For a few weeks beginning on September 10, 2015, the student was given additional time in the gym in the afternoon as a strategy implemented in hopes of increasing his on-task, safe behavior in the classroom setting. This additional time in the gym was not required by the student's IEP. The afternoon gym time was discontinued on October 28, 2015.

The district concedes that there were times when the afternoon gym intervention shown for a time on his daily schedule was not implemented. On those occasions, the number of staff members necessary to ensure his safety during transition to and from the gym (2) was not available. However, the student has participated in P.E., and the P.E. teacher has come to the classroom once a week to provide the student with additional P.E. activities.

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

### **Issue Three: Staff is inadequately trained.**

The parent contends that much of the student's instruction is being provided by inadequately trained paraprofessionals.

The student's October 2014 IEP does not call for any specific training for staff.

The district contends that the paraprofessionals working with this student have received training as follows:

- August 17, 2015: A 2-hour Classroom Orientation session was conducted. All of the classroom paraprofessionals attended. Training focused on student needs, behaviors, and behavior management techniques.
- August 18 and 19, 2015: CPI training was conducted for paraprofessionals.
- August 20 through September 4, 2015: The Intensive Skills Consultant/Tertiary Support Specialist provided on-site classroom training and support. During this period, the consultant provided "on-the-job training" and assisted staff in getting to know the students and on how to handle situations as they arose. The consultant continues to spend at least 2 days per week in the classroom offering support.

- October 8, 2015: The CPI trainer provided a special session for the Intensive Skills classroom staff on new components of CPI and on strategies and techniques likely to be most effective in managing the behavior of students in the classrooms. Specific techniques reviewed included restraint, transport, and how to avoid or release holds when biting or hair pulling occurs.
- October 15, 2015: Paras attended a 3-hour training session on Structured Teaching. Participants received an overview of the structured teaching model for children with significant needs in the areas of communication, behavior, and social interaction. The training provided an overview of the Structured Teaching model and information regarding the levels of Structured Teaching.
- Ongoing: The Intensive Skills teacher meets with paraeducators at the conclusion of each day to “debrief” and review effective and ineffective strategies/interventions, revisions/changes to student schedules, daily Behavior Intervention data, and other topics as deemed needed.

Across the state of Kansas certified teachers and paraeducators often work collaboratively to provide services to students in special education settings. Paraeducators working under the supervision of certified teachers must meet the personnel standards determined by the school district, be supervised by a professional, and receive a minimum of 20 hours per year of training.

The paraeducators who have provided support to this student have met district standards, have received training, and work under the supervision of the certified teacher responsible for this student’s primary instruction. An allegation of a violation of special education laws and regulations is not substantiated on this issue.

**Issue Four: Because one teacher is spread between two classrooms, the student’s access to instruction from professionally trained staff is inadequate.**

It is the parent’s contention that the district’s delivery model for special education services for this student is limiting his access to instruction from trained staff. The student and his twin brother were provided special education services in a classroom in Neosho Rapids during the 2014-15 school year. One teacher who was supported by 3 paraeducators instructed the 5 students in that classroom.

For the 2015-16 school year, special education services for the student and his brother are delivered in an elementary school in \_\_\_\_\_, Kansas. At the start of the school year, all 8 students in the Intensive Skills program at this elementary school were in the same classroom. Eight paraeducators were assigned to the classroom.

On September 24, 2015, the district made the decision to split the class between two rooms in order to better serve the students. Those classrooms are situated in the same hallway but do not adjoin one another. One certified teacher supervises instruction to the 8 students in these classrooms. Four students were assigned to the student's classroom, as were 4 paraeducators. A consulting teacher – the student's teacher during the 2014-15 school year – came to the classroom twice a week.

At an IEP Team meeting during the week of November 19, 2015, it was determined that this student and his brother would be assigned to one Intensive Skills classroom. Three paraeducators are now assigned to support the twins. The remaining 6 Intensive Skills students have been assigned to the second Intensive Skills classroom.

The ratio of students to teacher seen in the current instructional setting (8:1) is not outside of the norm for the state nor is the ratio of staff to students. Special education rules and regulations allow a certified teacher to move through educational settings overseeing the provision by paraeducators of the instruction he or she has designed. While the physical location of the two classrooms in this case may not be ideal, the arrangement is not prohibited. A violation of special education laws and regulations is not substantiated.

#### **Corrective Action**

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is required.

#### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the *State Commissioner of Education, Early Childhood, Special Education and Title Services, 120 SE 10th Avenue, Topeka, Kansas 66612*, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

Diana Durkin  
Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

# 16FC06

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

### REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # PUBLIC SCHOOLS ON NOVEMBER 9, 2015

DATE OF REPORT: DECEMBER 8, 2015

This report is in response to a complaint filed with our office by \_\_\_\_\_ and \_\_\_\_\_ the parents of \_\_\_\_\_ Ms. \_\_\_\_\_ and Mr. \_\_\_\_\_ will be referred to collectively as "the parents" and individually as "the mother" or "the father" in the remainder of this report. \_\_\_\_\_ is identified as a child with an exceptionality and is the subject of this complaint. \_\_\_\_\_ will be referred to as "the student" in the remainder of this report. The complaint included two allegations: (1) the student did not receive a special education service regarding breakfast on one occasion as required by the student's individualized education program (IEP) and (2) due to bullying by school staff the student was denied a free appropriate public education (FAPE).

#### Investigation of Complaint

The investigator reviewed the complaint submitted by the parents, the complaint response from the district's special education director; a written statement from the building principal, Mr. \_\_\_\_\_; a written statement from Ms. \_\_\_\_\_; a summary of the principal's interview with Ms. \_\_\_\_\_; a written statement from Ms. \_\_\_\_\_; the student's April 2014 IEP; the student's April 2015 IEP; the student's November 2015 amended IEP; notes from the November 18, 2015, IEP team meeting resulting in the amended IEP; the student's breakfast and lunch log from August 20 to November 20, 2015; and all progress reports for the student from December 19, 2014, to October 15, 2015. Additionally, the investigator interviewed the parents in person on November 9, 2015, and by telephone on November 10 and November 18, 2015. The investigator exchanged emails with the special education director on November 18, 19, 23, and 24 and December 2, 3, and 6, 2015, and spoke with the special education director in person on December 4, 2015.

#### Background Information

The student is a nine-year-old boy who is in the third grade at \_\_\_\_\_ Elementary in USD \_\_\_\_\_ and has been identified as an exceptional child. The parents alleged that bullying by school staff took place in the 2014–15 school year and the 2015–16 school year and this denied the student FAPE in the 2015–16 school year. This investigator

reminded the parents in a phone call on November 10, 2015, that this investigation would only cover alleged violations of special education law that occurred in the one year prior to the parents filing the complaint. The parents also alleged that the student did not receive breakfast on a specific occasion as required by his April 2015 IEP.

### Issues and Conclusions

**ISSUE ONE: THE STUDENT DID NOT RECEIVE A SPECIAL EDUCATION SERVICE REGARDING BREAKFAST ON ONE OCCASION AS REQUIRED BY THE STUDENT'S IEP.**

The mother alleges that on or about October 5, 2015, she brought the student to school in the morning and dropped him off in the cafeteria. She stated that instead of leaving the building immediately she hid behind a door in the cafeteria and watched the student. She said that the student went to get food and a staff member, Ms. \_\_\_\_\_ yelled at the student, told him he was not authorized to have food, and to return to his table. The mother stated that she then came out from behind the door where she was hiding and got food for the student. The mother said that when she asked Ms. \_\_\_\_\_ why she prevented the student from having food Ms. \_\_\_\_\_ did not respond. The mother also stated that she later learned that a district staff member, Ms. \_\_\_\_\_, ordered that the student not be provided breakfast.

The student's April 2015 IEP includes the provision, "Starting 4/10/2015, \_\_\_\_\_ will receive special education services before school, while eating breakfast-20 minutes, 5 days a week, as well as during lunch for 20 minutes, 5 days week, to encourage him to eat, use manners and to stay on task while eating." In the district's response, staff provided the student's breakfast and lunch log from August 20 to November 20, 2015, as well as explanations for most of the days that the student did not receive breakfast during this time period. The district maintained in its response that the days that the student did not receive breakfast was due to a miscommunication and misunderstanding between the district and the parents. The parents would inform district staff on certain days that the student had eaten breakfast at home and so district staff then did not provide the student with breakfast at school as well. The district stated in its response that the parents made staff aware of this concern on October 22, 2015, at a parent-teacher conference. The district maintains that once it was aware of the parents' concern that the student was not receiving breakfast, that all relevant staff were informed that the student must receive breakfast every day that he was present at breakfast time, even if the parents informed staff that he had eaten at home.

It is this investigator's position that both parties are misinterpreting this provision of the student's IEP. This provision states that the student "will receive special education services before school, while eating breakfast . . . ." This provision obligates the district to provide the student with special education services, but makes no mention of the district providing the student with breakfast. This investigator is not commenting on the district's obligation under any other law to provide the student with breakfast. But this provision of the student's IEP does not state that the district will provide the student with breakfast and therefore the district is not obligated under the IDEA to provide the student with

breakfast. Because this investigator did not find a violation of special education law, no corrective action is ordered. However, due to the parties' misunderstanding of what this provision states the district is strongly encouraged to set up an IEP team meeting to discuss what is meant by this provision and to articulate it more clearly so that there is no confusion over the extent of the district's obligation.

## ISSUE TWO: DUE TO BULLYING BY SCHOOL STAFF THE STUDENT WAS DENIED A FREE APPROPRIATE PUBLIC EDUCATION.

Kansas is within the jurisdiction of the 10th Circuit Court of Appeals and is bound by the FAPE standard it has set. In determining whether a district provided a student with FAPE, the 10th Circuit follows "a two-step analysis and ask[s] (1) whether the district complied with the [IDEA's] procedural requirements, and (2) whether the IEP developed by those procedures is substantively adequate such that it is 'reasonably calculated to enable the child to receive educational benefits.'" *Andrew F. v. Douglas Co. Sch. Dist. RE-1*, 798 F.3d 1329, 1334 (10th Cir. 2015) (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)). The parents do not allege that the district committed any procedural violation of law. The parents allege that due to the bullying by school staff the student did not make measurable progress on the goals set in his IEPs. This investigator must use the standard set by the 10th Circuit, whether the student's IEP is reasonably calculated to enable the child to receive some educational benefit. *Andrew F.*, 798 F.3d at 1341.

The parents allege that the incident the mother states that she witnessed in the cafeteria on or about October 5, 2015, amounts to verbal abuse of the student by Ms. [REDACTED]. In addition, the parents allege that the student is subjected to emotional and verbal abuse from other staff members. The father alleged that this abuse includes a teacher, Ms. [REDACTED], pulling the student's hair, yelling at the student, and pinching the student. The father stated that the student previously was completely nonverbal, but now can communicate some. The father stated that the student will come home with bruises on his legs and when his parents asked him what happened he says, "Ms. [REDACTED] pinch me." When the student is upset after school and his parents ask him what is wrong he says, "Ms. [REDACTED] pull my hair" or "Ms. [REDACTED] yell at me." Additionally, the parents stated in their interview with this investigator that they received information from a former district staff member that the student was subjected to emotional and verbal abuse, mostly during timeouts, during the 2014–15 school year and 2015–16 school year.

In its response the district stated that it undertook its own investigation regarding the parents' allegations of physical, verbal, and emotional abuse and these allegations were not substantiated as a result of the investigation. Ms. [REDACTED] specifically stated in the district's response that she does not yell at the student, but sometimes uses a loud voice to get his attention. Ms. [REDACTED] provided in the district's response that she has never pinched a child, pulled a child's hair, or yelled at a child. She acknowledges that she has a loud voice. As a result of the district's investigation into these allegations it gathered information from some staff that indicated that they thought that the parents' concern could be related to the tone of voice of certain staff members, but that does not mean that these staff yell at or abuse the child. Regarding the allegations of pinching and pulling

hair, the district indicates that these are behaviors sometimes displayed by other students and this may be where the student got this idea. Further, this district asserts that the student is anemic and may bruise easily from daily activities. The district was not aware of any situation where staff acted inappropriately or in an abusive manner with the student, nor any particular situation where the student was actually bruised.

This investigator does not have the authority to determine whether this student was abused by district staff. The parents stated to this investigator that they have filed a report alleging abuse with the Department for Children and Families. That is the appropriate venue for an allegation of abuse of a student. The parents used the term "abuse" interchangeably with "bullying" in the complaint and so from this point forward this investigator will use the term "bullying" for the parents' allegation. The parents allege that bullying by school staff deprived the student of FAPE. This investigator has no evidence, other than conflicting statements by both parties, regarding possible bullying of this student. However, this investigator does not ultimately need to determine whether any bullying actually occurred because this investigator determines that the student was not deprived of FAPE.

The parents allege that due to bullying by staff the student has made no progress during the 2015–16 school year. A review of the student's April 2014 and April 2015 IEPs, November 2015 amended IEP, and progress reports from December 19, 2014, to October 15, 2015, indicate that the student made progress toward the goals on his IEP and that he received educational benefit during this time. His April 2015 progress report shows that the student made progress toward three of five goals. On one of the goals the district admits in the progress report that the student has "regressed some" in that skill. This specific goal is for the student to work on repeating two-word phrases with a given degree of accuracy. On May 19, 2015, the progress report states that the student was repeating two-word phrases with 60% accuracy and on October 16, 2015, the progress report states that the student was repeating two-word phrases with 40% accuracy. On the other goal that the student did not make progress the short term bench mark given for the first nine weeks did not sufficiently align with the short term bench mark given for the first 18 weeks so this investigator is unable to determine whether progress was made toward this goal. Therefore, this investigator determines that the student did not make progress toward this goal. Overall though, it appears that the student is making some progress toward the goals set in his IEP. The progress that the student has made on three of the five goals in his IEP meets the standard set by the 10th Circuit, that the student must receive some educational benefit. This investigator does not find a violation of special education law regarding this allegation.

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Kansas State Department of Education, Landon State Office Building, 900 SW Jackson Street, Suite 600, Topeka, Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see K.A.R. § 91-40-51(f), which is attached to this report.



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**K.A.R. § 91-40-51. Filing complaints with the state department of education.**

(f) Appeals.(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

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

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

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON APRIL 12, 2016**

**DATE OF REPORT: MAY 12, 2016**

This report is in response to a complaint filed with our office by [redacted] on behalf of her grandson, [redacted]. In the remainder of this report, [redacted] will be referred to as "the student."

### **Investigation of Complaint**

Nancy Thomas, Complaint Investigator, spoke with USD # [redacted] by telephone on April 21, 25 and 26, 2016. The following staff persons were interviewed:

- [redacted], Due Process Supervisor
- [redacted], Executive Director – Student Support Services
- [redacted], Principal for [redacted] Alternative Middle School
- [redacted], Social Worker for the 2015-16 school year
- [redacted], Special Education Teacher for the 2015-16 school year
- [redacted], Special Education Teacher for the 2015-16 school year
- [redacted], Special Education Paraprofessional for the 2015-16 school year
- [redacted], Special Education Paraprofessional since January 2016 for the 2015-16 school year
- [redacted], Special Education Paraprofessional for the 2015-16 school year
- [redacted], Special Education Paraprofessional for the 2015-16 school year
- [redacted], Special Education Paraprofessional for the 2015-16 school year
- [redacted], Security Guard
- [redacted], Security Guard

The Complaint Investigator spoke to the complainant by telephone on April 13, 21, and 28, 2016. With a written release of information, the Complaint

Investigator spoke to the student's targeted case manager on May 9, 2016. The following persons were interviewed:

- \_\_\_\_\_, Grandmother and IDEA Educational Decision Maker
- Jana Rhea Cartwright, Targeted Case Manager, Cerebral Palsy Research Foundation

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

- Notice of Meeting dated March 13, 2015 for annual IEP review scheduled for April 3, 2015
- Behavior Intervention Plan (BIP) dated April 1, 2015
- Individualized Education Program (IEP) dated April 2, 2015
- IEP Goal Progress Reports dated October 7 and December 23, 2015
- Notice of Meeting dated March 21, 2016 for annual IEP review scheduled for April 7, 2016
- BIP dated April 7, 2016
- IEP dated April 7, 2016
- Special Ed Student Contact Log for the 2015-16 school year (printed on April 21, 2016)
- Yellow Group "A" Day schedule for the 2015-16 school year
- Yellow Group "B" Day schedule for the 2015-16 school year
- \_\_\_\_\_ *Public Schools: Emergency Safety Intervention Parent Information Packet* (2015)
- Emergency Safety Intervention Parent Notification dated September 3, 2015
- \_\_\_\_\_ Point Sheet for the student dated September 3, 2015
- Emergency Safety Intervention Parent Notification dated October 8, 2015
- \_\_\_\_\_ Point Sheet for the student dated October 8, 2015
- Emergency Safety Intervention Parent Notification dated November 2, 2015
- \_\_\_\_\_ Point Sheet for the student dated November 2, 2015
- Emergency Safety Intervention Parent Notification dated November 5, 2015
- \_\_\_\_\_ Point Sheet for the student dated November 5, 2015
- Emergency Safety Intervention Parent Notification dated December 3, 2015
- Emergency Safety Intervention Parent Notification dated December 16, 2015
- Synopsis of Child Study Team Meeting Notes regarding the student during the 2015-16 school year
- Emails between Debra Romero, LMSW, Institutional Liaison for Public Schools, and \_\_\_\_\_ dated March 2, 2016 describing parent request for placement other than \_\_\_\_\_ Alternative Middle School

- Email dated March 22, 2016 from [redacted] to [redacted] and [redacted] with synopsis of notes from the reentry meeting held on March 21, 2016
- Team Meeting Notes kept by [redacted] from the reentry meeting held on March 21, 2016
- Behavior Intervention Plan Snapshot for the student dated August 25, 2015
- Team Meeting Notes kept by [redacted] from the wrap around meeting held on December 17, 2015
- Listing of strategies Implemented during 2015-16 school year for the student
- Team Meeting Notes for the 2015-16 school year kept by [redacted]

### **Background Information**

This investigation involves a fifteen year-old student who is currently enrolled in the eighth grade at USD # [redacted] and attends [redacted] Middle School. Records indicate the student initially received early childhood special education and related services under the eligibility category of Young Child with a Developmental Delay. In kindergarten, the student was reevaluated and found eligible for special education with Emotional Disturbance as the primary exceptionality and Speech/Language Disordered as the secondary exceptionality. In October of his kindergarten year, the student began attending a separate special day school. The student first enrolled in USD # [redacted] as a second grade student and has attended [redacted] Elementary School and [redacted] Middle School since that time.

USD # [redacted] developed two IEPs with BIPs that have been in effect during the 2015-16 school year. The first was developed on April 2, 2015 and the second was developed on April 7, 2016.

### **Issues**

The complainant raised four issues which were investigated.

**ISSUE ONE:** The USD # [redacted], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP(s) of [redacted] during the 2015-16 school year, specifically by not providing the special education, related services, and supplementary aids / services as required by the IEP.

## Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written. Federal regulations, at 34 C.F.R. 300.324(a)(2)(i), require that in the case of a child whose behavior impedes his learning or the learning of others, consider the use positive behavioral interventions and supports, and other strategies, to address the behavior.

Ms. reports USD# has not provided the special education services and one-to-one paraprofessional support required by the student's IEP during the 2015-16 school year. Ms. believes the lack of services and supports during this school year has contributed to the increase in aggressive behavior at school resulting in multiple suspensions, emergency safety interventions, and ultimately the student's involvement with the court system. Ms. stated the school had even allowed the student to elope from the school building so she was sure the student was not being supervised. Ms. reported her understanding of the IEP was that the student would have 1:1 supervision throughout the entire school day since the Daily Point Sheet documents the implementation of the BIP every 20 minutes throughout the student's school day. In addition, Ms. reports school staff told her the student is checked on every 10 minutes to be redirected back to task as well as to keep him awake.

Documentation shows the April 2, 2015 IEP requires 390 minutes per day of special education services in the alternative school setting. In addition, the IEP requires five minutes per day of indirect counseling services by the school psychologist. The IEP states under classroom accommodations that the student "works best in one on one situations, or in small groups of 3 or 4." The BIP lists prevention strategies and supports including "works best with 1:1 support" during class periods with "staff" being the person responsible for providing the support. The IEP does not include any supplementary aids or services for the student. The IEP documents the student will only participate with exceptional peers due to the alternative school placement.

Documentation shows the April 7, 2015 IEP continues to require 390 minutes per day of special education services in the alternative school setting. However, this IEP decreases the amount of counseling services to 10 minutes per week. The classroom accommodations remained the same. The BIP changed the prevention strategies and supports from "works best with 1:1 support" to "works best with 1:1 support whenever possible." And again, the IEP does not include any supplementary aids or services for the student and notes the student will

participate 100% of the time with exceptional peers in the alternative school setting.

Interviews and the student's school schedule for the 2015-16 school year show the student was placed 100% of the school day with peers with disabilities in the alternative school setting. School staff reported in interviews that the student is supervised by school staff during the entire school day. His core academic and social skills/study skills special education classes are taught by a special education teacher supported by at least two classroom paraprofessionals during each of these daily class periods for a total of 301 minutes per day of special education instruction. In addition, the student participates in two exploratory classes daily e.g. Music/Art or PE/Technology where at least one paraprofessional is assigned to the classroom for a total of 86 minutes per day of special education instruction provided by a paraprofessional. His daily classroom schedule also includes 15 minutes for breakfast and 43 minutes per day for lunch/recess where, again, at least one paraprofessional and/or one teacher was assigned to provide instruction and supervision for this activity. Interviews found that lunch and recess were considered instructional times for the student. School staff indicated that no specific paraprofessional or special education teacher was assigned to work specifically with the student 1:1 at any time during the school day; instead the staff used a team approach to providing the 1:1 supervision required for the student.

Samples of daily records of behavior interventions were provided through Point Sheets for the student. These data collection records showed the student's behaviors were monitored every 20 minutes throughout the school day and included documentation of strategies including working with the school psychologist, school therapist, and social worker on almost a daily basis.

The allegation that the IEP was not implemented as written during the 2015-16 school year is not substantiated. Based upon the interviews and classroom schedule, the student was placed in the alternative school setting 100% of the school day. The student's schedule documents at least 390 minutes per week of specialized instruction and the Point Sheets document at least 25 minutes per week of counseling supports. The IEP and BIP do not require 1:1 support but only indicate the student works best in this type of situation. It is noted that the BIP was changed on April 7, 2016 to only require 1:1 support "whenever possible" as a means of clarifying this issue for Ms.

**ISSUE TWO:** The USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP(s) of \_\_\_\_\_, during the 2015-16 school year, specifically by not following the Behavior Intervention Plan (BIP).

**Findings:**

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written. Federal regulations, at 34 C.F.R. 300.324(a)(2)(i), require that in the case of a child whose behavior impedes his learning or the learning of others, consider the use positive behavioral interventions and supports, and other strategies, to address the behavior.

In this case, Ms. \_\_\_\_\_, reports the school staff did not follow the BIP resulting in the student being subjected to the use of Emergency Safety Interventions (ESI) on six separate occasions during the 2015-16 school year. Ms. \_\_\_\_\_ indicates three of these incidents resulted in the student being handcuffed due to aggressive behavior. In addition, Ms. \_\_\_\_\_ reports the student has been given three days of out-of-school suspension as well as been transported to the juvenile detention facility on two occasions. Currently the student is facing charges of assault in the court system as a result of the incidents that happened at school. Ms. \_\_\_\_\_ believes that if the school staff had been implementing the BIP, none of these situations would have escalated to the point of physical violence towards others.

The findings of Issue One are incorporated herein by reference.

The target behavior addressed in both of the BIPs was passively being off-task. In addition to the prevention strategy of works best with 1:1 support, documentation showed the BIP in effect beginning on August 18, 2015 through April 6, 2016, required daily structure and routine; allowing up to a couple of minutes for the student to respond to directions; and using Legos to calm the student when he becomes very upset. The BIP developed on April 7, 2016 added a reference to using a visual schedule as well as qualified the 1:1 support as "whenever possible."

The steps to follow in the BIP in effect beginning on August 18, 2015 through April 6, 2016, required asking the student if he is ready to join when passively off-task; prompting the student to listen closely if he is awake due to being asked questions; supportive comments when he is irritable; removing the student from

the classroom setting if he becomes physically aggressive and allowing the student calming time. The BIP developed on April 7, 2016 made the following adjustments to the plan: added use of the visual schedule to re-engage; added allowing the student to move to a safe quiet room setting when irritable; changed to removing others from his proximity if the student becomes physically aggressive; and added the known triggers of blocking doorways, touching the student or having security called.

Interviews with the school staff as well as documentation found six ESI Parent Notifications for the following dates: September 3, 2015; October 8, 2015; November 2, 2015; November 5, 2015; December 3, 2015; and December 16, 2015. In addition, Point Sheets documenting the setting, antecedent, behavior, and the consequences were found for the September 3, 2015; October 8, 2015; November 2, 2015; and November 3, 2015. Notes from these point sheets document use of strategies including attempts to re-direct and re-engage the student, supportive comments when he was irritable; removing the student from the classroom setting if he becomes physically aggressive and allowing the student calming time. School staff reported that when the student began to get upset he was allowed to choose Legos as an alternate activity, to visit with the school psychologist, school therapist, or school social worker, or to take walks.

No Point Sheets were found for the ESI incidents that occurred on December 3 or December 16, 2015. School staff reported the student was sent home early on December 3, 2015. No Point Sheet was completed for the student on that date, and no other physical evidence was presented to document that the BIP was implemented on that date. The ESI Parent Notification shows the student was secluded from 9:00 – 9:19 a.m. after an incident in the classroom where the student became very upset when security guards took a peer out of the classroom. School staff reported they were unable to locate the Point Sheet for December 16, 2015 but that the monthly data summary chart shows data was collected on that date; however, no physical evidence was presented to show that the BIP was implemented on that date.

The allegation that the BIP was not implemented as written during the 2015-16 school year is substantiated. There is no physical evidence that the BIP was implemented on December 3 and December 16, 2015.

**ISSUE THREE:** The USD # [redacted] in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to a parent request, specifically the parent requests for IEP revisions and change of placement for [redacted] during the 2015-16 school year.

**Findings:**

Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action.

In this case, the Ms. [redacted], reports and documentation shows that she requested the USD # [redacted] consider a more restrictive placement such as Heartspring, a private residential treatment center, for the student at the December 17, 2015 IEP team meeting. Ms. [redacted] stated she made this request due to the increase in aggressive behavior at school which resulted in the student being handcuffed on three separate occasions. She indicated that this specific facility was suggested to her as a placement option for the student by the Amerigroup Autism Specialist. Notes provided by Ms. [redacted] document the Heartspring discussion on December 3, 2015 as well as the meeting on December 17, 2015, which included the school principal, the school therapist, the social worker and the special education teacher from the school along with the targeted case manager, the medical insurance provider, and Ms. [redacted].

Ms. [redacted] also reported she requested another IEP meeting when the student returned from residential treatment on March 21, 2016. This IEP team meeting was held on April 7, 2016 and Ms. [redacted] again indicates that she requested consideration of a more restrictive placement such as Heartspring. She indicated the school staff told her that the USD # [redacted] did not place students at Heartspring and the current placement was appropriate for the student.

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

Interviews and documentation show a team meeting was held on December 17, 2015 with all of the members of an IEP team present. Ms. [redacted] shared that a referral for a psychiatric residential treatment facility (PRTR) was being

considered for the student. School staff acknowledged that Ms. [redacted] wanted Heartspring to be considered as a placement option for the student. Mr. [redacted] reported the team considered a full range of placement options including Heartspring but determined the current placement continued to be appropriate for the student. The only change as a result of this meeting was to change the student's assigned special education classroom from Ms. King to Ms. Bolstad's classroom. School staff acknowledged that written notice to refuse the request for Heartspring was not provided to the parent.

Interviews with school staff indicated a full range of placement options was again considered for the student at the April 17, 2016, but that Ms. [redacted] did not specifically request Heartspring at that meeting. In these interviews, it was stated that when asked by school staff if she was happy with services and placement, Ms. [redacted] indicated "yes."

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD # [redacted] failed to appropriately respond to the parent request for a change of placement by not providing Ms. [redacted], with a written notice refusing her request for a more restrictive placement option for the student.

**ISSUE FOUR:** The USD # [redacted] in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide a free appropriate public education (FAPE) for [redacted], specifically by not reviewing/revising the IEP as a result of increased behavioral outbursts and lack of IEP goal progress during the 2015-16 school year.

#### Findings:

Federal regulations, at 34 C.F.R. 300.324(b), Each public agency shall ensure that the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. The IEP Team must also review and, as appropriate, revise the IEP to address any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; the results of any reevaluation; information about the child provided to or by the parents; the child's anticipated needs; or, other matters.

In this case, Ms. [redacted] believes the USD # [redacted] should have reviewed and revised the student's IEP when he began experiencing an increase in negative

behaviors which resulted in multiple suspensions, emergency safety interventions, and ultimately the student's involvement with the court system.

Ms. \_\_\_\_\_, indicated the student was not making progress towards his IEP goals and the BIP was either not being implemented or not working for the student.

Ms. \_\_\_\_\_ believes the school staff was not proactive in dealing with the student during the 2015-16 school year.

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

Interviews with school staff and documentation of Child Study Team notes for the student during the 2015-16 school year indicated school staff met regularly to discuss the student's progress and plan for interventions. The special education team met informally at the end of each school day to debrief and the special education teachers formally met together on Wednesdays of each week to review student progress. In addition, monthly Child Study Team Meetings were held with the special education teachers, the principal, the school therapist, the social worker, and the school psychologist to review data and make decisions regarding student progress and recommendations for interventions.

IEP progress reports for first quarter dated October 7, 2015, indicated the student was not making sufficient progress on the two reading goals and the one behavior goal. School staff reported changes were made at that time including 1:1 reading time with leveled readers and Premack scheduling of Aims web reading assessments.

IEP progress reports for second quarter dated December 23, 2015 indicated the student was not making sufficient progress on the two reading goals, the one math goal and the one behavior goal. School staff reported the IEP team had met on December 17, 2015 to discuss lack of progress and decided to change the teacher assignment of the student.

School staff reported there were no IEP progress reports for third quarter as the student was placed in a PRTF from January 21, 2016 through March 21, 2016. School staff indicated that multiple discussions and meetings were held with the PRTF staff in preparation for the April 7, 2016, IEP Team Meeting and that those recommendations were considered and incorporated into the student's IEP.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # \_\_\_\_\_ has procedures and practices in place to consistently review student data and make determinations of the need to change

the IEP. Documentation shows the student's IEP was reviewed and revised two times during the 2015-16 school year.

### **Corrective Action**

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

- 34 C.F.R. 300.17 which requires the IEP be implemented as written. Specifically, USD # [redacted] failed to implement the BIP on December 3 and December 16, 2015. On both of these dates, the student was subjected to ESI but there is no physical documentation that the BIP was implemented as written to proactively intervene or de-escalate the student's behavior prior to the student becoming physically violent.
- 34 C.F.R. 300.503 require that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency refuses to take the action. Specifically, USD # [redacted] failed to provide the parent with written notice refusing to change the educational placement of the student following the December 17, 2015 IEP Team Meeting.

As a result of these violations, the student was denied a free appropriate public education during the 2015-16 school year.

Therefore, USD # [redacted] 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 Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.17 by implementing the IEPs including the behavior intervention plan (BIP) of students, as written; and
  - b) comply with 34 C.F.R. 300.503 by providing the parent with written notice when refusing any requested change in placement or services.

2. Within 60 calendar days of the receipt of this report, Alternative School staff will be trained on the special education requirements, specifically including: (1) the requirement to implement the IEP, including the BIP, as written and (2) when to provide written notice to parents when refusing any requested changes in placement or services. USD # will document who provided the training, the content of the training, and who attended the training and send that documentation to Early Childhood, Special Education and Title Services.
3. Within 45 calendar days of the receipt of this report, USD # shall reconvene the IEP team and discuss the parent request for the private separate school placement for the student and provide the parent with written notice regarding the team's decision.
4. Further, USD # shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.

 5/12/16

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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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON OCTOBER 30, 2015**

**DATE OF REPORT: NOVEMBER 29, 2015**

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

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with Director of Special Education for USD # \_\_\_\_\_ on November 20 and 24, 2015.

The investigator spoke by telephone with the student's mother on November 6, 2015.

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

- Supplemental materials associated with this complaint and provided by the parent including the following:
  - Timeline
  - Initial Letter
  - Notice of a 2-day out-of-school suspension
  - USD # \_\_\_\_\_ Latchkey pamphlet
  - USD # \_\_\_\_\_ Latchkey behavior policy and Latchkey field trip behavior policy
  - Behavior write-ups dated May 26, June 5, and June 17, 2015
  - Email correspondence dated June 18, 19, and 22, 2015
  - Email correspondence dated June 24 and 25, 2015
  - Letter from the parent to Latchkey dated June 24, 2015
  - Letter from the parent to Comcare staff dated June 24, 2015
  - Behavior chart developed by Latchkey on July 6, 2015
  - Email correspondence dated July 27, 2015 reflecting the parent's request for a 504 Accommodation Plan
  - Section 504 referral
  - Document reflecting student behaviors during the period of August 20 through August 31, 2015

- Behavior write-ups from Latchkey dated August 28 and August 31, 2015
- Letter from the parent to the district requesting an evaluation of the student for the purpose of determining his eligibility for special education
- Letter from the Director to the parent granting the parent's request for evaluation
- Letter dated August 31, 2015 requesting parental consent for the evaluation
- Two write-ups from Latchkey dated September 2, 2015
- Copy of Emergency Safety Interventions dated September 8, 2015
- Email from the elementary school to the parent dated September 9, 2015 regarding special transportation accommodations
- Write-up from Latchkey regarding events leading to the student's 5-day suspension from the program
- Email from the parent to the school requesting a note taker for the September 11, 2015 504 meeting
- Email exchanges between the parent and district staff dated September 11, 2015 regarding a September 9<sup>th</sup> write-up from Latchkey
- A copy of the student's 504 Accommodation Plan dated September 11, 2015
- Parental request for copies of disciplinary records from Latchkey
- USD # Board Policy regarding Student Records, website pages regarding student records, and selected sections of the Elementary Student Handbook
- 504-related questions presented by the parent to Latchkey staff
- A copy of a cancelled check showing payment to the Latchkey program
- A Latchkey environmental structure and support document dated September 15, 2015
- Email from the Director to the parent dated September 16, 2015 regarding rewards to be used at Latchkey as well as transportation accommodations to be provided to the student
- ESI notification forms from the elementary school dated September 22 and 24, 2015
- Write-up from Latchkey dated October 16, 2015
- Accountability for Behaviors write-up
- A copy of the IEP for the student dated October 19, 2015
- Email from the parent to the Director dated October 21, 2015 asking for clarification regarding the inclusion of Latchkey in the student's 504 Plan and his IEP
- Email to the parent dated October 23, 2015 regarding the student's behavior on that date
- Latchkey write-up dated October 27, 2015

- Email from the district dated October 27, 2015 advising the parent that the student had been suspended from the Latchkey program for one calendar year
- Parental request for a meeting with the Superintendent
- Parental request for a hearing concerning the student's dismissal from Latchkey
- Event cancellation for a meeting scheduled for October 29, 2015
- Notice of Meeting form dated October 7, 2015
- Evaluation and Eligibility Team Report dated October 19, 2015
- *Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent* dated October 19, 2015
- Public Schools website ( web.com)
- Public Schools website ( schools.com)
- Latchkey documents related to behavioral incidents between August 18 and October 26, 2015

### **Background Information**

This investigation involves an 8 year-old boy who is enrolled in the 3rd grade. The student has attended the same elementary school since Kindergarten.

The student has participated in the Latchkey program for more than 2 years. According to a district website, Latchkey is an after school program offered by the district. Quoting the website, "Latchkey is a district-wide program offered before and after school for students kindergarten through fifth grade; it is offered 6:00 am to 6:00 pm during the summer as well as during the school year. Care is available at ' and Elementary schools. Morning transportation from Latchkey to a student's attendance center (home school) is provided as well as from that home school location to Latchkey at the end of the school day." Parents are directed to contact "district Latchkey offices" for additional information.

The student has medical diagnoses of Oppositional Defiant Disorder, Generalized Anxiety, and ADHD. Medications have been prescribed to address ADHD-related symptoms. According to the parent, she sent a letter to the school district on July 27, 2015 stating that the student had been given a medical diagnosis and was in need of a Section 504 Plan. On August 11, 2015, a Section 504 referral was completed at the request of the parent. A Section 504 Eligibility Determination meeting was scheduled for September 11, 2015.

A Section 504 Accommodation Plan was developed for the student on September 11, 2015. The plan focused on three behaviors: "aggressive acting out," "elopement," and "increased symptoms during less structured activities." The plan stated "Latchkey will utilize the 5 point scale and an individualized

positive behavior plan.” It was also noted on the plan that the student was being referred for “Comprehensive Evaluation.”

The 504 Accommodation Plan included a Positive Intervention Behavior Plan that outlined the district’s anticipated disciplinary responses to specific behaviors as follows:

- “Elopement will result in one day of ISS (in-school suspension) in safe room
- Destruction of school property will result in one day structured ISS in safe room
- In an instance of unprovoked physical aggression towards staff or peers, where physical aggression is defined as the following, with assigned responses:
  - Hitting with a closed or open hand – 2 days structured ISS in safe room
  - Hitting with objects – 2 or more days in ISS in safe room
  - Kicking – 2 days structured ISS in safe room
  - Spitting – 1 day structured ISS in safe room
  - Biting – 3 days or more structured ISS in the safe room
  - Other acts of physical aggression resulting in harm to another will result in structured ISS in the safe room based on the judgment of the team and administrator
  - Suspension of services will be utilized based on the professional judgment of the team and administrator.”

On September 15, 2013, a meeting was held at Latchkey to discuss accommodations and strategies to be used while the student was in that program. The Latchkey team agreed to implement some of the accommodations outlined in the student’s 504 plan and agreed to implement the following “Environmental Structure and Supports:”

- “Visual schedule (shared daily)
- Safe place (designated area in classroom)
- Individual Positive Behavior Intervention System (time earned with *board game, computer time, etc.*)
- Rules and expectations should be clarified (verbal directives)”

On September 16, 2015, the Director of Special Education sent an email to the parent regarding anticipated accommodations to be used while the student was being transported from El Paso Elementary to the Latchkey program site.

### **Issues**

In her complaint, the parent presented the following concern:

**The district's denial of the parent's request to include the Latchkey program into the student's IEP resulted in the student's expulsion from that program.**

In completing this investigation, the investigator determined that three issues were associated with the parent's concern:

**Issue One: The district inappropriately refused the parent's request to incorporate the student's Section 504 Accommodation Plan into his October 2015 IEP.**

Federal regulations, at 34 C.F.R. 300.107, state that districts must "take steps, including the provision of supplementary aids and services determined appropriate and necessary by the 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 activities. Nonacademic and extracurricular services and activities may include counseling services, health services, recreational activities, special interest groups or clubs sponsored by the public agency..." It is the responsibility of the IEP team to determine what – if any – supplementary aids and services are needed.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, field trips and the services specified above, the school must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate and to the needs of the child (K.A.R. 91-40-3(b)(1); 34 C.F.R. 300.117).

The parent believes that had supplemental aids and services been provided to the student in the Latchkey program, he would have been successful in that program and would not have been expelled for demonstrating behaviors that she contends are directly related to his disability.

According to the parent, she filed a formal request for the special education-related evaluation of the student on August 31, 2015 after the student was given a 2-day out-of-school suspension. The parent provided written consent for the evaluation on September 1, 2015.

An IEP Team meeting was held on October 19, 2015 at the student's elementary school. Parents were given 12-days prior notice of the meeting. All legally required participants attended the meeting. The district proposed the following services:

- "Special Education services in the general education classroom, 55 x 3, 40 x 1, 70 x 1 to provide behavioral support during lunch and recess.
- Special Education services in the special education classroom, 14

minutes 5 days a week to provide a calming place for (the student), 15 minutes 5 days a week for supplemental reading practice.

- ...social work services 2 times per week for 20 minutes per session...
- ...nurse services 5 minutes 5 days per week for blood pressure and pulse check."

According to the October 2015 IEP, specialized transportation services are not needed for the student. (The student was being transported on a general education bus to the Latchkey program.) The IEP indicates that the student would "have the opportunity to participate in all non-academic and extracurricular activities such as clubs, sports, etc. to the same extent as non-identified peers."

The October IEP states that the following Supplementary Aids and Services/ Accommodations are to be provided to the student in both general and special education classrooms:

- First/then chart used to earn a reward (preferred activity)
- Allowed to work ahead
- Snack
- Permission to sleep in 15-minute increments for up to 1 hour

The Supplementary Aids and Services/Accommodations section of the October IEP also shows that the student is to be given the option to start his day in a quiet, separate location. While in the general education classroom, an "emotional check-in" is to be conducted upon arrival. Any core academic class work refused by the student is to be sent home.

A "Positive Behavioral Intervention Plan" is included in the student's IEP. The target behaviors addressed by the Plan include "physical aggression with staff and peers," "not staying within the academic environment (elopement)," and increases in the frequency of the previous two behaviors "during unstructured times."

According to the parent, she asked the team how the IEP would address the Latchkey program and was told by the building principal that the IEP could not address Latchkey since that program was housed in another building. The parent states that she was asked to sign off on a form allowing the district to remove the 504 Plan from the student's record because the plan was being incorporated into the student's proposed IEP. According to the parent, she asked that the plan not be removed because it specifically outlined the accommodations that were to be provided to the student at Latchkey. The parent reports that she also asked to have Latchkey accommodations included in the student's IEP.

By report of the parent, the student's principal – after consulting by telephone with the Director of Special Education – told the team that the 504 Plan would

remain in effect for Latchkey. The district would not, however, include Latchkey accommodations in the student's IEP.

The parent gave her signed written consent for the district's proposed services on October 21, 2015.

The district contends that the Latchkey program is not a district-sponsored non-academic or extracurricular program. It is the district's position that it was under no obligation to address any need for supplemental aids and services at Latchkey when developing the student's IEP. According to the district, the Latchkey staff wanted the student to be successful in their program and had agreed on September 15, 2015 to implement what they determined to be "applicable items" from the behavior plan of the student's 504 Accommodation Plan.

In the opinion of the investigator, the Latchkey day-care program must be considered a district-sponsored nonacademic activity. The program is advertised on the district website, is housed on the grounds of a district elementary school, is staffed in part by district-paid personnel, and is overseen by a district administrator (the principal of the elementary school where one of the Latchkey programs is located). Fees for participation in Latchkey are paid to USD #

The student had been participating in Latchkey for more than two years at the time he was determined to be eligible for and in need of special education services. The IEP team did not determine when developing the student's October 2015 IEP that participation in the Latchkey program was necessary in order for the student to achieve his IEP goals and objectives. The IEP Team conceded that some of the behavioral strategies initially outlined in a Section 504 Accommodation Plan on September 11, 2015 were needed, but the team did not incorporate those strategies into the Supplemental Aids and Services portion of the student's IEP. Additionally, the IEP does not include the accommodations that the district had already put in place on the bus to assist the student in making his transition from his elementary school to the Latchkey location.

Because the district did not include in the student's October 2015 IEP the supplemental aids and services he would need in order to participate in a school-sponsored non-academic activity, a violation of special education laws and regulations is substantiated on this aspect of the parent's concern.

### **Additional Comments**

In the course of this investigation, the investigator has determined that the district has not considered Latchkey to be a district-sponsored non-academic program and has not considered whether any of the special education students attending its Latchkey program are in need of supplemental aids and service. A systemic violation of special education laws and regulations has been established.

**Issue Two: The district did not follow due process procedures when the student was expelled from the Latchkey program.**

Special education laws do not prohibit the use by a district of the customary disciplinary techniques for all children, including those with disabilities. For children with disabilities, traditional forms of discipline such as detention, time-out, study carrels, or the restriction of privileges can also be used so long as these forms of discipline are also used with nondisabled children and do not violate the provisions of a child's Individualized Education Program (IEP) or the child's right to a free appropriate public education (FAPE). School officials may use in-school or out-of-school suspension so long as the use of these techniques does not constitute a change of educational placement.

A change of educational placement is considered to have occurred if as a result of the disciplinary action the student is removed from the educational placement specified in the student's IEP for more than 10 consecutive days or is subjected to a pattern of removals from his or her educational placement.

In addition, under the Individuals with Disabilities Education Act (IDEA) other disciplinary procedural requirements, such as manifestation determination are also applicable only for educational settings, not for non-academic programs that are held before or after school. There may be procedural safeguards under Section 504 of the Rehabilitation Act that would apply under the circumstances of this case, but this investigator does not have jurisdiction to consider a potential violation of that law.

The published USD # Latchkey Behavior Policy contains the following statements:

- "Children are expected to be in control and to exhibit respectful behavior while in Latchkey care.
- Playground rules are to be followed.
- Certain behaviors will not be tolerated at Latchkey. This includes, but is not limited to:
  - A. Behavior that threatens the safety of the child or others.
  - B. Behavior that is deliberately destructive of property.
  - C. Behavior that is outright disobedient.
  - D. Behavior that is physically aggressive.
  - E. Behavior that interferes with group activities.
  - F. Behavior that violates the district policy on racial harassment.
  - G. Behavior that violates the district policy on weapons.
  - H. Possession and/or use of tobacco.
  - I. Sexual Harassment
  - J. Bullying Others"

The policy states that a second "formal" write-up of infraction of items A through E above would result in a 36-hour suspension from the Latchkey program. According to the policy, a third formal write-up "could result in dismissal from the Latchkey program for one calendar year." Infractions of rules F through J above "may result in short-term suspension, long-term suspension, expulsion, or other disciplinary measures per district guidelines."

On October 27, 2015, the parent was contacted by the Latchkey Coordinator who told the parent that the student was being expelled from Latchkey for one year. The parent reports that she was told by the Coordinator that the student would be allowed to return to Latchkey on October 29, 2016. It is the parent's contention that the student should have been afforded the due process protections allowed him under special education law.

According to the parent, she and the student's grandfather as well as a representative from an outside agency met with the district Superintendent on October 28, 2015. The parent maintains that the Superintendent told the group that he knew the student had been determined to be eligible for special education services and was aware of the student's removal from Latchkey. The Superintendent reportedly stated that while he did not direct the removal, he supported the right of Latchkey staff to make that decision. According to the parent, the Superintendent did acknowledge that Latchkey was a USD # program but said that Latchkey was not an educational program and therefore was not covered by FAPE (*free appropriate public education*) regulations.

The district contends that the student had committed numerous behavioral infractions at Latchkey even though behavioral interventions had been implemented. It is the district's position that appropriate, published procedures were followed when the student was suspended for a year from the Latchkey program.

According to the district, the following behavioral incidents were documented:

- August 18: "refused to listen and left his group...talking disrespectfully"
- August 19: "acting in an aggressive manner"
- August 20: struck a staff member with his lunch box
- August 28: hitting other children with a toy (stress ball on a string), refused to comply with staff and ran from them
- August 31: ran from staff after refusing to comply with staff request
- September 2: ran from staff when asked to go to the Director's office
- September 2: pushed another child and ran from staff
- September 9: "punched another child in the stomach"
- September 29: was repeatedly asked to give scissors to an adult; scratched table leg with scissors
- October 7: broke another student's toy
- October 16: "tackled" a child who had taken a football from a group of

children with whom the student was playing; kicked that student in the head

- October 19: "threw things, tore up...worksheets" while serving in-school suspension
- October 22: "kicked another child on the playground"
- October 23: "kicked in the sides of some of the hallway lockers...and front doorway windows...tore off several classroom door displays...tearing up...locker artwork and the fire escape plan...got into a water fight"
- October 26: struck another student and refused to go to his safe room; struck staff with/threw rocks at staff

The student's identification as a child with a disability does not prohibit the district from implementing disciplinary consequences for behaviors that violate the student code of conduct. The student's removal from the Latchkey day-care program did not in any way remove the student from his educational placement. It did not alter the special education services outlined in the student's October 2015 IEP, did not impede the student's access to the general education curriculum, and did not restrict his ability to make progress toward meeting the goals set out in his IEP. However, consistent with the findings and conclusion in Issue 1 of this report, that the district failed to address in the student's IEP the supplementary aids and services the student needed to have an equal opportunity to participate in the Latchkey program, the removal of the student from the Latchkey program without providing the needed supports is also a violation of the equal opportunity requirement of federal regulation 300.107.

A violation of special education laws and regulations is substantiated on this aspect of the parent's concern.

**Issue Three: By destroying Latchkey records, the district violated special education laws and regulations.**

An "Education Record" is defined by the Family Education Rights and Policy Act of 1974 (FERPA) as those records that are

- (1) directly related to a student; and
- (2) maintained by an educational agency or institution or by a party acting for the agency or institution.

Federal auditing requires the availability of ***special education records*** for identified students for 3 years after the final grant expenditure report for services is submitted to the United States Department of Education. 2 C.F.R. 200.333. After that period of time, schools may destroy records. However, before destroying special education records, the school must notify the parent (or the adult student) that the information is no longer needed to provide services to the student.

If a district maintained a record with the student's name on it, it is an educational record. If the record were used for special education purposes, then federal regulations, at 34 C.F.R. 300.624, require agencies to inform parents when personally identifiable information collected, maintained or used is no longer needed to provide educational services. ***If the records were not used for any special education purpose, then special education laws and regulations do not apply.***

Complaints related to the destruction of non-special education related records should be directed to the Family Policy Compliance Office (FPCO), which takes complaints regarding FERPA. It should be noted, however, that FERPA does not have the notice requirement with regard to the destruction of education records.

On September 14, 2015 the parent sent an email to the Superintendent requesting copies of the Latchkey records for the student. The request included records covering the entire 3-year period of the student's enrollment in the program.

The parent reports that the district told her that the records had been shredded. The parent states that the district administrator in charge of the program told her that the Program Coordinator for Latchkey had advised him that student records were destroyed at the end of every session. The parent contends that the destruction of these records violates special education laws.

The district states that Latchkey records are maintained by Latchkey staff, are destroyed at the end of each session, and are not used for special education purposes.

Because Latchkey records are not used for special education purposes, their destruction is not addressed under special education laws and regulations. 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, a violation has been substantiated with regard to

- 34 C.F.R. 300.107, which requires that IEP teams determine whether or not supplementary aids and services are needed in order to provide students with equal opportunity for participation in nonacademic and

extracurricular services and activities, and if so, to specify the needed services in the student's IEP, and to provide the specified services.

This violation is a systemic violation because the district has failed to implement the requirements of 34 C.F.R. 300.107 for any child with a disability in the district who is participating in the Latchkey program.

Therefore, the School District is directed to take the following actions:

- 1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will
  - a. comply with the requirements 34 C.F.R. 300.107 by directing IEP Teams to consider whether supplementary aids and services are needed by special education students participating in the Latchkey program .
- 2) Upon receipt of this report, set aside the student's suspension from the Latchkey program.
- 3) Within 5 calendar days of the receipt of this report, schedule an IEP Team meeting for this student, with at least a 10 day advance notice of the meeting unless the parent agrees to waive the advance notice, for the purpose of determining whether supplementary aids and services are needed in order for the student to participate in Latchkey.
- 4) Within 5 school days from the date of the meeting, submit to Early Childhood, Special Education and Title Services a copy of a notice of the meeting referenced in item 3, a summary of that meeting, and a copy of the student's IEP if it is determined by the IEP Team that additional aids and services are needed.
- 5) Within 30 school days of the receipt of this report, submit to Early Childhood, Special Education and Title Services a report of a district investigation into the need for supplementary aids and services for all special education students participating in the Latchkey program. That report should include:
  - a. the number of special education students participating in Latchkey,
  - b. a plan for determining whether any of the identified students are in need of supplementary aids and services, which shall, at a minimum, include: (1) the provision of written notification to the parents of all identified special education students participating in

the Latchkey program that special education regulations require the IEP team to consider whether supplementary aids and services are needed in order for children with disabilities to have an equal opportunity for participation in nonacademic activities; (2) the provision of a written offer to each of these parents for an opportunity for an IEP meeting for this purpose; and (3) written notification to Early Childhood, Special Education and Title Services of the date(s) the above referenced notices and offers were sent to parents; and

- c. a timeline for the scheduling of IEP Team meetings to review and, if necessary, revise the IEPs of all identified students whose parents elect to participate in an IEP meeting for the purpose specified in paragraph b, above.

Further, USD shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education and Title Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

### **Right to Appeal**

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



Diana Durkin  
Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

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

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON FEBRUARY 10, 2016**

**DATE OF REPORT: MARCH 8, 2016**

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

**Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_ Director of Special Education for USD # \_\_\_\_\_, on February 24 and 29, 2016 and on March 1 and 3, 2016.

The complainant did not list her own address and telephone number on the Formal Complaint Request Form, and instead submitted contact information for the parent. Therefore, the investigator spoke by telephone with the student's mother on February 29, 2016.

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

- IEP for this student dated February 10, 2015
- IEP Progress Report for the student covering the period of March 23, 2015 through February 9, 2016
- IEP for this student dated February 9, 2016
- Notice of the use of an Emergency Safety Intervention (ESI) on January 15, 2016
- Notice of the second use of an ESI on January 15, 2016
- Notification of short-term suspension dated January 26, 2016
- Email correspondence between the parent and the building principal covering the period of January 29 - 31, 2016

**Background Information**

This investigation involves a 10 year-old boy who is enrolled in the 5th grade in his neighborhood school.

The student received a diagnosis of Autism from Children's Mercy Hospital. According to his IEP, dated February 9, 2016, the student demonstrates academic skills at or above his current grade level and displays particular strength in the area of math. He is reported to be very engaged by technology, and he prefers to converse with adults rather than his peers.

The student's February 2016 IEP states that during the previous IEP year the student demonstrated appropriate behavior 76% of the time. The majority of his inappropriate behaviors involved verbal acting out although 5 incidents of physical aggression were recorded over the 12-month period prior to the development of the February 2016 IEP.

Currently, the student is receiving 250 minutes per day of special education services in the general education classroom and 100 minutes per day of special education services in a special education setting (Behavior Intervention Supports classroom). A Speech/Language Pathologist also provides 2 thirty-minute sessions per week of support, and the student is seen by a school social worker 40 minutes per week; both services are provided in a special education setting.

The complainant is a Psychologist who provides therapy to the student at \_\_\_\_\_ in \_\_\_\_\_. The parent reports that while she shares the concerns expressed by the therapist in this complaint, she has been pleased with the services provided by the district under an IEP developed on February 9, 2016.

### **Issues**

The investigator examined three allegations associated with this complaint:

**Allegation #1: The district is unable to provide support for the student's disability.**

The complainant alleges that because the student's elementary school did not have a specialist in the area of autism on staff, the district did not recognize that many of the student's inappropriate behaviors were related to his disability and failed to implement the type of prompts and calming techniques that would have prevented those inappropriate behaviors. The complainant contends that the student's educational placement should be changed so that he can be provided with accommodations that would meet his needs.

It is the district's contention that the services that have been provided to the student are appropriate and that the educational plans outlined in the student's February 2015 and February 2016 IEP are specific to his needs as a student with autism. The district asserts that both of these IEPs contain descriptive present levels, goals, services, accommodations, and detailed behavior plans.

According to the district, the social/emotional present level statements and behavior plans appropriately address needs related to the student's disability. Further, the district asserts that the pragmatic communication curriculum being used with the student was specifically developed as an intervention for students with autism and addresses the individual needs of this student. Additionally, the district contends that the behavior plans developed for the student's February 2015 and February 2016 IEPs are specifically designed to target the unique needs of the student.

An appropriately constituted IEP Team that included the parent developed the February 10, 2015 IEP for this student. Under the "Health/Motor Status" section of the document, it is noted that the student "has a medical diagnosis of Autism." The "Social/Emotional" section of that IEP for this student contains the following statement:

"(The student) has shown improvement with his behaviors and especially in his motivation to complete work. He is beginning to show an understanding and the ability to connect his actions to consequences both positively and negatively. He is more motivated to complete work for rewards or free time and often uses his time more wisely. (The student's) difficulty with displaying appropriate classroom behavior and poor motivation to complete work at times can affect his impact and progress in general education curriculum. (The student) likes to be in the general education classroom and interacts positively with other students. He usually requires one on one support while in the classroom. (The student) has difficulty with yelling out in class and becoming verbally inappropriate which leads to removal from that setting. (He) struggles with redirection once rules are violated and once his behavior escalates if he is given prompts and redirection. (The student) is at times overwhelmed by written work, even though it is often easy for him to complete. The visual of seeing it can be a trigger. (He) will also act out if he feels he does not have the correct supplies – such as a long pencil with an eraser or a new marker – this is a trigger point for him. He is also very competitive. If he is not first, or called on, or things done his way, he often will react with verbal outbursts and yelling. When (the student) does not want to do work, he verbally acts out in all settings both general education and special education settings. If things are broken down and discussed with him, he will at times take the redirection and get back to work. (His) level of intensity in situations is another area that he continues to struggle with and work on. He at times will react in a manner that is inappropriate to the situation with both verbal and physical reactions. He does respond to prompts and discussion at times of what appropriate reactions would be."

According to the February 2015 IEP, the IEP Team determined that these social/emotional needs would be met by a goal. The IEP includes one goal that specifically targets the development of verbally and physically appropriate

behavior, one goal that targets pragmatic language, and one goal that addresses the development of socially appropriate coping skills.

The February 2015 IEP also includes a Positive Behavioral Intervention Plan. That plan specified the skills that the student "may be lacking" which could be impacting his behavior (language skills, social skills, and emotional regulation). The team also determined that the function of the inappropriate behaviors displayed by the student was "escape avoidance" and "attention." A variety of "environmental structure and support" strategies are listed, as are six "proactive interventions." Replacement skills are specified and consequences are outlined.

A Progress Report for this student shows that at each quarter of the student's IEP year (March 23<sup>rd</sup>, May 18<sup>th</sup>, and October 20<sup>th</sup> of 2015 and January 2<sup>nd</sup> and February 9<sup>th</sup> of 2016) the student was progressing toward attainment of the goal related to improved communication with peers and adults. The report showed that progress toward attainment of a goal related to the demonstration of verbally and physically appropriate behavior was somewhat inconsistent but had improved between October 20, 2015 and January 4, 2016 (up from 70% to 80%) but dropped to 68% by February 8, 2016. With regard to the goal related to the development of socially appropriate coping skills, the report showed that the student had improved from a baseline level of 50% to a level of 67% by February 2, 2016.

The Annual Review of the student's IEP was completed on February 9, 2016 – the day before this complaint was received by Early Childhood, Special Education and Title Services and three days prior to notification of the district that a complaint had been filed. The IEP Team – which again included the parent – included the following statement under the "Social/Emotional" section:

"The majority of (the student's) inappropriate behavior is yelling out, expressing his dislike of the situation/expectations or arguing about how he wants things to be. These social/emotional concerns work along with his communication concerns as outlined in the communication section. Staff will continue to support and build (the student's) skills with consistent terminology and application of skills as listed in communication section. Expectations will be direct and limited by time to reduce anxiety. (His) negative talk is regulating a lot of his feelings and perspective of thing. At this time, (his) positive choices and behaviors will be monitored to put an emphasis on the things he is doing right throughout the day. He will have a visual chart/object to monitor his positive choices and working towards a goal. Overall behavior will be monitored and communicated to mom on a daily basis but positives will be communicated to (the student)."

The February 2016 IEP noted that social/emotional needs would be addressed through a goal as well as through accommodations and/or modifications. The IEP includes four goals that specifically address behaviors as well as three additional goals that focus on the development of pragmatic language skills.

The February 2016 IEP also includes the same Positive Behavioral Intervention Plan. This plan includes eleven "Proactive Interventions" designed to reduce his anxiety in the school setting.

The IEP Team also determined that it would be in the student's best interest to solicit input from outside the building regarding effective interventions for the student. A teacher from another elementary school with specific experience in meeting the needs of students with autism was asked to observe the student and offer suggestions to the team. That observation was conducted on February 22, 2016, and feedback was provided to the school team on February 23<sup>rd</sup>.

While a complaint investigator as a representative of a State Education Agency (SEA) may determine that an IEP has failed to provide a free appropriate public education (FAPE) because it is inadequate, the investigator should not undermine the IEP team process by citing inadequate IEP development unless it is clear that the IEP developed by the team did not meet the student's needs.

In a very recent guidance letter by Office of Special Education Programs (OSEP), Letter to Deaton, 65 IDELR 241 (OSEP 2015) OSEP said an SEA in a complaint may order child-specific services to be added to an IEP. In that letter, OSEP added: "An SEA might order a public agency to ensure the child's IEP is modified or amended in accordance with 34 CFR § 300.324(a)(4) to include the direct services the State has determined are appropriate for that child consistent with the resolution of that State complaint. However, because the IDEA contemplates that the IEP Team, which includes the child's parent, is best equipped to make informed decisions regarding the specific special education and related services necessary to provide FAPE to the child, an SEA should carefully consider whether ordering the provision of services not previously in the IEP is appropriate and necessary to ensure the provision of FAPE."

This new guidance comes more in line with policy of another office in the United States Department of Education, the Office for Civil Rights (OCR). Unlike OSEP, the OCR actually conducts complaint investigations. The OCR Case Processing Manual for complaint investigations states that it has a policy to refrain from assessing the appropriateness of decisions made by 504 teams and to refrain from assessing the appropriateness of pedagogical decisions.

In a guidance letter, cited at: Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, (OCR 2010), OCR responds to a pertinent question as follows:

"5. Does OCR examine individual placement or other educational decisions for students with disabilities?"

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school

district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.”

In summary, an investigator should take the position of rewriting an IEP only when it appears clear that a rewriting is both appropriate and necessary to ensure the provision of FAPE.

It is the opinion of the investigator that the IEPs developed by the district in February of 2015 and 2016 were designed to convey FAPE to this student. Progress reports show that the student has made progress toward the attainment of goals that were written to address unique needs that stem from his disability. The team made adjustments to the educational plan when completing the Annual IEP Review in February 2016, responded to the concerns of the parent, and modified present level statements to reflect changes observed during the previous 12-month period. The student’s behavior plan was modified, and additional support was brought in to assist the team in developing effective strategies. A violation of special education laws and regulations is not substantiated on this issue.

**Allegation #2: The district’s actions have reinforced the student’s inappropriate behavior.**

It is the contention of both the complainant and the parent that the district allowed the student to express the anxiety he experienced over academic tasks through inappropriate behaviors and then called the parent to pick the student up from school thereby increasing the likelihood that the student will repeat those behaviors.

On January 26, 2016, the student was given a 1-day suspension after he slapped his special education teacher. Notice of the suspension was provided to the parent via telephone, and additional documentation regarding the suspension was hand-delivered to the parent by the building principal.

The student received a 2-day suspension on January 29, 2016 when he again slapped his special education teacher and destroyed school property. On this occasion, notice of the suspension was provided to the parent via email.

Parents should be notified when their child is suspended. Email correspondence between the parent and the building principal shows that the parent was notified of both suspensions. The parent also met with the building principal on February

1, 2016.

The parent reports that in addition to these formal suspensions, she has on several occasions been contacted by the school and asked to pick the student up from school due to behavioral issues. According to the parent, she was contacted "maybe 2 or 3 times" between the start of the school year and the beginning of Winter Break. Additionally, the parent reports the following:

- On January 8, 2016 the parent spoke with the student's special education teacher who asked her to pick the student up from school.
- On January 11, 2016 at 11:54 AM, the school secretary left a voicemail message for the parent asking her to come to school to pick up the student.
- A message was left for the parent at 1:34 PM on January 15, 2016. On that date, the parent was traveling out of town on business and the student's grandfather went to the school to pick the student up.
- At 11:42 AM on January 26, 2016, the building principal left a message for the parent requesting an immediate pick up of the student.

It is always possible that the use of suspension could reinforce inappropriate behavior in some students. In this case, data provided by the district shows that while the rate of inappropriate behaviors during the third quarter of the school year, when all the suspensions and the majority of early releases occurred, is higher than the rate during the second quarter, the 3<sup>rd</sup> quarter rate is only slightly higher than the rate observed during the 1<sup>st</sup> quarter of the year. However, this data does not establish that the student's removals from school caused any increase in negative behaviors or if other factors could have played a contributing role.

Moreover, even if the data did indicate that the use of suspensions was reinforcing inappropriate behavior of this student, the law allows a district to suspend a student for up to 10 days in a school year without educational services. It is important to note that suspension for any part of a day is considered a whole day if a student with a disability is sent home as a result of inappropriate behavior.

The student has been formally suspended from school for a total of 3 days during this school year. By report of the parent, she is able to document that she has been asked to pick the student up early from school on at least 4 occasions. The investigator would advise the district to be sure that staff understands that early releases designed to address inappropriate behavior accrue toward the 10-day total.

The allegation of a violation of special education laws and regulations is not substantiated on this issue.

**Allegation #3: The parent has not been informed of all occasions when the student has been restrained at school.**

The complainant contends that during one of her therapy sessions with the student he complained of being restrained “so hard he can’t breathe.” She further contends that the district failed to inform the parent every time restraint was used and did not document each use of restraint.

The Kansas Emergency Safety Interventions Law (also known as the Freedom From Unsafe Restraint and Seclusion Act) was enacted in July of 2015. Section 2(d) of the Act defines “restraint” as “bodily force used to substantially limit a student’s movement...” Districts must document any incident of an Emergency Safety Intervention (ESI). Parents must be notified in writing within two days when an emergency safety intervention is used on their child. The notice must include the date and time when the intervention was used, the type of ESI, the length of the intervention, and the school personnel who participated in or supervised the intervention. This law includes its own complaint process. If the parent wishes to file a complaint alleging that the reporting requirements of this law were not implemented, she may do so by following the procedure specified in the law.

A special education complaint investigator has limited authority, and may only investigate allegations of a violation of special education requirements. In this case, no evidence was presented that this student’s IEP included any requirement to report the use of restraint to the parent. No special education law or regulation requires such reporting.

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

### **Corrective Action**

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is directed at this time.

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson

Street, Suite 620, Topeka, Kansas 66612-1212 within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

*Diana Durkin*

Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

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

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON DECEMBER 9, 2015**

DATE OF REPORT: JANUARY 8, 2016

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 \_\_\_\_\_, Director of the \_\_\_\_\_ Educational Services Interlocal Cooperative, on December 15, 2015 and again on January 4, 2016. On January 5 and 8, 2016, the investigator spoke by telephone with \_\_\_\_\_, Assistant Director of Special Education for the Interlocal Cooperative.

The investigator spoke by telephone with the student's mother on January 5, 2016.

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

- IEP for this student dated October 29, 2015
- Email from the parent to the building principal dated December 4, 2015
- Summary of the November 30, 2015 incident written by the special education teacher
- Notes taken by the building principal during a meeting with the special education teacher on November 30, 2015
- ESI (Emergency Safety Intervention) Follow-up Training forms dated December 14, 15, and 16, 2015
- Email correspondence regarding the review of training modules
- December 16, 2015 email requesting staff CPI (Crisis Prevention Institute) training
- Notice of Meeting form for an IEP Team meeting on January 7, 2016
- Behavior Intervention Plan at a Glance
- Agenda for January 7, 2016 IEP Team Meeting
- Participants list for January 7, 2016 IEP Team Meeting

- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated January 7, 2016

### **Background Information**

This investigation involves a 6 year-old boy who is enrolled in the 1st grade. The student has diagnoses of Autism Spectrum Disorder Level 1, without accompanying intellectual impairment, and without accompanying language impairment, an Other Specified Anxiety Disorder, and Oppositional Defiant Disorder based on an outside evaluation completed in September of 2015. That evaluator also determined that the student had difficulties related to Sensory Integration.

The student has received special education services since the age of 3. Currently, the student receives special education services in both general and special education settings for a total of 60 minutes per day. He also receives services from an Occupational Therapist and a Social Worker.

### **Issue**

In her complaint, the parent alleges the following:

**The student's special education teacher did not follow the Behavior Plan outlined in his IEP and struck the student in the face with a sock.**

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

The IEP for this student dated October 29, 2015 shows that the IEP Team determined that the student's behavior impedes his own learning or the learning of others. The IEP Team also determined that the behavioral needs of the student could not be appropriately addressed within the IEP through the development of a goal or goals, special education services, related or support service, supplementary aids and services, and/or program modifications. An individualized behavior intervention plan was developed by the Team and included in the student's IEP.

The plan included the following "Preventative Strategies:"

"Teachers will speak and interact with (the student) in a neutral and emotionally flat manner using a calm tone. All staff who work with (the student) will use common statements encouraging him to use the calming strategies that have been taught to him. Teachers will state directives, expectations, and directions in a clear and concise manner, and then walk away from (the student) to avoid being drawn into a power struggle. Wait

times of at least 10 seconds will also be used when giving him directions. Teachers will externalize directives, requests, and corrections (rather than saying 'I want you to', say 'when the bell rings that means' or 'the school rules say we must'). Teachers will break assignments into smaller parts or put fewer items on a page. Teachers can have (the student) explain directions what his plan is to start a task in an effort to complete it (sic). Teachers will send (the student) for a break or an errand when they see (the student) escalating (get a drink, drop a note off, etc.). When appropriate and possible, teachers will ignore disruptive behavior from (the student)."

In order to teach alternative behaviors, the following strategies were to be utilized:

"(The student) will ask to take a break when getting or feeling overly frustrated. Teachers will post the school/and or class rules, expectations, and consequences in a highly visible place. (The student) will have social stories read to him daily during his check in. Teachers will make comments to validate and normalize (the student's) feelings of frustrations (for example, 'I know you feel frustrated and that is ok, everyone has trouble with and makes mistakes on challenging work, but we need to take a deep breath and try again.'). The teacher and/or (the student) will work on an item or problem for a specified amount of time then move on when the timer goes off. Staff members will use 'I messages' when discussing expected and unexpected behaviors."

The following "Positive Reinforcement" techniques were to be implemented:

"(The student) will be allowed to use the computer and other privileges for working, good effort, and attempting tasks. Staff will send a positive note home, call the parent in front of (the student) to give verbal praise, write encouraging notes or put reward sticker on his papers that are complete or he's put forth good effort on. Teachers will give frequent positive feedback like green sticks, a high five or thumbs up."

"Consequences for Non-Compliance" were listed as follows:

"If (the student) refuses to work on assignments during class, (the student) will lose privileges and work on assignments during recess or other unstructured or free time. If (the student) remains non-complaint and disruptive, Teachers will issue firm redirections and (the student) will be given options of 2 places to be within the classroom.

When (the student) becomes noncompliant on 2 or more assignments or tasks or for an extended period of time, additional and more intensive consequences will take place. These could include removal from the

classroom until the work is completed; after school detention; or time out with counseling/administrative staff. Special education staff will accompany him. These consequences will also be implemented for extreme acts of disruption of the class, destruction of property, or harming others.”

It is the parent's contention that the student's special education teacher “lost it” when the student did not comply with the teacher's request that he put on his shoes and socks, that the teacher disregarded the procedures outlined in the student's IEP, and that the teacher struck the student in the face with a sock.

The district stipulates that one or more components of the behavior plan outlined in the student's October 2015 IEP were not implemented in response to the student's behavior during the incident of November 30, 2015.

The district offers the following response to the parent's allegation:

“In an attempt to intercede during a period of student noncompliance and behavioral escalation on November 30, 2015, (the student's special education teacher) tried to retrieve a sock (the student) was waving about...The attempt ...resulted in the student being struck in the face with the sock.”

The special education teacher provided the following written summary of the incident.

“On Nov. 30, 2015 at approximately 11:15, (the student) was brought to me by the assistant principal because he refused to go to music. After trying to get him to walk to music with her, she said that she had to leave for lunchroom duty. She left and (the student) plopped himself in front of the door with his feet straight up in the air. He was blocking the doorway and wouldn't move. I was doing my best to just ignore him, but he wasn't letting people get in or out of the classroom. I left briefly to go to the restroom hoping that he might move to his 'calm' areas if I wasn't there. There was another para in the room working with another student. When I came back he was still laying on the floor with his feet on the door. I had to move his feet out of the way so I could get through. At that point, I noticed that one of his socks was off and I told him he needed to have his socks on. I was thinking that it might be a distraction for him and would help him move on. I was able to help him put on his socks already earlier in the morning. I tried to help him put on his sock, he was punching his foot into my stomach. I gave him his sock to put on himself but he wouldn't put it on. He had the sock on his hand, so I reached for it and asked him to give me the sock. He was moving his hand back and forth and in the process of me struggling to get the sock from him, I hit him in the face with it. He told me I hit him in the face. I said that I was sorry and asked him if he was okay. He had his hands in front of his face. I moved

his hands and said I was sorry. I hit the sock on the ground and said, 'Enough! Enough! Enough!' I then helped him put on his socks and helped him choose a calming tool from his folder. He was able to get to one of his calm areas and play with the putty."

According to the district, the special education teacher reported the incident to the building principal. On December 1, 2015, the principal and special education teacher placed a conference call to the parent to provide the parent with a verbal report of the November 30<sup>th</sup> incident.

In an email from the parent to the building principal dated December 4, 2015, the parent confirms that the conference call took place and states that she told the teacher that "accidents happen." According to the email, the teacher apologized to the parent and told the parent she would "work on her patience with (the student)." According to the email, the principal told the parent that he had examined the student for "marks or bruising and found zero."

The district reports that a formal investigation into the incident was initiated on December 1, 2015 in compliance with normal district procedures. That investigation included the following actions:

- Requesting and receiving notes taken by the building principal during his conversation with the special education teacher
- Requesting and receiving a written account of the incident from the special education teacher
- Requesting and receiving a written account of the incident from the paraeducator who was present at the time of the incident
- Interviewing the paraeducator
- Interviewing the special education teacher
- Compiling the information obtained during the course of the investigation
- Determining appropriate actions to be taken based upon the results of the investigation
- Taking those actions

On December 4, 2015, the district's Director of Human Resources telephoned the parent to report that the investigation into the incident had been completed and that no additional information had surfaced beyond what had been reported to the parent in the telephone call of December 1, 2015. The Director told the parent that because the investigation of the incident was considered a "personnel matter," no written report of the district's actions would be provided to the parent.

The investigator has determined that some of the actions taken by the special education teacher during the incident of November 30, 2015 did not comply with the student's behavior plan. During the initial period of that incident, the teacher appropriately responded to the student's behavior by ignoring his disruptive actions and walking away from the situation. Upon her return to the classroom,

the teacher gave the student a directive to put his sock back on. The teacher's statement does not, however, reflect that she gave the student 2 options for places he could be within the classroom – as required by the student's behavior plan.

The behavior plan does not call for physical intervention – beyond the possible removal of the student from the classroom – in the event of an extended period of non-compliance. An open struggle with the student over control of his socks was contraindicated by the student's behavior plan, which emphasizes the importance of avoiding an open power struggle with the student. The teacher's actions instead resulted in the student being struck in the face with his sock. Under these circumstances, a violation of special education laws and regulations is substantiated.

### **Actions Taken By the District to Address the Issue**

The district reports that the following actions have been taken:

- Over the period of December 14-16, 2015, staff working directly with this student completed ESI (Emergency Safety Intervention) training modules specific to providing positive supports and intervention to address behavioral concerns associated with this student's social/emotional needs.
- On December 16, 2015, staff working directly with this student met with a Behavior Coach for 90 minutes to discuss those modules and review the student's current behavior plan, highlighting the target behaviors, preventative strategies, strategies for teaching alternative behaviors, positive reinforcers, and consequences outlined in the behavior plan associated with the student's October 2015 IEP.
- On December 16, 2015, district staff made a request that staff working directly with this student be included in the next scheduled CPI (Crisis Prevention Institute) Training.
- On January 5, 2016, staff working directly with this student collaborated with a Behavior Specialist/coach to develop a brief outline or "BIP at a glance" to support both licensed and classified staff who serve the student in the implementation of the student's behavior plan. Staff working directly with this student will, as necessary, identify and call upon other school professionals to eliminate any anticipated potential barriers to the implementation of the student's behavior plan "to the faith and fidelity intended." Paraeducators who work with the student are to be trained on the plan on January 6, 2016.
- The district conducted an IEP Team meeting on January 7, 2016 to review and/or revise the IEP as needed. Parents were provided with prior written notice of that meeting on December 14 and 16, 2015. Along with updating the Present Levels of Educational and Functional Performance Levels, the primary purpose of this proposed meeting was to address the student's behavior plan in order to ensure that all providers responsible for carrying

out the plan can clearly understand and implement it. The review of the plan included (but was not be limited to) the following:

- Review of the targeted behaviors
- Determination of or amendment of behavioral goals related to increasing or decreasing target behaviors
- Determination of or amendment of specific intervention strategies appropriate for target behaviors
- Designation of the individual(s) responsible for the implementation of the plan
- Determination of the frequency of the review of the plan and the evaluation of its success
- Determination of the appropriate methods for evaluation of the effectiveness of the plan

Additionally, the district proposes that at the January 7<sup>th</sup> IEP Team meeting, consideration will be given to the supports needed by school personnel (licensed and classified) "in order for the student to advance appropriately toward attaining his annual goals, to be involved and progress in the general curriculum, and to be educated and participate in extracurricular and other nonacademic activities with other exceptional and nonexceptional children."

#### **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 been substantiated with regard to

- 34 C.F.R. 300.101, which requires that a student's IEP be implemented as written.

The School District has already voluntarily undertaken a number of actions that appropriately address the violation substantiated by this investigation. Therefore, no additional corrective actions are required.

#### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212 within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), 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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
COOPERATIVE / UNIFIED SCHOOL DISTRICT # .  
ON OCTOBER 29, 2015**

DATE OF REPORT: NOVEMBER 27, 2015

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

### **Investigation of Complaint**

Nancy Thomas, Complaint Investigator, spoke with \_\_\_\_\_, Cooperative / USD # \_\_\_\_\_ by telephone on November 3, November 16, November 17, and November 19, 2015. The following staff persons were interviewed:

- \_\_\_\_\_, Special Education Teacher
- \_\_\_\_\_, Paraprofessional
- \_\_\_\_\_, Secondary Principal
- \_\_\_\_\_, Math Teacher
- \_\_\_\_\_, Humanities Teacher
- \_\_\_\_\_, Science Teacher
- \_\_\_\_\_, School Counselor

The Complaint Investigator spoke by telephone to the complainant on November 2 and November 11, 2015. The following person was interviewed:

- \_\_\_\_\_, Parent

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

- An IEP for the student dated March 11, 2015
- A Reevaluation Report for the student dated March 12, 2013
- A letter and Release of Information form signed by the Parent on September 30, 2015
- Paraprofessional Log for the student dated August 26 through November 5, 2015

- Paraprofessional Daily Schedule for [redacted] for the 2015-16 school year
- Snapshot IEP for the student reflecting the March 11, 2015 IEP
- Special Education Teacher Log for the student dated August 26 through November 2, 2015 kept by [redacted]
- October 7, 2015 Parent Teacher Conference Log kept by [redacted]
- Para Expectations form dated August 24, 2015, signed by [redacted] and [redacted]
- Log of all activities in the student's IEP file dated February 11, 2010 through September 30, 2015
- Copies of three modified math assignments
- Copy of one modified math test
- Copy the student's September 25, 2015 humanities class research assignment including rubric, paper, and notes
- Copy of modified science test
- Copy of 7<sup>th</sup> and 8<sup>th</sup> grade summary sheet created
- Copy of the Junior High Pre-enrollment form for the student
- Copy of the student's class schedule for 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> grades
- Copy of the August 2015 Staff Inservice Schedule for USD [redacted]

### **Background Information**

This investigation involves a 13 year-old student who is enrolled in the 7<sup>th</sup> grade at the [redacted] Junior High School in USD # [redacted] during the 2015-16 school year. The student was originally determined eligible for special education and related services in the first grade by [redacted] Cooperative / USD # [redacted] and was placed in learning disabilities services and speech/language services on March 10, 2010. [redacted] Cooperative / USD # [redacted] has developed and implemented an Individual Education Plan (IEP) for the student since that date. The student's most current Individualized Education Program (IEP) is dated March 11, 2015.

### **Issues**

The complainant raised eight issues which were investigated.

**ISSUE ONE:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to ensure the implementation of \_\_\_\_\_'s IEP during the 2015-16 school year, specifically by not informing each teacher and provider of his or her specific responsibilities related to implementing \_\_\_\_\_'s IEP in a timely manner.

**Findings:**

Federal regulations, at 34 C.F.R. 300.323(d), require that the child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; that each teacher and provider are informed of his or her specific responsibilities related to implementing the child's IEP; and, the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

In this case, the parent reports the student's general teachers were unaware of the disability and the accommodations and modifications required by the IEP based on discussions held at the October 7, 2015 parent/teacher conferences. The parent reports the general education teachers were unable to answer specific questions regarding the provision of accommodations and modifications in the classroom or describe the impact of the student's disability on his access to the general education curriculum.

Interviews with the student's general education humanities teacher, science teacher, and math teacher found each of these teachers was aware of the student's IEP and was informed of the accommodations and modifications required to be provided for the student. Documentation shows all of the general education teachers received a list of students who had IEPs assigned to their classrooms during the before school inservice training day on August 17, 2015. Prior to the first day of school on August 20, 2015, the special education teacher provided each general education teacher of the student with a Snapshot IEP showing the three goals and baseline data, the classroom accommodations and modifications, and a description of participation in state and district-wide assessments from the March 11, 2015 IEP. The core teachers report there was a misunderstanding of their comments made during the parent/teacher conferences on October 7, 2015. Interviews with the secondary principal and school counselor found providing this type of information regarding IEPs to the

general education staff during before school inservice training has been a common practice for the district for the past four school years.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as there is evidence to demonstrate the district has procedures and practices in place to ensure each student's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; that each teacher and provider is informed of his or her specific responsibilities related to implementing the child's IEP; and, the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. Interviews and documentation show the student's general education teachers were made aware of the student's IEP on August 17, 2015 and were provided with specific information from the student's current IEP regarding their responsibilities as well as the specific accommodations and modifications that must be provided for the student prior to the first day of school on August 20, 2015.

**ISSUE TWO:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_ during the 2015-16 school year, specifically by not providing the accommodation/modification of modifying assignments as required by \_\_\_\_\_'s IEP.

**Findings:**

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written. Federal regulations, at 34 C.F.R. 300.320, require a statement of the special education and related services and supplementary aids and services to be provided to the child and a statement of the program modifications or supports for school personnel that will be provided to the child including the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services.

Note this allegation will only address accommodations and modifications in the core classes of humanities and science. Allegation Seven specifically addresses modified assignments being provided in the math class.

In this case, the parent reports the [redacted] Cooperative / USD # [redacted] did not provide the student with the accommodation of modifying assignments as required by the March 11, 2015 IEP during the 2015-16 school year. The parent indicated that this allegation relates to core classes such as the humanities class which includes both social science and language arts curriculum and the science class.

Documentation shows the most current IEP for the student is dated March 11, 2015. This IEP requires the following five accommodations and modifications for science: extra time; separate, quiet or individual setting for classroom, district or state assessments; read-aloud of assignments and assessments; use of a calculator; and use of a scribe. The IEP requires the following four accommodations and modifications for language/reading and social science: extra time; separate, quiet or individual setting for classroom, district or state assessments; read-aloud of assignments and assessments; and use of a scribe.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as the March 11, 2015 IEP does not require the use of modified assignments in the language arts/reading, social science or science classes.

**ISSUE THREE:** The [redacted] Cooperative / USD # [redacted], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of [redacted] during the 2015-16 school year, specifically by not providing paraprofessional support as required by [redacted] s IEP.

**Findings:**

Federal regulations, at 34 C.F.R. 300.323(a), require that at the beginning of the school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction who has been determined eligible to receive services under IDEA, Part B. Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports the [redacted] Cooperative / USD # [redacted] did not provide the student with the paraprofessional support required by the March 11, 2015 IEP during the 2015-16 school year. The parent indicated a paraprofessional is assigned to work with two other students in addition to the

student in the general education setting and therefore the student is not receiving the paraprofessional support required by the IEP.

Documentation shows the most current IEP for the student is dated March 11, 2015. The IEP requires the student to have support in the inclusive and or pull out 7<sup>th</sup> grade setting for 275 minutes daily beginning August 15, 2015 ending March 11, 2016. The IEP does not require that this support be one-on-one support. Documentation and interviews found a paraprofessional is assigned to the student's general education math class, humanities class, and science class for a total of 180 minutes per day. Documentation and interviews found the student receives 50 minutes per day of support in the seminar class in the special education setting on Monday through Thursday each week for a total of 200 minutes per week of support. The special education teacher reported additional support is provided on Fridays as needed.

Interviews with school staff acknowledged the paraprofessional was assigned to work with three students with IEPs in the general education math, humanities and science classrooms beginning the first day of the 2015-16 school year on August 20, 2015. School staff report the three students sit in close proximity in the classrooms with the paraprofessional scribing notes and assignments as well as reading aloud text from classroom materials and assignments to the student on a daily basis. The school counselor reported these same three students worked with one paraprofessional in the 6<sup>th</sup> grade general education setting during the 2014-15 school year.

The allegation of a violation of special education laws and regulations on this issue is substantiated as the March 11, 2015 IEP requires the student to have support in the inclusive and or pull out 7<sup>th</sup> grade setting for 275 minutes daily beginning August 15, 2015 ending March 11, 2016. Documentation and interviews found the student only received a total of 220 minutes per day of support from either the special education teacher or the paraprofessional in the inclusive or pull out setting beginning on August 20, 2015.

**ISSUE FOUR:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to the parents of \_\_\_\_\_; \_\_\_\_\_'s request for access to educational records on October 7, 2015, specifically by not providing the parents of \_\_\_\_\_ access to

classroom documentation of the implementation of the accommodations/modifications required by the IEP.

Findings:

Federal regulations, at 34 C.F.R. 300.613 and 34 C.F.R Part 99.6(2), require that the district permit parents to inspect and review any educational records relating to their children that are collected, maintained, and used by the local school district/public agency regarding their student without unnecessary delay and, in no case, more than 45 days after the request has been made. "Educational records" means records maintained by a public agency responsible for the provision of general education or special education and related services that pertain to the special education and related services provided to a student with a disability. The term includes medical, psychological, and educational reports but does not include records of instructional, educational, ancillary, supervisory, and administrative personnel which are the sole possession of the maker and which are not accessible or revealed to any other personnel, except another person who performs on a temporary basis the duties of the individual who made the record. Although these regulations require school districts to make existing education records accessible to parents, they do not require districts to develop new materials for parent inspection.

In this case, the parent reported she made a verbal request to the special education teacher at the parent/teacher conference held on October 7, 2015, for written notice of what specific accommodations and modifications were being implemented for the student in each of his core classes. The parent indicated she was initially told this written document would be provided the next day; however, she was subsequently told she was not entitled to receive any papers other than the IEP.

The special education teacher reported and documentation shows the parent requested a document at the parent/teacher conference on October 7, 2015, showing the accommodations and modifications provided to the student and that the special education teacher and parent met in person on October 8, 2015 to discuss this request. At that meeting, the special education teacher indicated to the parent that the requested information was already included in the current IEP and another copy of the current IEP could be provided to the parent. The special education teacher reported she offered to schedule a meeting to discuss the accommodations and modifications rather than create another document besides the IEP. The parent became upset at this point and the meeting ended. The school counselor reported and documentation shows he contacted that parent by phone on two separate occasions on October 9, 2015 to attempt to schedule a meeting to discuss the request. He reported the parent indicated the need to visit with her husband and

would then call back to schedule a meeting. The school counselor indicated the parent never called back to schedule a meeting.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as interviews and documentation shows the parent did not make a request for copies of existing educational records but instead requested the creation of a new document.

**ISSUE FIVE:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_ during the 2015-16 school year, specifically by not providing specialized instruction to address the reading goals.

#### Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written. Federal regulations, at 34 C.F.R. 300.320 require 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 including the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services.

In this case, the parent reports the \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_ did not provide the student with the special education support services to address the reading goal required by the March 11, 2015 IEP during the 2015-16 school year. The parent indicated the student does not have a reading class in his 7<sup>th</sup> grade schedule because the Reading Advantage class is only offered during the same hour as band in the junior high school master schedule. The parent indicated the student has been enrolled in the band class since the 5<sup>th</sup> grade.

The findings of Allegation Three are incorporated herein by reference.

The March 11, 2015 IEP includes a goal stating the student will increase his reading fluency by increasing his words correct per minute (wcpm) at the 1.5-2.0 reading level from 31 wcpm to 50 wcpm by the end of the IEP year. Interviews with the paraprofessional and special education teacher indicated the reading goal is being addressed during the seminar class in the special education classroom. The student spends approximately 35 minutes per class period

working on reading fluency and the final 15 minutes of class working on homework and organization.

The school counselor and special education teacher acknowledge the Reading Advantage class is the class designed to provide specialized instruction in reading at the junior high level and that this class and band class are only offered during 6<sup>th</sup> block in the master schedule. Interviews and documentation show the student had both a band and a reading class during 5<sup>th</sup> and 6<sup>th</sup> grades; however, the student is only enrolled in band during 7<sup>th</sup> grade.

The allegation of a violation of special education laws and regulations on this issue is substantiated. The March 11, 2015 IEP includes a specific goal addressing reading skills and requires the student to have support in the inclusive and or pull out 7<sup>th</sup> grade setting for 275 minutes daily beginning August 15, 2015 ending March 11, 2016. Special education laws and regulations do not require that the services provided to a child be specified separately in an IEP for each annual goal. However, this IEP does not provide a clear description of the frequency, location, and duration of the special education and related services intended for this student. First the locations statement is that the services will be provided in the inclusive and or pull out 7<sup>th</sup> grade setting. That statement does not provide any clarity regarding the amount of services that will be provided in either of those two setting, and is essentially meaningless. Second, the statement in the IEP that the student will receive 275 minutes per day of support does not specify whether the support is special education, related services, supplementary aids and services, supports for school personnel, or some combination of the above. Accordingly it is impossible to determine whether the student is getting the kinds of services the IEP team intended, or even what amount of each kind of service was intended. Third, documentation and interviews found the student only received a total of 220 minutes per day of support from either the special education teacher or the paraprofessional in the inclusive or pull out setting beginning on August 20, 2015.

**ISSUE SIX:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to the parents of \_\_\_\_\_'s request made on October 7, 2015 for goals and benchmarks in reading with placement in a phonics-based reading program with a teacher trained in phonics instruction during the 2015-16 school year.

Findings:

Federal regulations, at 34 C.F.R. 300.503(a), requires school districts to provide written notice to parents prior to proposing or refusing to initiate or change the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child, in a timely manner.

In this case, the parent reports speaking to the special education teacher and requesting the addition of reading goals with special education instruction in reading at the October 7, 2015 parent/teacher conference. The parent indicates the district never scheduled an IEP meeting to discuss her request nor provided any notice of action refusing her request.

The findings of Allegation Five are incorporated herein by reference.

The special education teacher acknowledged the parent requested the student be placed in the Reading Advantage class at the parent/ teacher conference held on October 7, 2015. The special education teacher reported she offered to provide the reading instruction during the 5<sup>th</sup> block during the student's currently scheduled music appreciation class and the special education teacher's planning period. The school counselor reported and documentation shows he contacted the parent by phone on two separate occasions on October 9, 2015 to attempt to schedule a meeting to discuss the request. He reported the parent indicated the need to visit with her husband and would then call back to schedule a meeting. The school counselor indicated the parent never called back to schedule a meeting. There is no documentation to show the school district scheduled an IEP meeting to discuss the parent request or provided the parent a notice of action describing a proposal or refusal of the parent request.

The allegation of a violation of special education laws and regulations on this issue is substantiated as interviews and documentation shows the school district did not provide the parent with written notice for proposing or refusing the parent's request for special education goals and services in reading made at the parent/teacher conference held on October 7, 2015.

**ISSUE SEVEN:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_ in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_ during the 2015-16 school year, specifically by not providing the

accommodation/modification of reducing the number of math problems as required by \_\_\_\_\_'s IEP.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written. Federal regulations, at 34 C.F.R. 300.320, require a statement of the special education and related services and supplementary aids and services to be provided to the child and a statement of the program modifications or supports for school personnel that will be provided to the child including the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services.

In this case, the parent reports the \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_ did not provide the student with the accommodation of reducing the number of math problems as required by the March 11, 2015 IEP during the 2015-16 school year.

Documentation shows the most current IEP for the student is dated March 11, 2015. This IEP requires the following five accommodations and modifications for math class: extra time; separate, quiet or individual setting for classroom, district or state assessments; read-aloud of assignments and assessments; use of a calculator; and use of a scribe. This IEP also includes a math goal for the student to maintain a 75% or above grade average on modified math assignments in the 7<sup>th</sup> grade with support. In the description of baseline data, it is noted that due to the student's delayed processing speed, the student should receive modified tasks to allow for success and avoid frustration. Two examples are provided and show 10 out of 20 problems if reading is involved and 5 out of 20 problems if multiple step problems are assigned.

Documentation and interviews with the paraprofessional, the special education teacher, and the general education math teacher found the student is receiving modified assignments in the math class. The student is assigned a representative sample of the homework problems to ensure equal content across the reduced number of practice items in math assignments.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as the student's most current IEP dated March 11, 2015 does not require the accommodation of modifying math assignments for the student. However, the IEP math goal does refer to "modified math assignments" and interviews and documentation show the student is receiving modified assignment for the math class.

**ISSUE EIGHT:** The \_\_\_\_\_ Cooperative / USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to the parents of \_\_\_\_\_'s request made on October 7, 2015 for updates to the IEP to include providing assistance from the paraprofessional or teacher when working with technology and assistance in turning in his assignments on the chrome book.

**Findings:**

Federal regulations, at 34 C.F.R. 300.503(a), requires school districts to provide written notice to parents prior to proposing or refusing to initiate or change the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child, in a timely manner.

In this case, the parent reports speaking to the special education teacher and general education teachers at the October 7, 2015 parent/teacher conference and expressing concerns related to missing assignments and the student not knowing how to access the chrome book. The parent indicates that she requested the paraprofessional and special education teacher provide the student additional assistance with the chrome book technology and help in turning in assignments.

The special education teacher and general education teachers acknowledge the parent shared concerns related to missing assignments and use of the chrome book with them but were unaware the parent was requesting changes in the IEP to address these concerns. The school staff reports sharing with the parent their concerns for the student losing homework assignment and not charging the chrome book for use in class. These staff also shared with the parent their ongoing plans to address these concerns including having the student turn in all assignments to the paraprofessional or special education teacher for safekeeping and providing additional reminders for charging the chrome book.

All of the school district staff reported the student is able to use the chrome book in a manner commensurate with his peers. The principal reported all general and special education teachers received two days of training on the use of the chrome books and technology in the classroom provided by the district's Information Technology (IT) staff on August 13 and 14, 2015. The paraprofessional reported attending training on August 19, 2015, conducted by

the special education teacher on the use of the chrome book and technology in the classroom.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as there is no evidence the parent requested changes be made in the IEP related to additional chrome book assistance and help in turning in assignments. Interviews and documentation show all school staff working with the student was trained on the use of the chrome book and technology in the classroom prior to the first day of the school year. The school staff were aware of concerns related to use of technology and turning in assignments and had already developed plans to address these concerns.

### **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 three areas:

- 34 C.F.R. 300.17 which requires that special education and related services be provided in conformity with an IEP. Specifically, the [redacted] Cooperative / USD # [redacted] failed to provide 55 minutes per day of support in the inclusive and or pull out 7<sup>th</sup> grade setting beginning August 20, 2015.
- 34 C.F.R. 300.320 which requires 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 including the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services.
- 34 C.F.R. 300.503(a) which requires school districts to provide written notice to parents prior to proposing or refusing to initiate or change the identification, evaluation, educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child, in a timely manner.

As a result of these violations, the student was denied a free appropriate public education during the 2015-16 school year.

Therefore, the [redacted] Cooperative / USD # [redacted] 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 Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.17 by implementing the IEPs of students as written; and
  - b) comply with 34 C.F.R. 300.320 by describing the special education services to be provided the student including the frequency, duration and location of each of the special education services; and
  - c) comply with 34 C.F.R. 300.503(a) by providing appropriate prior written notice either proposing or refusing an action as the result of a parent request to change the special education services and goals.
2. Within 30 calendar days of the receipt of this report, special education staff will be trained on appropriately documenting the special education and related services on the IEP, specifically including the location of each special education and related service. The district will document who provided the training, the content of the training, and who attended the training.
3. Within 30 calendar days of the receipt of this report, reconvene the student's IEP team to review and revise the IEP to include the frequency, duration and location of the special education, related services, supplementary aids and services and supports for school personnel the student is to receive in order to advance toward annual goals, participate in the general curriculum and participate in nonacademic activities. The IEP team shall also consider the parent request for additional reading goals and special education services in reading and provide prior written notice to the parent of the proposal or refusal of the request. A copy of the IEP and Prior Written Notice shall be submitted to Early Childhood, Special Education and Title Services, within 5 days after the meeting with the student and his representatives.
4. Within 30 calendar days of the receipt of this report, meet with the parent of the student to develop a plan to provide compensatory services for a

total of 57 hours and 45 minutes of special education support to address the math and reading fluency goals.

- a) 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.
  - b) A copy of the plan to provide the compensatory services shall be submitted to Early Childhood, Special Education and Title Services, within 5 days after the meeting with the student and his representatives.
5. Further, USD #        shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
- a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.

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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  
EARLYCHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

KSDE

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON OCTOBER 16, 2015**

**DATE OF REPORT: NOVEMBER 17, 2015**

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

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with Sarah Loquist, Staff Attorney with the Kansas Association of School Boards working on behalf of USD # \_\_\_\_\_, on November 2, 2015, 2015.

The investigator spoke by telephone with the student's mother on November 7, 2015.

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

- Special Education Evaluation/Reevaluation Report dated March 10, 2015
- IEP for the student dated March 11, 2015
- Request for Student Records from the \_\_\_\_\_ dated September 21, 2015
- Texts between the parent and the Assistant Principal dated September 25, 2015
- Texts between the parent and the Assistant Principal dated September 28, 2015
- Texts between the parent and the Assistant Principal dated September 29, 2015
- Email dated September 29, 2015 from the student's elementary school to \_\_\_\_\_ staff member
- Audio file from September 29, 2015 containing a recording of the voicemail message left by the principal for the parent
- Audio file from September 29, 2015 containing a recording of a conversation between the parent and the Superintendent of Schools
- Text from the parent to the Assistant Principal dated September 30, 2015
- Notice of Meeting dated October 6, 2015
- Audio file from October 12, 2015 team meeting

- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 12, 2015 reflecting the district's proposal to move the student to the ( )
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 12, 2015 reflecting the district's refusal to provide services to the student "half in regular education and half in special education"
- Conference Summary dated October 12, 2015
- *Recording of call made by the Director of Special Education to the parent on October 13, 2015*
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 29, 2015
- Letter from the Director of Special Education to the parent dated October 30, 2015
- Notice of Meeting for an IEP Team meeting on November 19, 2015
- Letter from the Director of Special Education to the parent dated November 11, 2015
- Notice of Meeting for an IEP Team meeting on December 3, 2015
- U.S.D. Response to Formal Complaint dated November 13, 2015
- Notes compiled by the Superintendent summarizing facts related to issues regarding student transportation
- Timeline regarding release of records provided by the district
- On-line Parent-Student Information Booklet for the Public School District and for 2015-16
- District Applications newsletter for 2015-16

### **Background Information**

This investigation involves a 9 year-old boy who is enrolled in the 4th grade. Records indicate that he has been diagnosed as having ADHD and Mood Disorder. He also suffers from asthma and food allergies.

### **Issues**

In her complaint, the parent outlines three issues:

**Issue One: The district released confidential records regarding the student to the School program even though the parent gave instructions not to do so.**

Confidentiality of educational records is a basic right shared by all students in public schools and their parents. These fundamental rights are described in the Family Educational Rights and Privacy Act (FERPA) of 1974, as amended (2009).

Education records include personally identifiable information, and may not be released to another agency or organization without parent consent. However, when a student transfers to another Kansas school district or nonpublic school, education records may be forwarded without student or parent consent if the annual FERPA notice to parents includes a statement that these records will be forwarded to the receiving school.

Kansas schools may NOT withhold records because of fines or other such reasons. The sending district is to transfer the original school record to the requesting district (K.S.A. 72-5386). The sending district should maintain a copy of the educational record that is sent. In addition, Kansas special education regulations require the sending district to immediately transfer the IEP, and any additional educationally relevant information regarding a child with an exceptionality, to the receiving district (K.A.R. 91-40-4(c)). *If the school's annual FERPA notification does not contain a statement that the school sends educational records to a receiving school, it must make a reasonable attempt to notify the parent at the last known address of the parent.*

The parent contends that she did not authorize the release of the student's records to the \_\_\_\_\_ and even told the district that the records should not be released.

The district maintains that it acted appropriately when it forwarded the student's records to the \_\_\_\_\_.

Under the section entitled "Student Records: FERPA, Directory Information and Information for Military Recruiters," the Parent-Student Information Booklet for \_\_\_\_\_ Elementary contains the following entry:

"The district will disclose a student's education records to officials of another school district in which the student seeks or intends to enroll without your consent and without further notice that the records have been requested or forwarded."

According to the district, the Principal of the student's school and the Assistant Principal met with the parent on September 24, 2015. Staff shared concerns regarding the student's lack of progress and discussed a variety of possible service options including the \_\_\_\_\_ (\_\_\_\_\_), private school, virtual school, Alternative Learning Placement (ALP), and general education. At the conclusion of that meeting, the parent told district staff that she had enrolled the student in the \_\_\_\_\_.

On September 25, 2015, the student's elementary school received through interschool mail a request for records from the \_\_\_\_\_ dated September 21, 2015. That request had initially been sent by mistake to the \_\_\_\_\_.

elementary school previously attended by the student.

Though published district policy did not require her to do so, the Assistant Principal texted the parent on the date the records request was received to ask whether the parent wanted the student's records to be released. The parent indicated that she did want to have the records released and stated she planned to "do half and half."

On September 28, 2015, the district Superintendent learned that the statewide student management system no longer showed the student to be enrolled in Public Schools. The Superintendent contacted the Director of the to confirm that the student was enrolled there. The Director of the indicated that she would follow up with the parent to explain that the student could not be enrolled in both programs.

The Director of the called the Superintendent back after speaking with the parent and reported that the student would be considered a full-time student with the .

The student's records were released to the on September 29, 2015.

The district has implemented procedures designed to inform parents of policies related to the release of student records. Upon receipt of a written request for records from the school in which this student was – according to the statewide student management system – currently enrolled, the district followed those policies and released the student's records. A violation of special education laws and regulations is not substantiated on this issue.

**Issue Two: The district did not provide transportation services to the student as required by his IEP.**

Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with an exceptionality, to benefit from special education services. The IEP team determines what additional services are necessary for the child to benefit from the special education services. K.A.R. 91-40-1(ccc) includes a list of related services; included in that list of related services at K.A.R. 91-40-1(vv) is transportation.

On September 28, 2015, the Superintendent for the district learned that the statewide student data management system no longer showed the student to be enrolled in USD # . When Elementary was contacted, the school confirmed that the student had been attending on a full-day basis.

The Superintendent then contacted the Kansas State Department of Education (KSDE) for clarification on the district's responsibility for the student. At the

suggestion of KSDE staff, the Superintendent contacted the . The Director of the Virtual School voiced surprise over hearing that the student was still attending school in full time and told the Superintendent that the Virtual did not accept students on a part-time basis. The Virtual Academy Director told the Superintendent that she would follow up with the parent regarding plans for the student's attendance.

The Director of the Virtual / called the Superintendent late in the day on September 28<sup>th</sup> to report that the parent now understood that the student would be enrolled full time with the Virtual and confirmed that the parent would not send the student to school at on the 29<sup>th</sup>. The Superintendent then made necessary arrangements to cancel transportation services for the student beginning September 29<sup>th</sup> and notified the Principal of that the student would not be attending school there as of that date.

The Assistant Principal sent a text to the parent at approximately 7:20 PM on the 28<sup>th</sup> saying that district staff has "received a message that (the student was) enrolled in the virtual school starting (September 29, 2015)...Before we cancel the bus, (the district) wanted to make sure this is correct." The parent responded via text saying, "No its (sic) not true...He will be at school in the morning."

After learning that the student was not at on September 29<sup>th</sup> and after clarifying with both the Principal and Assistant Principal that the parent had not been told that the student would have to be formally re-enrolled in the district in order to attend, the Superintendent placed a phone call to the parent at approximately 5:00 PM. The Superintendent told the parent that the student would need to be re-enrolled by noon on September 30<sup>th</sup> in order to continue to attend school at . By report of the Superintendent, the parent indicated she would sign the necessary paperwork on the 30<sup>th</sup> after she dropped the student off for school.

On September 30<sup>th</sup>, the student did not come to school, but the parent came to the Administrative Center and completed the required paperwork at around 12:00 PM. The Superintendent then made arrangements for transportation to be reinstated for the student beginning the morning of October 1, 2015.

Transportation services were not provided to this student by the district for the two-day period of September 29 and 30, 2015. On the 29<sup>th</sup>, the student was shown under the state student management system to be enrolled as a student at the . The student was re-enrolled in the district on September 30<sup>th</sup>, though he did not attend school that day. Transportation services were reinstated the morning of October 1, 2015. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Three: The IEP team predetermined the placement of the student in a**

### special day program.

Educational placement refers to the educational environment for the provision of special education and related services rather than a specific place, such as a specific classroom or school (K.A.R. 91-40-1(t)). The IEP team makes the decision about the child's educational placement. For children with disabilities, the special education and related services must be provided in the environment that is least restrictive, with the general education classroom as the initial consideration. The team's decision must be based on the child's needs, goals to be achieved, and the least restrictive environment for services to be provided. Least restrictive environment (LRE) means the child is provided special education and related services with peers who are not disabled, to the maximum extent **appropriate** (K.A.R. 91-40-1(l)). The IEP Team must consider how the child with a disability can be educated with peers without disabilities to the maximum extent appropriate, and how he/she will participate with children without disabilities in other activities such as extracurricular and nonacademic activities.

LRE does not require that every child with a disability be placed in the general education classroom regardless of the child's individual abilities and needs. The law recognizes that full time general education classroom placement may not be appropriate for every child with a disability. School districts are to make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for a continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The continuum of alternative educational placements include instruction in general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (K.A.R. 91-40-21(b); 34 C.F.R. 300.115(b)(1)).

Parents have the right to be part of the decision-making team for determining their child's educational placement and have input into that decision. In Kansas, placement decisions are made by the IEP team. The parent must be provided notice of the IEP team meeting at least 10 calendar days prior to the meeting to ensure that parents have the opportunity to participate. Once the IEP team has made the decision on the initial placement of a child with an exceptionality, the parents must be provided Prior Written Notice about the placement decision and requested to provide consent before initial provision of special education and related services in the proposed placement. For subsequent changes in 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 a service) (K.S.A. 72-988(b)(6)).

The parent contends that placement for the student was predetermined by the district prior to the IEP Team meeting of October 12, 2015.

The IEP for this student dated March 11, 2015 shows that during the 2015-16 school year he was to receive "academic/behavior support in a Behavior Support room for all core academics (ELA, Math Science, and Social Studies) totaling 350 minutes, 5 days a week, for the duration of the IEP. He will receive adult support in the general education setting for PE, lunch, and recesses, totaling 90 minutes, 5 days a week for the duration of the IEP." A behavior plan was included in the student's IEP as was an Emergency Intervention Plan.

An IEP Team meeting was convened on October 12, 2015 at the request of the parent. The parent gave her written consent to waive her right to 10-day prior written notice of the meeting. The student's grandmother participated in the meeting via telephone. Also present was the attorney representing the district. The student was present for some portions of the meeting.

As heard in an audio recording of the team meeting, much of the team discussion was focused on the concerns of the parent and grandparent. District staff did share their concerns regarding the student's lack of progress, his sleeping at school, and his escalating behaviors. District staff proposed a change of placement for the student to the \_\_\_\_\_ (\_\_\_\_\_).

Per the audio recording, the parent is initially heard to be in favor of the proposed change in placement, but she subsequently changed her position and stated that she wanted the student to spend half his day in the regular education classroom and half his day in his current placement. District staff members presented reasons why – based upon the student's previous lack of success in a general education environment – they did not believe that a split placement was in the best interest of the student.

The parent left the meeting but returned. The district is heard presenting the parent with prior written notice of its refusal of the parent's request for a split placement and a second prior written notice reflecting the district's proposal to move the student to \_\_\_\_\_. The parent then stated that she wanted to revoke consent for all Special Education Services for the student. Again, staff members presented their opinions that termination of special education services would not be in the best interest of the student, but the parent adamantly stated that she wanted to end the student's special education services.

The parent then left the meeting, taking with her the prior notice paperwork developed by the district. Placement for the student continued in the behavior supports special education class at \_\_\_\_\_ as outlined in his March 11, 2015 IEP.

Later on in the evening of October 12, 2015, the parent called the Assistant Principal and told her that she had changed her mind and planned to give written

consent to the district's proposed change in placement at TLC. That phone call was followed up with a series of text messages between the parent and Assistant Principal regarding the scheduling of a meeting for the purpose of completing necessary paperwork to allow for the placement change.

In a phone call with the Director of Special Education on October 13, 2015, the parent indicated she had reconsidered the district's placement recommendation for the student and was in agreement with a transfer to . The parent indicated she would enroll the student later that day and asked the Director to *make the necessary arrangements for bus transportation*. The parent gave her written consent to a change in placement for the student to the program on October 13, 2015.

District staff did propose a significant change in the placement of the student. The audio recording of the IEP Team meeting of October 12, 2015, shows, however, that the district considered a range of placement options (no change in placement, a split placement, placement in , and removal from service). The parent was provided with prior written notice of the district's proposed change and gave her written consent. A violation of special education laws and regulations is not substantiated on this issue.

#### **Additional Information**

The IEP Team met again on October 29, 2015 for the purpose of revising the student's IEP. At the meeting, the district reports that the parent stated that she wanted to have the student removed from the program and returned to his former placement in the behavior supports special education classroom at . The parent left the meeting while prior written notice of the district's refusal to change the student's placement was being developed by staff.

On October 29, 2015, the Director of Special Education mailed the parent prior written notice of the district's refusal to remove the student from a special day school ( ) to a special education classroom (specifically a behavior support classroom) in a regular education building.

The District continues to work with the parent to schedule an IEP Team meeting for the purpose of amending the student's IEP. A meeting has been scheduled for December 3, 2015.

#### **Corrective Action**

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Early Childhood, Special Education, and Title Services, 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

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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS, USD #  
ON MARCH 1, 2016**

**DATE OF REPORT: MARCH 29, 2016**

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

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with [redacted] Director of the [redacted] Cooperative, on March 8, 15, 24, 26, and 28, 2016.

The investigator spoke by telephone with the student's mother on March 21, 26, and 28, 2016.

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

- Notice of Evaluation or Reevaluation and Request for Consent dated January 8, 2015
- Psychological Evaluation Report dated April 15, 2015
- Report of Behavior Assessment System for Children – Second Edition (BASC-2) testing dated April 20, 2015
- Speech/Language Evaluation dated April 23, 2015
- Occupational Therapy Educational Re-evaluation Report dated April 23, 2015
- Educational Physical Therapy Evaluation dated April 23, 2015
- IEP for this student dated April 23, 2015
- Comprehensive Evaluation and Eligibility Team Report dated April 23, 2015
- Test for Everyday Living Results dated September 17, 2015
- Daily schedule for the student sent to the parent on January 7, 2016
- Notice of Meeting dated January 11, 2016
- IEP for this student dated January 18, 2016
- Teacher Information Page printed February 10, 2016
- Class schedule for the student dated March 11, 2016
- Text correspondence between the parent and the student's special education teacher between November 24, 2015 and February 16, 2016

## Background Information

This investigation involves a 14 year-old boy who is enrolled in the 8th grade. Though not a resident of his district of attendance, he has attended school in that district since preschool. The student has been determined eligible for special education services under the category of Other Health Impaired. He has a medical diagnosis of Hypothyroidism.

The student received Occupational Therapy (OT) services from Kindergarten through 4<sup>th</sup> grade; he was dismissed from OT in April of 2012. Physical Therapy (PT) services were provided from August of 2007 through October of 2009. The student has low muscle tone and has been diagnosed with hypotonia.

The parent reports that she has hired a tutor to work with her son outside of school to enhance his reading and math skills.

## Issues

Federal regulations, at 34 C.F.R. 300.101, require a district to implement a student's IEP as written. In her complaint, the parent alleges the following:

### **Allegation #1: The district is not providing instruction in core subjects.**

According to the parent, the student has not been receiving instruction in core subjects. It is her contention that the student's IEP specifically calls for him to receive English instruction, but she asserts that this instruction has not been provided.

### **Instruction In Core Subjects**

In the "Non-Participation in General Education" section, the student's April 23, 2015 IEP stated that the student "will be in the Resource Room for English, Math, Social Studies, Science, and Seminar." The "Special Education & Related Services" section of the document showed that the student was to be provided with 212 minutes of special education services in a special education setting. Goals were established in the areas of reading and math.

The student's IEP was revised on January 18, 2016. According to the revised IEP, "core classes" will assist the student in achieving "desired post-school outcomes" in the area of post-secondary education and/or training; employment; independent living; and community participation/recreation and leisure. The "Course of Study" section of the January 2016 IEP indicates that during his 8<sup>th</sup> grade year the student would participate in the following "**Modified curriculum** (emphasis added) classes:"

- “English – Functional Reading/Life Skills Reading
- Math – Functional Math/Life Skills Math
- Science – Exploratory Learning/Discovery Education
- Social Studies – Current events/History Research”

The portion of the January 2016 IEP entitled “Non-Participation in General Education” states, “(The student) will not participate with non-identified students in general education classes for: Science, English, Math, Social Studies/History, and study hall. Due to (the student’s) extreme cognitive and academic deficits, his least restrictive environment will be one-on-one in the Resource Room or one-on-one with a job skills supervisor...”

Neither the student’s April 2015 IEP nor his January 2016 IEP specify the amount of time in the student’s schedule that was to be devoted to each core subject. According to the district, the student adhered to the following schedule between the start of the second trimester and January 18, 2016:

- 1<sup>st</sup> Hour: Math – Resource Room
- Seminar – 25 minutes
- 2<sup>nd</sup> Hour: Music
- 3<sup>rd</sup> Hour: FACS
- 4<sup>th</sup> Hour: Social Studies – Resource Room
- 5<sup>th</sup> Hour: Science – Resource Room
- 6<sup>th</sup> Hour: English – Resource Room
- 7<sup>th</sup> Hour: PE

The student’s schedule at that time followed the same overall structure as the schedules of non-disabled 8<sup>th</sup> graders.

In a text on January 11, 2016, the special education teacher tells the parent that the student is “doing reading, math, discovery education (science experiments), and current events everyday...20 to 30 minutes per subject.”

After the January 18<sup>th</sup> IEP Team meeting, the student’s schedule was modified as follows:

- 1<sup>st</sup> Hour: Building Safety and Maintenance (20 minutes) – refilling vending machines, conducting building walkthroughs; Reading and Math for Life (Lifeskills – 20 minutes)
- 2<sup>nd</sup> Hour: Music alternating with Independent Study in the General Education Classroom
- 3<sup>rd</sup> Hour: Computer Skills/Shop Safety (FACS)
- 4<sup>th</sup> Hour: Restaurant Skills and Safety in the cafeteria and kitchen including washing trays and wiping down cafeteria tables

- 5<sup>th</sup> Hour: Assistant Skills (20 minutes) – including such tasks as shredding paper in the office; Current Events/Discovery Education (Social Studies and Science – 33 minutes)
- 6<sup>th</sup> Hour: Custodial Job Skills
- 7<sup>th</sup> Hour: PE

In response to the parent's request, the district revised the student's schedule on February 29, 2016, returning the student to the schedule in place at the start of the second trimester. It is the district's assertion that the student is currently receiving 53 minutes per day of instruction from either the special education teacher or a paraeducator in each of the core subjects of science, social studies, language arts, and math in the resource room – the same amount of core course instruction as is provided to all 8<sup>th</sup> grade students.

It is the parent's contention that the student has not received adequate instruction in core subjects during the 2015-16 school year. According to the parent, the district did not have an instructional plan in place and continued to try to find appropriate curricular materials to use with the student until December 2015. The parent asserts that the special education teacher confirmed in a text on November 24, 2015 "we are still working on a curriculum for him. We will start it next week." In a follow-up text on December 7, 2015, the teacher states "we just got (the curriculum) done and are just got it approved (sic) from (the building principal). Sending it to (the director of the Cooperative) tomorrow. We have been implementing it a little bit."

The Director of the Cooperative stipulates that she did procure some materials for the classroom teacher to use with the student but reports that the teacher has independently developed other curricular materials that she had been using with the student.

### **English Instruction**

The student's April 2015 IEP shows that the student was "unable to read most basis 1<sup>st</sup> grade books and struggles to comprehend any book beyond 1<sup>st</sup> grade." The IEP Team established the following reading goal:

"By March 30, 2016, (the student) will increase his reading grade from 1.1 to 3.0 as measured by the Star Reading Tests."

The district reports that instructional emphasis has been placed on improving the student's reading, phonics, vocabulary, and spelling. Progress reports show that the student has accrued some educational benefit from the instruction he has been provided in the area of reading. Records indicate that he was performing at the 0.8 grade level as of August 2015, at the 1.1 grade level by November, and at the 1.7 level by January 2016.

According to the student's January 2016 IEP, the student's reading skills fall at the first to second grade level. Passage Comprehension as measured by the Brigance Reading test is at the 1<sup>st</sup> grade level. The student's reading fluency as assessed using Easy CBM Reading is above the 50<sup>th</sup>ile for first grade material but falls below the 10<sup>th</sup>ile for second grade passages. Easy CBM Reading measures show that the student's reading comprehension skills for second grade probes falls below the 10<sup>th</sup>ile.

Two reading-related goals were incorporated into the student's January 2016 IEP by his IEP Team.

- "Goal 1: By January 18, 2017, (the student) will read 100 high frequency sight words at the 3<sup>rd</sup> grade level with 90% accuracy as measured by the Brigance Sight Word Test.
- Goal 2: By January 18, 2017, (the student) will demonstrate comprehension of a variety of 3<sup>rd</sup> grade level test by reading passages or stories that have been read aloud (eg. character ID, setting problem, solutions, and sequence of events) with 90% accuracy as measured by the Easy CBM comprehension test and Brigance Long Passage Comprehension Test."

Neither the student's April 2015 IEP nor his January 2016 IEP specify the number of minutes in the student's schedule that are to be devoted to instruction in core subjects. The January 2016 IEP makes it clear that the curriculum for all core subjects would be modified. The daily schedules provided by the district and the parent show that since the beginning of the school year, at least a portion of each day has been spent working with the student on core content.

Though he failed to attain benchmarks on the reading goal established by his April 2015 IEP, the student did make some progress, moving from a 1.1 grade level to a 1.7 grade level over a 9-month period.

In the opinion of the investigator, the district and the parent did not have a shared understanding as to how the student was to be spending his instructional day. It also appears to the investigator that the district has struggled to develop and implement an appropriate curriculum for the student. While the delivery of instruction in core content may not have been optimal, the student has received at least some level of instruction in his core subjects – including English/reading – on a daily basis and the student has received educational benefit from that instruction. For this reason, a violation of special education laws and regulations is not substantiated on this issue.

**Allegation #2: The student does not need the support of a paraeducator while attending Music and PE classes.**

The "Non-Participation in General Education" section of the student's April 23, 2015 IEP states, "(The student) will receive inclusion para support in FACS classes." According to the "Special Education & Related Services" portion of that IEP, 79 minutes of special education services were to be provided daily to the student in the general education setting.

The "Non-Participation in General Education" section of the student's January 18, 2016 IEP states, "(The student) will have a para-educator present during the general education classes of: music, FACS..."

The "Supplementary Aids and Services" section of the student's January 2016 IEP states a "one-to-one paraeducator (will be provided) in any general education environment" for 2.5 hours each day.

According to schedules provided by the district, the student participated in the following general education classes during the first trimester of the 2015-16 school year: Seminar, Music, Agriculture, and PE. During the second trimester, the student participated in Seminar, Music, Family and Consumer Skills (FACS), and PE. At the time the complaint was filed, the student was participating in the following general education classes: Seminar, Music (2 days per week alternating with Study Hall), Web, and PE.

The district confirms that a paraeducator has been assigned to support the student in both FACS and Music. Music classes are not provided daily and alternate with a study hall in the general education setting.

The district reports that four paraeducators provide support to several students during the hour this student is enrolled in PE. All 5<sup>th</sup> through 8<sup>th</sup> grade students who are not in sports are enrolled in that class. Several special education students are enrolled in the class. According to the district, none of these four paraeducators are specifically assigned to this student but all are available to provide guidance to this student and any other student who might need assistance in order to ensure safety.

The student's April 2015 IEP specifically required the district to provide paraeducator support to the student in his FACS class. FACS is a 53-minute course. The student's April 2015 IEP indicated that he was – between April 23, 2015 and January 18, 2016 – to have been provided with an additional 26 minutes of paraeducator support in the general education setting during each school day, but it is unclear where that support was to be provided. The district did assign a paraeducator to support the student in Music – a 53-minute class that alternates with Study Hall. The January 2016 IEP does not specifically prohibit the assignment of a paraeducator to support the student in Music and does call for more paraeducator support than would be needed for the FACS class alone.

The student's January 2016 IEP calls for the provision of paraeducator support to the student in ***all general education settings***. A paraeducator is assigned by the district to work directly with the student in Music and FACS, and paraeducator support is available to the student in PE. By assigning a paraeducator to support the student in Music – a general education class – the district has implemented the January 2016 IEP as written. Any change to the established level of paraeducator support called for in the January 2016 IEP would need to be made by the IEP Team.

In the opinion of the investigator, the district's provision of paraeducator support to the student in his Music class and the availability of paraeducator support in PE are compliant with the requirements of both his April 2015 and January 2016 IEPs. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Allegation #3: The student should not be required to assist with “custodial tasks” or to help with the cleaning of trays in the cafeteria.**

Goal #7 of the student's January 18, 2016 IEP states,

“By January 18, 2017, (the student) will practice appropriate job skills and safety procedures in a variety of environments (eg. hallways, classrooms, PE, job skills settings) during at least 80% of the class periods as measured by teacher observations and anecdotal records.”

The “Modifications” section of the January 2016 IEP for the student also indicates that the student would be provided with a “Functional Curriculum to address and teach student life skills/needs for preparation of transition from high school” in a “functional job skills setting/special education setting” for 2 hours per day.” The district contends that many of these work-related tasks provided the student with opportunities to practice functional math and functional reading skills.

According to the parent, she believed that job-related activities would be completed in the classroom on a limited basis. The parent insists that the student could work on custodial types of skills in the home, and the bulk of his instructional time should be spent working on academic tasks.

A schedule provided to the parent by the special education teacher shows that the student was working on job-related skills for a total of 146 minutes per day as follows:

- 1<sup>st</sup> Hour: Building Safety and Maintenance (20 minutes) – refilling vending machines, conducting building walkthroughs
- 4<sup>th</sup> Hour: Restaurant Skills and Safety in the cafeteria and kitchen (53 minutes) – including washing trays and wiping down cafeteria tables

- 5<sup>th</sup> Hour: Assistant Skills (20 minutes) – including such tasks as shredding paper in the office
- 6<sup>th</sup> Hour: Custodial Job Skills (53 minutes)

On February 29, 2016, the parent spoke by telephone with the Director of the Cooperative and stated that she no longer wanted the student working on custodial tasks at school. The Director contacted school staff via email and told them to stop all such activities. The district has indicated that the student's IEP will be formally reviewed and revised at an upcoming team meeting.

The student's January 2016 IEP requires the district to deliver – in a functional job skills/special education setting – 2 hours per day of functional curriculum designed to teach skills needed to transition from high school services. The schedule developed by the district shows that between January 18 and February 29, 2016 the district was exceeding the established time to be devoted to instructing the student in functional job skills by 26 minutes per day. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

#### **Additional Comments**

Both the parent and the district confirm that an IEP Team Meeting has been scheduled for April 1, 2016 for the purpose of reviewing and revising the student's January 2016 IEP.

#### **Corrective Action**

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, a violation has been identified with regard to 34 C.F.R.300.101, which requires that a student's IEP must be implemented as written.

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

1. Submit, within 20 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will comply with 34 C.F.R.300.101 by implementing this student's IEP as written.
2. Within 20 school days of the receipt of this report, develop and offer a plan for compensatory services, consisting of academic tasks in the classroom, to compensate the student for the loss of 26 minutes of such services each school day between January 18 and February 29, 2016. This offer of compensatory services shall be in addition to the educational services currently being provided, and may be offered outside of regular school

hours or school days. The parent shall have the option to accept or reject any portion of the offered services.

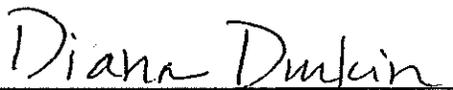
3. Within 5 days of the receipt of this report,
  - a) provide Early Childhood, Special Education and Title Services with a copy of the revised IEP developed during the scheduled April 1, 2016 IEP Team meeting, and
  - a) If the April 1, 2016 IEP Team meeting is not held as scheduled, provide a prior notice of a rescheduled meeting, and within 5 days of that meeting a copy of the revised IEP.

Further, USD #      shall, within 10 calendar days of the date of this report, submit to Special Education Services one of the following:

1. A statement verifying acceptance of the corrective action or actions specified in this report;
2. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
3. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

#### **Right to Appeal**

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



Diana Durkin, Complaint Investigator

(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect. Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) The issuance of an accreditation deficiency advisement;

(B) the withholding of state or federal funds otherwise available to the agency;

(C) the award of monetary reimbursement to the complainant; or

(D) any combination of the actions specified in paragraph (f)(2).

RECEIVED JUL 01 2016

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

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS, USD #  
ON JUNE 1, 2016**

DATE OF REPORT: JUNE 27, 2016

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 \_\_\_\_\_, Director of the \_\_\_\_\_ Special Education Cooperative, on June 9, 2016. The investigator spoke by telephone with \_\_\_\_\_, Assistant Director for the Cooperative, on June 14, 15, and 16, 2016.

The investigator spoke by telephone with the parent on June 24, 2016.

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

- Amendment IEP for the student dated August 12, 2015
- IEP for the student dated October 14, 2015
- Staffing Committee Report dated October 14, 2015
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated October 22, 2015
- IEP Amendment Between Annual IEP Meetings dated November 5, 2015
- Staffing Committee Report dated November 6, 2015
- IEP Amendment dated December 17, 2015
- Email correspondence between the parent and School Psychologist dated April 7, 2016 regarding the parent's request for an IEP Team meeting
- Email dated April 28, 2016 from the Assistant Director of the Cooperative
- Email correspondence dated May 3 – 13, 2016 between the parent and the Assistant Director of the Cooperative
- Certificate of Eligibility Extended School Term (EST)

### **Background Information**

This investigation involves a 10 year-old boy who, for the 2015-16 school year,

was enrolled in the 4<sup>th</sup> grade. The student has been diagnosed with ADHD.

The student has previously received special education at his neighborhood school – \_\_\_\_\_ Elementary – and at a day school program in his home district. During his 3<sup>rd</sup> grade year, staff from Heartspring (a therapeutic residential and day school center located in Wichita serving children with severe developmental disabilities) came to the district to observe the student and offer consultative services. In the summer of 2015, the student participated in Heartspring's "day camp."

At the beginning of the 2015-16 school year, the student was enrolled in the Structured Learning Program in \_\_\_\_\_, Kansas – a program designed to address the needs of students with Autism. An IEP Team Meeting was held on October 14, 2015. The team agreed that the Structured Learning Program was not meeting the student's needs and discussed other placement options. A new IEP was developed, and the district recommended that the student be transferred to a day school program with a subsequent transfer back to his neighborhood school in Andover. The parent opposed this change in placement.

A meeting was held on November 6, 2015 with the parent, the Assistant Director of the \_\_\_\_\_ Special Education Cooperative, and the Director of Heartspring in attendance. The purpose of that meeting was to amend the student's October 2015 IEP. A Staffing Committee Summary from that meeting shows that the participants recommended a transfer of the student to a separate educational setting as of November 9, 2015. The summary states "(the student) will be reintegrated to general education classes in an \_\_\_\_\_ elementary school. The IEP will meet (sic) to amend the IEP to reflect an increase in the general education setting. The IEP will meet (sic) to address as behavior data indicates a readiness for more general education setting. The separate educational setting will be based at Heartspring." The parent gave written consent for a material change in the student's services and a substantial change in his placement that resulted in the student's placement at Heartspring.

The parent made a request of the \_\_\_\_\_ district to allow the student to transfer from his neighborhood school ( \_\_\_\_\_ ) to \_\_\_\_\_, and that request was approved (a non-special education action). On December 17, 2015 a meeting was held to again amend the student's October 2015 IEP. At that meeting, the parent consented to a change that would as of January 5, 2016 allow the student to spend the first 65 minutes of his school day at \_\_\_\_\_ Elementary School in \_\_\_\_\_ (as long as staff from Heartspring was available to attend the school with him). The remainder of the student's instructional day would continue to be spent at Heartspring.

Another IEP Amendment meeting was held on February 29, 2016 to discuss a 30-minute increase in the amount of time the student would attend \_\_\_\_\_ Elementary. The parent gave her written consent for that placement change.

## Issues

### **Issue One: The district removed Extended School Year (ESY) services when developing the student's October 14, 2015 IEP.**

The parent asserts that ESY services were included in the student's IEP as of August 12, 2015 but states that these services were removed when a new IEP was developed on October 14, 2015. The parent contends that she was unaware of this removal until April 7, 2016 when she reviewed her son's IEP to determine what ESY services were to be provided for the summer of 2016.

An IEP was developed for the student on March 5, 2015. That IEP stated that ESY services were necessary for the student and that "the IEP Team currently has enough information to determine necessary EST (Extended School Term) services..."

The district contends that the failure of the IEP Team to address ESY services when developing the October 2015 IEP was an oversight and that there was no intent on the part of the district at the time the IEP was developed to deny ESY services to the student.

The portion of the student's October 2015 IEP entitled "Extended School Year" has been left blank on the document provided to the investigator by the district. Neither "Yes" nor "No" has been checked in response to the question "Are Extended School Term Services necessary for this student with a disability?" The parent acknowledges that the district also left this portion of the IEP blank on the copy of the document provided to her.

Both the parent and the district agree that ESY was never discussed at the October 14<sup>th</sup> meeting. The Staffing Committee Report dated October 14, 2015 summarizes the topics covered by the IEP Team on that date. This document contains no reference to any discussion of ESY by the team.

ESY services are currently being provided for the student, although – as will be discussed later in this report – an appropriately constituted IEP Team did not make decisions regarding those services. It is the opinion of the investigator that the district did not intend to deny the student ESY services when developing his October 2015 IEP but rather that the team, which included the parent, simply failed to address the topic when developing the IEP. Under these circumstances, a violation of special education laws and regulations is not substantiated with regard to the contention that the district intentionally denied the student ESY services when developing his October 2015 IEP.

**Issue Two: The district failed to convene an IEP Team meeting requested by the parent for the purpose of discussing the student's need for Extended School Year (ESY) services.**

Although the school is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with an exceptionality have the right to request an IEP meeting at any time (See K.S.A. 72-987(f)).

According to the parent, she became aware on April 7, 2016 that the reference to the student's need for ESY services contained in the August 12, 2015 Amendment to the student's March 5, 2015 IEP was absent from his October 2015 IEP. The parent states that she contacted the student's elementary school ( ) to request an IEP Team meeting for the purpose of discussing ESY services. The parent contends that she was told that the elementary school was not involved in ESY decisions in the past and that the parent's concerns had been referred to the Special Education Cooperative. The parent asserts that no IEP Team meeting was ever scheduled to address her request.

An email sent to the school by the parent dated April 7, 2016 states, "I would like to schedule an IEP meeting please. (The student's) IEP dated 8/12/15 provided for Extended School Term services, but his IEP dated 10/14/15 removed these services, and this was not ever discussed as part of that IEP meeting. I realize that no one included in this email was a part of that IEP meeting, but I believe the same reasoning for having EST last summer still applies, and these services should not have been removed from his IEP."

In response, the . School Psychologist sent the following email message on April 7, 2016:

"The decisions regarding ESY services were made prior to (the student) attending , therefore we have informed (the Assistant Director of the Cooperative) of your request and he is planning to call you to discuss this with you. I just wanted to let you know that your request is being addressed."

The district stipulates that it failed to comply with the parent's April 7<sup>th</sup> request for the scheduling of an IEP Team meeting to discuss the student's needs for ESY services. The Assistant Director states that he spoke with staff from the elementary school and believed that they did not feel the student needed ESY services based upon his performance in that setting. The Assistant Director reports that he then contacted Heartspring and received a statement in support of the student's need for ESY services as observed in that setting. Based upon that statement, the Assistant Director unilaterally approved the provision of ESY services at Heartspring.

School districts have authority to deny a parent's request for an IEP meeting, but, when doing so, they must provide the parents with a Prior Written Notice explaining the reasons for the denial [See Federal Register, 1999, Appendix A, p. 12477]. Because the district failed to either convene an IEP Team meeting requested by the parent or to provide the parent with a Prior Written Notice of its refusal to convene a meeting, a violation of special education laws and regulations is substantiated on this issue.

**Issue Three: The district made a unilateral decision to provide ESY services through the end of June 2016 without convening an IEP Team meeting to review the student's need for these services.**

Federal regulations, at 34 C.F.R. 300.17, define a free appropriate public education or FAPE as special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the (state), including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets (federal) requirements.

At 34 C.F.R. 300.320, federal regulations state that decisions regarding provision of FAPE under an IEP must be made in accordance with 34 C.F.R. 300.321 which spells out the membership of an appropriately constituted IEP Team. The required participants include the following:

- (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 of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
  - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (ii) Is knowledgeable about the general education curriculum; and
  - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(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.

Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or by amending the IEP rather than by redrafting the entire IEP. In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP (See 34 C.F.R. 300.324(a)(4)).

Kansas regulations, at K.A.R. 91-40-1(x) define extended school year services as special education and related services that are provided to a child with a disability under the following conditions:

- (1) Beyond the school term provided to nondisabled children;
- (2) in accordance with the child's IEP; and
- (3) at no cost to the parents of the child.

Extended School Year Services are provided to ensure the provision of FAPE (a free appropriate public education) so that a student can make progress toward the goals specified on the child's IEP and to prevent regression, which would impede such progress.

For children with disabilities, the IEP team must consider each individual child's need for extended school year (ESY) services during time periods when other children, both disabled and nondisabled, normally would not be served. If ESY is determined to be necessary to enable the child to benefit from his or her education, then the type and amount of special education services to be provided, including frequency, location and duration, are documented in the IEP. Schools must not limit the availability of ESY services to children in particular categories of disabilities, or limit the type, amount, or duration of these necessary services.

The need for ESY is to be decided based on the individual needs of each student. In considering whether or not to provide ESY services, it is important for the IEP Team to address the educational needs of the student and how those needs might be addressed, such as:

- Scope of the special education instructional services including the duration and content of the program;
- Which current goals and objectives will be addressed to maintain present skills and behaviors;
- Implementer(s) of the ESY services;
- What related services will be made available; and
- If contracting with other schools or private agencies is needed.

As discussed above under Issue 2, the parent determined on April 7, 2016 that

ESY services had not been addressed by the IEP Team at the time the student's IEP was written on October 14, 2015.

On April 15, 2016, according to the parent, she met with Heartspring staff to discuss ESY services. The parent contends that she was told by staff that they would recommend year round services for the student.

The parent reports that she subsequently met with the Assistant Director of the Cooperative on April 20, 2016. By report of the parent, she was told by the Assistant Director that he would talk with Heartspring staff to obtain information needed to make a determination regarding the need for ESY services.

According to the parent she received an email from the Assistant Director on May 13, 2016 stating that the student qualified for ESY services but indicating that there was no mandate for delivery of those ESY services at the Heartspring location. The parent asserts that she subsequently received an email from the Assistant Director stating that the student had been approved to attend Heartspring through the end of June 2016.

The parent contends that the district made unilateral decisions regarding ESY services for the student outside of the IEP Team process and failed to fully consider the student's needs when offering limited ESY support.

In an email to Heartspring staff dated April 28, 2016, the Assistant Director of the Cooperative wrote:

"Attached is a form. This form is used to determine eligibility for ESY. (The parent) has asked about ESY for (the student). I explained that I would ask you to provide the information needed. We require our school psychologists to complete this or verify that the data is correct. I am asking that Heartspring complete this document if ESY is considered. There is no evidence of a need based on his time at . . . . . We will not provide ESY for any student without this eligibility document."

The parent followed up with the Assistant Director on May 3<sup>rd</sup> and May 9<sup>th</sup> to ask if he had yet received the information requested from Heartspring, and on May 13<sup>th</sup> the Assistant Director sent the following email to the parent:

"(The student) qualifies for Extended School Year. However, that doesn't mean that we are required to use Heartspring to meet this requirement. I'll let you know Monday or Tuesday what our plan will be. We are planning on using Heartspring's service and assistance next year, but ESY is a bit different."

On May 17<sup>th</sup> the parent and the Director of CARE at Heartspring received the following email from the Assistant Director:

"We are approving (the student) to attend ESY at Heartspring through the end of June. I assume Heartspring will continue to bill us for the services."

The Certificate of Eligibility for Extended School Term (EST) provided by the district states:

"An IEP Team, under the leadership of the principal, must review (the listed) questions during an IEP Team Meeting. If, in the principal's best opinion, the response to all these questions is YES, the student will qualify for Extended School Term Services at the expense of the district. Once these questions are responded to in the affirmative, the IEP Team must return to the IEP staffing to complete the IEP goals, objectives and services that will be necessary for the extended school term. A student may qualify for all services provided during the school term or for any single service, including related services."

The only signature on the Certificate of Eligibility was that of a Heartspring Autism Specialist/Board Certified Behavior Analyst.

There is no evidence to indicate that any decisions regarding ESY services for this student were made by a properly constituted IEP Team at the time the student's IEP was written in October 2015. Decisions regarding ESY services for the summer of 2016 appear to have been made solely by the Assistant Director based upon information he solicited outside of any IEP Team Meeting process. The district provided no documentation to this investigator to indicate that an IEP Team meeting was held to discuss the student's needs or the level of support he required. There is no evidence that an IEP Team determined (per the district's statement on its own Certificate of Eligibility form) the goals, objectives, and services necessary for the ESY term. A violation of special education laws and regulations is substantiated on this issue.

### **Corrective Action**

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

- K.S.A. 72-987(f), which grants parents the right to request an IEP Team meeting and K.S.A. 72-988(b)(2) which requires a district to provide a Prior Written Notice when it refuses a parent's request related to a free appropriate public education, and
- 34 C.F.R. 300.321 and 300.324, which spells out the members of an appropriately constituted IEP Team tasked with the authority for developing the IEP for a child with a disability.

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 Early Childhood, Special Education and Title Services stating that it will comply with
  - a. K.S.A. 72-987(f) by complying with parental requests for the scheduling of IEP Team meetings, or, if the request is denied, complying with K.S.A. 72-988(b)(2) to provide the parents with Prior Written Notice of the refusal to convene an IEP meeting (as a matter related to FAPE), and with
  - b. 34 C.F.R. 300.321 and 300.324 by convening an appropriately constituted IEP Team when making decisions regarding the delivery of FAPE to a student.
2. Upon receipt of this report, USD #      is directed to take immediate action to schedule an IEP Team meeting for the purpose of making decisions regarding the need for and/or delivery of ESY services to this student. The ESY services, if any, that result from this meeting must specify the frequency, location, and duration of those services.
3. Provide to Early Childhood, Special Education and Title Services within 5 days of the date of the meeting referenced above under Item 2,
  - a. a copy of a written notice of that meeting, specifying the time, location, and purpose of the meeting;
  - b. a copy of the IEP developed at the meeting including any notes related to the IEP Team discussion, and
  - c. a copy of the prior written notice given to the parent, specifying any proposal adopted by the team and/or any refusal by the team related to the provision of ESY services to the student.
4. If, in the meeting referenced above under Item 2, the IEP Team determines that the student requires ESY services beyond June 30, 2016, provide to Early Childhood, Special Education and Title Services a plan for the delivery of any compensatory services to cover the period between June 30<sup>th</sup> and the initiation of those additional ESY services.
5. Note: If the IEP Team, at the meeting referenced above under Item 2 or at a future meeting, determines that the student does not require ESY services and decides to remove these services from the student's IEP,

that determination would represent a material change in services and would require the written consent of the parent.

Further, USD #      shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education and Title Services one of the following:

1. A statement verifying acceptance of the corrective action or actions specified in this report;
2. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
3. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

### **Right to Appeal**

Either party may appeal the findings 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  
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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS, USD #  
ON MARCH 21, 2016**

DATE OF REPORT: APRIL 14, 2016

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 in a conference call with Dr. \_\_\_\_\_, Executive Director of the \_\_\_\_\_ / Special Education Cooperative, and \_\_\_\_\_, Administrator of the \_\_\_\_\_ program, on March 25 and April 11, 2016. The investigator spoke by telephone with \_\_\_\_\_, School Psychologist for the district, on March 29 and 31 and April 7, 2016.

The investigator spoke by telephone with the student's mother on April 5, 2016.

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

- Prior Written Notice for Initial Evaluation and Request for Consent dated December 9, 2014
- Initial Evaluation/Reevaluation and Eligibility Report dated January 30, 2015
- Notice of Meeting dated January 30, 2015
- Multidisciplinary Team Staffing Summary dated January 30, 2015
- IEP for the student dated January 30, 2015
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated January 30, 2015
- Notice of Meeting dated March 4, 2015
- Multidisciplinary Team Staffing Summary dated March 4, 2015
- IEP for the student dated March 4, 2015
- Teacher Information Page showing day school placement beginning March 5, 2015
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 4, 2015

- Notice of Meeting dated March 11, 2015
- Multidisciplinary Team Staffing Summary dated March 11, 2015
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 11, 2015
- IEP for the student dated March 11, 2015
- Teacher Information Page showing the March 11, 2015 change in services
- Notice of Meeting dated April 10, 2015
- Multidisciplinary Team Staffing Summary dated April 15, 2015
- Notice of Meeting dated January 8, 2016
- IEP for the student dated January 8, 2016
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated January 8, 2016
- Multidisciplinary Team Staffing Summary dated January 8, 2016
- Notice of January 19, 2016 IEP Team Meeting
- Notice of January 29, 2016 IEP Team Meeting
- IEP for the student from the Central Kansas Cooperative in Education dated January 29, 2016
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent from the Central Kansas Cooperative in Education dated January 29, 2016
- Notice of Meeting dated February 24, 2016
- Multidisciplinary Team Staffing Summary dated February 25, 2016
- Notice of Meeting dated February 29, 2016
- Multidisciplinary Team Staffing Summary dated March 1, 2016
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated March 1, 2016
- Letter to the parent from the building principal/superintendent dated March 18, 2016
- Letter to the parent from the Director of the Cooperative dated March 28, 2016
- Letter dated March 26, 2016 from the building principal/superintendent to KSDE
- Abbreviated Timeline developed by the district

### **Background Information**

This investigation involves an 8 year-old boy who is enrolled in the 2<sup>nd</sup> grade. The student has been given diagnoses of Attention Deficit Hyperactivity Disorder – combined, Oppositional Defiant Disorder, and Post Traumatic Stress Syndrome.

The student first attended a district preschool program in August of 2011. The first recorded instance of behavioral concern occurred in September of 2011.

Twenty-eight office referrals were made during the student's Kindergarten year (2013-14).

The student was hospitalized from September 30 through October 3, 2014. The student attended his neighborhood elementary school from October 7 – 23, 2014, receiving 4 days of out-of-school suspension during that period. On one occasion, the student ran away from the school building; police were called. The student was subsequently placed in a residential treatment facility from October 23 through December 5, 2014, and returned to the neighborhood school on December 8, 2014.

In January 2015, a district evaluation team determined that the student's cognitive skills, his speech/language development, and his demonstrated academic achievement fell within the average range. However, negative behaviors exhibited by the student had been displayed for a prolonged period of time and were affecting his classroom performance. It was the opinion of the team that the student was in need of a functional behavior support plan and paraeducator support in the general education setting in his neighborhood school in \_\_\_\_\_, Kansas. On January 30, 2015, the student was determined to be eligible for and in need of special education under the categorical area of Other Health Impairment. One-to-one paraeducator support was provided to the student for 430 minutes each day in the general education setting. A Positive Behavior Support plan was instituted, and 20 minutes per week of counseling services through a School Social Worker was provided.

In the period of time between December 8 and March 3, 2015, the student received 13 days of out-of-school suspension or in-school suspension and was absent 10 days. Twenty-nine instances of the use of emergency safety interventions (ESI) were recorded.

On March 4, 2015, an IEP Team meeting was convened following a tour of the \_\_\_\_\_ program by the student, parent, and district staff. \_\_\_\_\_ is a special day school program sponsored by the \_\_\_\_\_ Special Education Cooperative (MCSEC) and is located in \_\_\_\_\_ Kansas. The \_\_\_\_\_ website shows that \_\_\_\_\_ classrooms are "designed to serve students identified as having a significant behavior disorder or severe emotional disturbance." Students who attend \_\_\_\_\_ are 5-21 years of age and demonstrate behaviors and needs which cannot be met in the traditional school setting.

The student's IEP was amended on March 4, 2015 to reflect a change in services and placement, and on March 5, 2015, the student was transferred to \_\_\_\_\_. According to the March 4, 2015 IEP, the student was to attend \_\_\_\_\_ for the full school day and receive 395 minutes of special education services for 4 days a week, and 335 minutes of special education services 1 day per week. He would receive individual counseling services for 20 minutes a week with a School Social Worker and was to see the School Psychologist for 40 minutes each week for \_\_\_\_\_.

group counseling while at [redacted]. The parent gave her written consent for the change in placement.

A meeting was held on March 11, 2015 to discuss a change in the educational plan for the student. The IEP Team proposed a modification to the IEP that the student begin attending school on a shortened day basis. The intent of the shortened day plan was to encourage the student to want to be at school and to demonstrate behaviors that would facilitate his doing so. Special education services were reduced from 395 minutes per day to 125 minutes per day. The student was to arrive at school each day at 8:00 AM for breakfast, move to special education classes at 8:25 AM, and leave for home at 10:30 AM. The change was made because the student had "not been able to make it through the morning time without a need to be sent home." The parent gave her written consent for the reduced school day.

On April 15, 2015, a team meeting was held to discuss the student's challenging behavior and the parent's concern that a DCF (Department for Children and Families) referral could result in her losing custody of her son. The team developed a plan to help ensure that the student would be able to complete the school year. Following that meeting, the parent pulled the student from the [redacted] program and began to provide him with home schooling.

At the start of the 2015-16 school year, the student was recorded as absent between August 20 and September 1, 2015. On October 2, the student was enrolled in the [redacted], Kansas Virtual School. While the parent wrote to the [redacted] district asking that the student not receive any special education services, she did not provide informed written consent to revoke those services. The [redacted] school district did not revise the student's IEP.

The student was re-enrolled at his neighborhood elementary school on January 5, 2016. The parent approached the [redacted] program and [redacted] staff asking that the student be returned to [redacted]. On January 8, 2016, a meeting was held to discuss the student's return and the services that would be provided at [redacted]. At the meeting, the parent shared with staff that it had become increasingly difficult for her to get the student to comply if she asked him to do something. The parent reported that the student had been prescribed medications but she had found it difficult to administer those medications.

The team discussed what the student's school day would look like if he returned to [redacted]. The team agreed that the student should attend a full day of school. A plan was put in place for the student to be educated in a separate classroom, earning time in the special education classroom setting with good behavior. There was discussion regarding when police would be called, how the safe room would be used, and how staff would work to keep the student safe. Transportation arrangements were made, and it was determined that the student would return to [redacted] on January 11, 2016. The parent gave informed written

consent for a change in services to allow the student to attend \_\_\_\_\_ for full school day services. The student's IEP was amended to reflect the change.

The student attended \_\_\_\_\_ until January 15, 2016. At that point, the student's therapist through St. Francis Community Services in Salina referred the student for residential placement in a Psychiatric Residential Treatment Facility (PRTF) in Salina, Kansas.

The district planned to complete the annual review of the student's IEP before January 30, 2016. An IEP Team Meeting was scheduled for January 19, 2016 but the parent did not appear at the agreed-upon time. Although the student was not attending school at \_\_\_\_\_, the district had not received a request for records from another school district and wanted to make the effort to complete the annual IEP revision. On January 22, 2016, the district sent a revised notice of meeting to the parent proposing to meet on January 29, 2016. On January 25, 2016, the district received a request for the release of records, and the proposed January 29<sup>th</sup> IEP Team meeting was cancelled.

An IEP outlining services to be provided by the \_\_\_\_\_ Cooperative in Education was developed by an appropriately constituted IEP Team, which included a representative of the cooperative, at St. Francis Academy in Salina, Kansas on January 29, 2016. The "Special Education Services" section of the new IEP states "(The student) will receive direct Special Education Services for 350 minutes a day, 5 days a week in a Residential Treatment Facility." The parent was given prior written notice that "(the student's) IEP was completed at St. Francis Salina on 01/30/2016. His special education services will continue 360 minutes a day 5 days a week in a residential school..." The parent gave signed written permission for the change in placement.

The parent pulled the student from the PRTF on February 15, 2016 and re-enrolled the student in his home district on February 19, 2016. On February 25, 2016 a multidisciplinary IEP Team meeting was held to discuss options for the provision of services to the student by the district. A follow-up IEP Team meeting was held on March 1, 2016. The parent is currently home schooling the student.

### **Issues**

In her complaint, the parent has identified two issues:

**Issue #1: The student has been out of school for 3 weeks because the district refuses to rewrite his IEP.**

K.A.R. 91-40-1(aa) defines "Free appropriate public education or 'FAPE' (as) special education and related services that...(a)re provided at public expense, under public supervision and direction, and without charge." Federal regulations,

at 34 C.F.R. 300.341, require an LEA to implement the provisions specified in a child's IEP.

K.A.R. 91-40-21(c) (1) states that in determining the educational placement of a child with a disability, a district must ensure that the placement decision was made by a group of persons, including the child's parent or parents and other persons who are knowledgeable about the child, the meaning of the evaluation data, and the placement options. The decision must be made in conformity with the requirement of providing services in the Least Restrictive Environment (LRE). Placement should be as close as possible to the child's home, and unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. Educational placement must be determined at least annually and based upon the student's IEP. In determining the LRE, the IEP Team must give consideration to any potential harmful effect on the child or on the quality of services that he or she needs, and a child with a disability may not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

When a student moves into a new school district, the new school district must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school district in which the child was enrolled. Pending receipt of the student's IEP, the new school district, in consultation with the parents, must provide a free appropriate 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 IEP from the previous district, the new school district may either adopt the child's transferred IEP from the previous school district or develop and implement a new IEP (K.S.A. 72-987(g)(1)). If the new district develops a new IEP, parental consent is required for any substantial change in placement or any material change in services proposed in the new IEP (K.S.A. 72-988(b)(6)).

Prior Written Notice must be provided to the parent when the school proposes to change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services to the child (K.S.A. 72-988(b)(2); 34 C.F.R. 300.503(a)) or 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 to the child (K.S.A. 72-988(b)(2); 34 C.F.R. 300.503(a)).

The Prior Written Notice provided to parents for each proposed special education action must contain specific information:

- a description of the action proposed or refused;
  - an explanation of why the school proposes or refuses to take the action;
  - a description of each evaluation procedure, assessment, record, or report the school used as basis for proposed or refused action;
  - a description of the other options the IEP team considered and reasons why they were rejected;
  - a description of any other factors relevant to the proposal or refusal;
  - a statement that the parents have parental rights under the law; and
  - sources for parents to contact to assist in understanding their rights.
- (K.S.A. 72-990)

If the parent refuses to consent to a substantial change in placement proposed by the school, the school may, but is not required to, pursue the proposed substantial change in placement by using mediation or due process procedures. Pending receipt of signed parental consent for a change in placement, services to the student must be provided in the placement specified in the last appropriately developed IEP and last agreed to by the parent when provided with appropriate prior written notice.

The parent contends that the last placement for the student prior to his return to \_\_\_\_\_ on February 25, 2016 was in a residential setting at a PRTF located outside the student's home district. It is the position of the parent that the district in which the PRTF was located rewrote the IEP for the student within two days of the time the student entered the PRTF program. She asserts that the home district must now write another IEP for the student since he is no longer residentially placed and has now returned to his home district. The parent opposes a return to \_\_\_\_\_ – the placement that was in place at the time the parent placed the student in the PRTF in January 2016 and states that she instead wants to have the student placed back in his neighborhood elementary school.

The parent asserts that the \_\_\_\_\_ program did not meet the needs of the student. She further asserts that the student's medications were appropriately adjusted while in the PRTF and believes he is now ready to return to the general education setting. According to the parent, the Director of the Cooperative has refused to allow the IEP Team to consider allowing the student to return to his neighborhood school with paraeducator support even though the principal of the neighborhood elementary school and the district superintendent have told her that they are willing to have him attend there.

In support of her position regarding the inappropriateness of placement at \_\_\_\_\_, the parent states that the student was enrolled there in the 4-day period immediately preceding his placement in the PRTF. According to the parent, she was called to come to \_\_\_\_\_ to pick the student up on 3 of those 4 days. During

this period, the student - by report of the parent – was separated from other students and worked one-on-one with a paraeducator in a separate setting.

The student was reenrolled in the district on February 19, 2016 but has not attended school since his reenrollment. Notes from a multidisciplinary team meeting on February 25, 2016 show that the parent met with district staff to talk about placement for the student. Notes show that the parent voiced her desire to have the student return to his general education building. The summary reflects that the team discussed the following:

- the parent's desire to have the student "return to the general education building,"
- the parent's reasons for pulling the student from the PRTF setting,
- the parent's opposition to returning the student to
- the fact that the last IEP for the student reflects services in a residential setting ("I"),
- finding another PRTF placement for the student,
- Family Preservation's position on the effectiveness of placement in a school setting,
- the effects of withdrawing the student from all special education services,
- improvements seen in the student resulting from changes to his medication while at the PRTF,
- mechanisms for transitioning the student from back to and
- medication needs for the student and how medications could be administered in the school setting.

No recommendations were made by the team at the February 25<sup>th</sup> meeting. According to the staffing summary, the Executive Director of the Cooperative asked that discussion be tabled.

A follow-up multidisciplinary team meeting was held on March 1, 2016. It was again emphasized that the current placement for the student as reflected by his January 29, 2016 IEP from Salina is for a residential ("I") setting. According to the Multidisciplinary Team Staffing Summary for the meeting, it was stated, "a student cannot go directly from a PRTF setting to a general education setting." The report states "mom was given options. The team, not including mom, recommended that (the student) return to until a spot opens up at another PRTF. Mom was given the phone number for other PRTF facilities. Prairie View will assist mom to contact PRTF's. Mom will let (the principal/district superintendent) know of her plans."

The district provided the parent with a Prior Written Notice form that listed the reasons the district did not believe the student would be successful in a general education setting. Those reasons included the following:

- A. "He has not be (sic) able to be successful in the most restrictive environment of \_\_\_\_\_ Day School and also when he was being self-contained.
- B. He has not received medication on a regular bases (sic) and medication was to be administered at \_\_\_\_\_ Day School as agreed upon in his IEP and this was not done.
- C. (The student) has a history of flipping desk and throwing supplies which could endanger other students and becoming violent with staff. These behaviors impede the learning of others.
- D. When (the student) becomes escalated he refuses to leave classrooms, or areas of the building, which prevents others (sic) students from feeling safe and secure and learning.
- E. Has ran out of the school building, walked along the highway and attempting (sic) to run into traffic."

In a letter to staff at the Kansas State Department of Education (KSDE), the district superintendent (who is also the building principal for Elementary) clarified his position regarding the student's return to the neighborhood school. He writes that he told the parent that "if the special education team believed it was the appropriate placement we would agree."

In his letter to KSDE staff, the principal/superintendent also states, "the team's position is that since the time (the student) was placed at \_\_\_\_\_ in March of 2015 the student has not been in school enough, nor exhibited the necessary behavior needed to be exhibited in order for the educational team to recommend that he be transitioned back into the general ed. classroom."

### **Findings**

The decision to place this student in a PRTF (St. Francis in Salina) was made by the parent. However, once the parent had residentially placed the student, it became the obligation of the district in which the PRTF was located (Salina) to provide him with special education services. An appropriately constituted IEP Team in Salina developed a new IEP for the student on January 29, 2016. That IEP Team determined that services to the student should be provided in a residential treatment facility. The parent gave written consent to change the student's placement to a residential facility.

Salina's January 29<sup>th</sup> IEP was in force when the student was reenrolled in his home district on February 19, 2016. A multidisciplinary team meeting was held by USD # \_\_\_\_\_, on February 25, 2016, and a follow-up multidisciplinary team meeting was held on March 1, 2016. While the district did not propose a new IEP, it is clear to the investigator that the district felt the student should return to \_\_\_\_\_ while the parent pursued another PRTF for the student. The parent refused to agree to change the student's placement to allow a return to \_\_\_\_\_,

and the district refused to allow special education services to be provided to the student in his neighborhood school.

The parent has not given informed written consent to any district proposal for a change in the student's placement. Therefore, USD # \_\_\_\_\_ has no legal option but to provide to the student the services outlined in his January 29, 2016 IEP in the last agreed upon placement (a residential facility).

No services are currently being provided to the student by the district. This is at least partially the result of the parent's desire to have the student return to a general education setting at his neighborhood school, and her refusal to allow the student to attend school in any other setting. And, as indicated earlier in this report, the IEP team offered to return the student to \_\_\_\_\_ until a spot opened at another PRTF, but the parent did not consent to this offer. However, even under these circumstances, the district failed to meet its legal responsibilities when it left the task of locating an available PRTF to the parent.

It is the responsibility of the district – not the parent – to find a PRTF setting for this student unless or until that placement has been appropriately changed. The placement of the student cannot be changed to either a day school or to a general education setting until the parent has been provided prior written notice of the proposed change and has provided signed written consent for that action. In the meantime, it is the duty of the district to find and make a PRTF available to the student.

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

### **Additional Comments**

In a situation, such as this one, where an IEP specifies a residential placement, a multidisciplinary district IEP Team may consider alternative placement options for the student. When determining the appropriate placements, the IEP Team should consider a continuum of placement options. The district may propose something other than a residential placement for the student, provide the parent with appropriate written notice of a proposed change, and request parental consent for its proposal. If the parent does not consent to the proposed change, then the placement for the student must continue to be in a residential facility. The district may opt to pursue a proposed substantial change in placement by using mediation or due process procedures.

The Office of Special Education Programs (OSEP), at the United States Department of Education, has provided guidance on the meaning of the term "placement" in special education, See Letter to Trigg, 50 IDELR 48 (OSEP 2007). This guidance letter states that the term "placement" refers to the educational environment in which a student will receive educational services, and

not to the physical location where services will be provided. Accordingly, if the services in an IEP are available in two or more equally appropriate locations that meet the student's needs, and are provided in the placement (educational environment) specified in the IEP, the district may refuse a parent's request to provide those services in the neighborhood school. Moreover, the physical location where services will be provided is generally an administrative decision, not an IEP team decision. Therefore, when school administration assigns a student to a particular location to receive the services specified in an IEP, the assignment is made without action from the IEP team, and may be made without the Prior Written Notice and consent that is required for a change in placement.

In this case, the student must be served in a residential setting, but the district administration may assign the student to the residential setting of the district's choosing.

**Issue #2: The parent signed paperwork that was subsequently modified by the district without her knowledge.**

Special education laws and regulations do not directly address this issue. However, federal regulations, at 34 CFR 300.618, state that parents have the right to request that their child's education records be changed if they believe something in the record is inaccurate, misleading, or in violation of the student's rights of privacy. The district shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

If the district decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing following the Family Educational Rights and Privacy Act (FERPA) requirements. The hearing officer would be the school's hearing officer, not a special education due process hearing officer.

According to the parent, she has been asked to sign blank documents reflecting her attendance (and the attendance of others) at various meetings. The parent asserts that when the district has subsequently provided her with copies of those signed documents, additional information has been typed on the form. The parent contends that the actions of the district have made it appear that she was in agreement with the notes contained in the full document when in fact that has not always been the case. The parent further states that the educational record is inaccurate.

The investigator reviewed the Multidisciplinary Team Staffing Summary reports provided by the district and determined that the reports of January 8 and February 25, 2016 were typewritten. All other team summaries provided by the district were handwritten. None of the staffing summaries contain any statement

suggesting that the signatures on the form reflect the agreement of those present with the statements contained therein.

If the parent wishes to request an amendment of these educational records, she may contact the Executive Director of the Cooperative to make a request that these records be changed.

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, a violation has been identified with regard to 34 C.F.R. 300.341 which requires that a student's IEP be implemented as written.

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

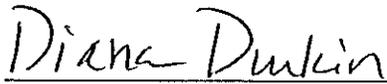
1. Submit, within 10 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will comply with 34 C.F.R. 300.341 by implementing the January 29, 2016 IEP for this student as written;
2. Upon receipt of this report, USD #     is directed to take immediate action to facilitate the placement of the student in a residential facility as directed by his current IEP, and to provide written notification to Early Childhood, Special Education and Title Services when the residential placement has been made available to the student;
3. Until such time as the student is in attendance at a residential facility, or the student's placement has been changed with the consent of the parent, USD #     is directed to provide Early Childhood, Special Education and Title Services with a weekly, written report documenting its efforts to make a residential facility available to the student, in conformance with paragraph 2 of these corrective actions; and
4. Within five school days of receipt of this report, USD #     is directed to:
  - (a) make a written offer to the parent to provide a minimum of four hours of educational services each school day to be provided at the student's home until the student is either in attendance at a residential facility, or the student's placement has been changed with the consent of the parent; and
  - (b) provide Early Childhood, Special Education and Title Services with a copy of this written offer and a statement describing the extent, if any, to which the parent accepted the offer.

Further, USD #        shall, within 10 calendar days of the date of this report, submit to Special Education Services one of the following:

1. A statement verifying acceptance of the corrective action or actions specified in this report;
2. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
3. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

### **Right to Appeal**

Either party may appeal the findings 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  
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).

# 16FC15A

In the Matter of the Appeal of the  
Report of Complaint Filed Against  
Unified School District No. \_\_\_\_\_

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## BACKGROUND

This matter commenced on March 21, 2016, when \_\_\_\_\_ (the parent), on behalf of her son, \_\_\_\_\_ (the student), filed a formal complaint with the Kansas State Department of Education (KSDE). This complaint (16FC\_\_\_\_-001) alleged two violations of special education law. A complaint investigator conducted an investigation on behalf of the Early Childhood, Special Education, and Title Services team at KSDE. Following this investigation, the investigator issued a report dated April 14, 2016. The investigator found a violation of special education law as to the parent's first concern, but not as to the parent's second concern. The investigator determined that the district was obligated to implement the Individualized Education Program (IEP) as written by finding a psychiatric residential treatment facility (PRTF) setting for the student unless or until that placement is appropriately changed, instead of allowing the student to be out of school.

The district filed an appeal electronically on April 27, 2016, and by mail on May 2, 2016. Neither party has appealed the second concern and, therefore, it will not be addressed by the Appeal Committee. The district's appeal contains five issues. Issues one through four of the district's appeal, appealed corrective action. According to K.A.R. 91-40-51 a party may "appeal any of the findings or conclusions of a compliance report." This requirement limits the basis of an appeal to findings and conclusions and does not permit the appeal of any corrective action. Because a party is not permitted to appeal corrective action the Appeal Committee's review is limited to issue five of the district's appeal. Upon receipt of the district's appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the parent's complaint, the investigator's report, the district's response to the appeal, and a letter the district sent, via certified mail, to the parent on March 28, 2016, along with confirmation that the United States Postal Service returned this letter to the district as it was not able to deliver this letter to the parent despite multiple attempts.

## DISCUSSION OF ISSUE ON APPEAL

The Appeal Committee must review the finding and conclusion of the investigator that the district has appealed to determine whether, by a preponderance of the evidence, the evidence presented is strong enough to support the finding and conclusion in the report. The Appeal Committee does not conduct a separate investigation or independently determine the weight of evidence or the credibility of witnesses.

ISSUE # 1: The student has been out of school for three weeks because the district refuses to rewrite his IEP.

The Appeal Committee notes that this specific issue that the parent identifies in her complaint was not addressed by the investigator with a specific finding. The Appeal Committee recognizes that the district is not required to rewrite the student's IEP to match the placement that the parent requests. According to 34 C.F.R. § 300.324(a)(1)(ii), when an IEP team develops an IEP it must consider the parents' concerns for enhancing the education of their student. Additionally, when an IEP team revises an IEP it must consider information provided by the parent, as appropriate. 34 C.F.R. § 300.324(b)(1)(ii)(C). Special

education law does not require the district to implement a parent's request, only to consider it. The district must ensure that the educational placement that the IEP team selects for the student will provide the student with a free appropriate public education (FAPE). 34 C.F.R. § 300.116. In this situation, the district is not required to amend the student's IEP if it believes that the placement in the student's IEP will provide the student with FAPE. The district may instead choose to offer the placement specified in the student's IEP.

The district appeals the specific conclusion of the investigator, located on page 10 of the investigator's report, "However, even under these circumstances, the district failed to meet its legal responsibilities when it left the task of locating an available PRTF to the parent. It is the responsibility of the district – not the parent – to find a PRTF setting for this student unless or until that placement has been appropriately changed." The district provides the following facts to support its appeal of this conclusion:

- *The IEP team met on March 1st, 2016 [sic] meeting and. [sic] Inter-agency personnel had researched and contacted all remaining PRTF Facilities [sic] available within the state of Kansas.*
  - *St. Francis in Salina was not contacted due to [the parent's] recent act of pulling [the student] . . . against the recommendation of the residential facility and refusing to place [the student] back in the facility.*
- *Efforts on the part of USD \_\_\_ and [the Cooperative] were suspended when the student . . . was enrolled in a homeschool setting on March 15th, 2016 [sic].*

The investigator determined that requiring the parent to search for an available PRTF is a violation of law and the Appeal Committee concurs. The investigator's conclusion is supported by meeting notes drafted by district staff at an IEP team meeting on March 1, 2016. The district's notes state, in relevant part, "Mom was given the phone number for other PRTF facilities. Prairie View will assist mom to contact PRTF's. Mom will let (the principal/district superintendent) know of her plans." The district provided facts on appeal that directly contradict their own notes from the March 1, 2016, IEP team meeting. The meeting notes clearly show that the task of locating a PRTF was left to the parent and that an agency other than the district would assist the parent with locating a PRTF. The task of locating a placement that matched the placement specified in the student's IEP is solely the district's task and providing the parent with phone numbers for PRTFs does not fulfill the district's obligation. To fulfill its legal obligation, the district should have located a PRTF that would agree to accept the student, made all necessary arrangements for the student to attend the PRTF, and then offered the placement to the parent. If the parent, at that point, had stated that she declined the placement and, instead, wished to home school the student, the district should have then sent the parent a letter that it was ready, willing, and able to provide the special education services in the student's IEP. Therefore, the Appeal Committee upholds the investigator's conclusion.

The Appeal Committee also wishes to address a statement that the district made in its appeal. In the first section of its appeal the district quotes from Chapter 5, Section H of the *Kansas Special Education Services Process Handbook*. This language that the district refers to states, "Therefore, if a home-schooled child is found to be a child with an exceptionality, parents should be informed, in writing, that special education and related services are available if the child is enrolled in the public schools and that the school district 'stands ready, willing, and able to provide a free appropriate public education' to the child upon enrollment." This statement found in the *Process Handbook* is correct and the situation in which it applies is distinguishable from the situation in this appeal. Just prior to this statement in the *Process Handbook* there is a discussion about a district's requirement, under child find, to locate, identify, and evaluate all children residing in the school district, including homeschooled students. If, by

reason of its child find responsibilities, a homeschooled child is found to be a child with an exceptionality the district would send the parent a “ready, willing, and able” letter as explained in the *Process Handbook*. The controversy at the center of this appeal, however, did not result in a homeschooled child being found to be a child with an exceptionality and then the district expressed its willingness to serve the child. Instead, it was due to the disagreement regarding placement between the parent and the district that the parent chose to homeschool the student. When a parent chooses to withdraw their child from public school and homeschool the child due to a disagreement with the district, the district cannot abdicate its responsibilities under special education law to make available to the student the placement and services specified in the student’s IEP by simply sending a letter to the parent that the district is “ready, willing, and able” to serve the student upon reenrollment in the school district. The district was required to make the placement specified in the student’s IEP available to the student unless the IEP team agreed on a different placement and the parent consented to that placement. The quoted language from the *Process Handbook* does not apply to the situation that formed the basis of the parent’s complaint in this appeal.

While the parties are not permitted to appeal the corrective action that the complaint investigator issued, the Appeal Committee, on its own initiative, may amend corrective action. Here, the Appeal Committee will amend the corrective action listed in #3 and #4 on page 12 of the investigator’s report. The investigator required the district to complete certain actions “[u]ntil such time as the student is in attendance at a residential facility, or the student’s placement has been changed with the consent of the parent . . . .” Whether the student is “in attendance at a residential facility” is not strictly within the control of the district. The parent ultimately has control over whether the student will attend a PRTF. Therefore, the Appeal Committee amends the corrective action listed in #3 and #4 on page 12 of the investigator’s report to the following:

3. Until the district makes a PRTF available to the student or the student’s placement has been changed with the consent of the parent, USD #\_\_\_ is directed to provide Early Childhood, Special Education, and Title Services with a weekly, written report documenting its efforts to make a residential facility available to the student, in conformance with paragraph 2 of these corrective actions; and

4. Within five school days of receipt of this report, USD #\_\_\_ is directed to: (a) make a written offer to the parent to provide a minimum of four hours of educational services each school day to be provided at the student’s home until the district makes a PRTF available to the student or the student’s placement has been changed with the consent of the parent; and (b) provide Early Childhood, Special Education, and Title Services with a copy of this written offer and a statement describing the extent, if any, to which the parent accepted the offer.

For clarification, making a PRTF available for this student means the district has found a PRTF which will accept this student for attendance.

The Appeal Committee also wishes to note its concern that, due to the disagreement regarding placement between the parent and the district, the student has not been provided with services by the district for quite a length of time. As stated accurately by the investigator in the investigation report this “is at least partially the result of the parent’s desire to have the student return to a general education setting at his neighborhood school, and [the parent’s] refusal to allow the student to attend school in any other setting.” The student’s IEP team has offered another placement to this student, but the parent has not consented. However, the district’s offering of a placement option did not remove the district’s responsibility to locate a PRTF opening and make it available to the student. It does not appear

that either party desires the placement listed in the student's IEP. The Appeal Committee is hopeful that the parties will work together to focus on the needs of the student in developing appropriate services and finding a mutually agreeable placement to provide those services.

### **CONCLUSION**

The conclusion of the investigator in Issue 1 is upheld. The corrective action listed in the investigator's report, and amended by the Appeal Committee, remains in place.

This is the final decision on this matter. Kansas special education regulations provide no further appeal.

This final decision is issued this 12th day of May, 2016.

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

REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS, USD #  
ON MAY 2, 2016

DATE OF REPORT: JUNE 1, 2016

This report is in response to a complaint filed with our office by \_\_\_\_\_ on behalf of his daughter, \_\_\_\_\_ 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 \_\_\_\_\_ Assistant Director of the \_\_\_\_\_ Cooperative, on May 10, 17, 19, and 27, 2016. The investigator spoke by telephone with \_\_\_\_\_ Principal of \_\_\_\_\_ School, on May 27, 2016.

The native language of the parent is Spanish. In telephone calls utilizing a Spanish language translator, the investigator attempted to contact the parent on May 26 and 27, 2016. The parent did not answer and did not return the investigator's call.

On May 27 and 28, 2016, the investigator spoke by telephone with the Family Liaison for the district, \_\_\_\_\_ Ms. \_\_\_\_\_ was present during several of the meetings referenced later in this report and assisted the parent in submitting his formal complaint.

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

- Notice of Meeting (English language version) dated January 13, 2015
- Draft IEP for the student (English language version) dated January 15, 2015
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated January 15, 2015 (English language version)
- Orthopedic Surgery Prescription dated August 7, 2015
- Notice of Meeting dated August 20, 2015 (English language version)
- IEP Amendment Between Annual IEP Meetings dated August 21, 2015 (English language version)
- Orthopedic Surgery Prescription dated November 16, 2015

- Notice of Meeting ((English language version) dated January 4, 2016
- Draft IEP for the student (English Language version) dated January 12, 2016
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent (English language version) dated January 12, 2016
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated January 13, 2016 (English language version)
- Physical Therapy Report dated January 15, 2016
- Notice of Meeting dated February 15, 2016 (English language version)
- *Evaluation/Eligibility Report Summary of Meeting dated March 8, 2016*
- Draft IEP for the student dated March 8, 2016 (English language version)
- Team Summary dated March 8, 2016
- IEP for the student dated March 8, 2016 (Spanish Language version)
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated March 8, 2016 (English language version)
- Home Therapy exercises
- Attendance records for the student covering the 2014-15 and 2015-16 school years
- Grade reports for the student for the 2014-15 and 2015-16 school years
- Letter to the district from the parent dated March 23, 2016 requesting an Independent Educational Evaluation (IEE) of the student
- Letter to the parent from the Director of Special Education dated April 8, 2016 regarding the parent's request for an IEE
- Letter to the investigator from the Assistant Director of Special Education dated May 17, 2016
- Process for Spanish Speaking Parents provided by the district
- Copy of district spreadsheet detailing documents provided for translation

### **Background Information**

This investigation involves an 11 year-old girl who for the 2015-16 school year was enrolled in the 5<sup>th</sup> grade. The student has been diagnosed with Morquio Syndrome, a rare genetic disorder that has resulted in physical abnormalities requiring ongoing monitoring and treatment. The student receives weekly infusion treatments designed to keep her bones from fusing, to enhance muscle flexibility, and to help slow down the overall progression of her condition.

According to the district, the student has made good academic progress over the years despite recorded absences resulting from surgeries required to address physical problems associated with her diagnosis. The student participates in PE with accommodations implemented by her general education Physical Education teacher. She also makes use of adaptive equipment in the general education classroom such as step stools, spring-loaded scissors, personal pencil sharpener, and an iPad.

The student has received support from both Physical and Occupational Therapists through the district since 2011. Between 5 and 10 minutes of Physical Therapy consultative services were provided each week from 2011 until August 2015. Twenty minutes of Occupational Therapy (OT) services per week were provided directly to the student in the general education setting during the 2011-12 and 2012-13 school years and for the first semester of the 2013-14 school years. In January 2015, OT services were changed to 10 minutes per quarter of consultation.

### **Issues**

This investigation focused on two issues:

**Issue #1: Was the school district required to provide the student with occupational and physical therapy, and, if so, did the district fail to provide those services?**

#### Parents Rights in Special Education

When reauthorizing the Individuals with Disabilities Education Improvement Act (IDEA) in 2004, Congress retained important procedures that schools must use when evaluating eligibility for special education services, when developing or changing a child's Individualized Education Program (IEP) or when attempting to resolve serious disputes regarding special education issues. These procedures are sometimes referred to as "procedural safeguards" or "parent rights." The procedural safeguards specified in the IDEA were primarily designed to help schools and parents work together to develop effective educational programs for children with disabilities.

In order to strengthen the role of parents in the special education process, Congress mandated that schools afford parents the opportunity to be members of any decision making team for their child, including eligibility, initial evaluation and reevaluation, and development of an individualized education program (IEP) for the provision of a free appropriate public education (FAPE). Schools are to ensure that parents have the opportunity to be fully participating members of the IEP team that makes decisions regarding the educational placement of, and services for, their child.

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 (34 C.F.R. 300.503).

Districts are also required to provide parents with 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
- the provision of special education and related services to their child.

The purpose of providing notice to the parents is so they understand what action the public agency is proposing and the basis used for determining the action is necessary. Kansas statutes, at K.S.A. 72-990, state the Prior Written Notice must include:

1. A description of the action proposed by the agency.
2. An explanation of why the agency proposes the action.
3. A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action.
4. A statement that the parents have protection under the procedural safeguards and how a copy of the procedural safeguards can be obtained.
5. Sources for parents to contact to obtain assistance in understanding their procedural safeguards.
6. A description of other options considered and the reasons why those options were rejected.
7. A description of other factors that are relevant to the agency's proposal.  
(K.S.A. 72-990; 34 C.F.R. 300.503(b))

In addition to these 7 elements, if the notice is to propose to conduct a reevaluation, the notice must describe any evaluation procedures that the school proposes to conduct (K.S.A. 72-986(b); 34 C.F.R. 300.304(a)(1)).

**All prior written notice documents** must be written in language understandable to the general public and **provided in the native language of the parent** or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication, that the parent understands the content of the notice and that there is written evidence that this has been done (K.A.R. 91-40-26(a)(b)(c); 34 C.F.R. 300.503(c)).

The Kansas State Department of Education has made available Prior Written Notice forms to assist districts with the provision of prior written notice to parents whose primary language is Spanish. Sample forms are available on the Kansas State Department of Education website at [www.ksde.org](http://www.ksde.org).

If a parent presents results of an outside evaluation or recommendations from a professional outside of the school district, that information should be considered by the school, if it meets the school's criteria, in any decision made with respect to the provision of FAPE to the child. However, the school is not obligated to implement the recommendations made by any outside party.

If it has been determined by a physician that a child may benefit from Occupational Therapy (OT) or Physical Therapy (PT), the district is not automatically required to provide that therapy. However, an IEP Team meeting *should be held to review the physician's recommendation and determine if additional supports and/or services are necessary for the child to benefit from his/her educational program.* The IEP team must determine whether a child requires occupational therapy or physical therapy in order to benefit from the instructional program. The district is not responsible for the provision of therapy unless it can be demonstrated that the child has an educationally related need that only OT or PT (or both) can address.

#### August 2015 Prescription

The IEP for the student dated January 16, 2015, stated that the student was to receive 10 minutes per quarter of both Occupational Therapy and Physical Therapy.

In August of 2015, the student underwent surgery for hardware removal in both her legs. A date stamp on the document shows that the district received a copy of an Orthopedic Surgery Therapy Prescription for the student on August 7, 2015. That prescription stated that once weekly "Physical Therapy &/or Occupational Therapy" was "medically necessary for the patient's diagnosis." It was noted that the student could "stand but not walk." Therapy was to include range of motion, strengthening, and stretching and was to be non-weight bearing.

The investigator could not find any record of the parent having made a formal request that the district provide the services specified by the prescription, and there is no indication that any IEP Team meeting was held for the **specific** purpose of discussing any such request. However, the parent was provided with notice (in English) of an IEP Amendment meeting to be held on August 21, 2015. The parent and the Occupational Therapist serving the student met and amended the student's January 2015 IEP. The parent gave written consent to an amendment written in English that stated:

"Due to surgery on 8/6/2015 for hardware removal in both her legs, (the student) requires assistance from staff to complete toileting activities at school. During the time that (the student) requires the use of a wheelchair, she will have assistance for approximately 30 minutes/day (3-10 minute bathroom breaks) during the school hours. This will continue until she is released from the physician, which is estimated to be around

September 21, 2015. At that time, these services will be discontinued, and the current IEP will continue as written.”

The change proposed by the district represented a material change in services and a substantial change in placement for the student. The parent was provided with prior written notice – in English – of the district’s proposed action and gave written consent for the change.

Records indicate that the student also received Physical Therapy once per week at \_\_\_\_\_ in \_\_\_\_\_ through November of 2015.

#### November 2015 Prescription

The district provided the investigator with a second prescription, this one dated November 16, 2015. The “Patient Name” on this prescription is blank, and the district could not determine how or when the document was received. It is, however, the belief of the district that this prescription, which calls for OT and PT services to be provided “2/wk during school year,” is also for this student.

The district reports that the first formal discussion of the parent’s desire for an increased amount of therapy for the student occurred during the annual review of the student’s IEP on January 12, 2016. A “Draft” IEP shows that the team recommended that the student receive OT services “1x/week for duration of the IEP 20min.” The Draft document does not clearly specify the level of PT services to be provided to the student, but a prior written notice form written in English and signed by the parent on January 12, 2016 shows that the district proposed to provide “PT approx 1x/week x 20 min” in addition to “OT 1x/week x 20 min approx.” These services are hand written on the form; “consultative” OT services had been typed on the form but had been crossed out.

#### Findings

There is no record prior to January 12, 2016 to show that the parent asked to have the IEP Team consider the provision of OT or PT services to the student as outlined by either her August or November prescription. The IEP Team did consider the parent’s request for services at the January IEP Team meeting when the parent surfaced the issue. Based on the discussion at the meeting, the IEP team recommended that direct services to the student be provided. Because the district considered the recommendations of the physician at the January IEP Team Meeting when determining services to the student, a violation of special education laws and regulations is not substantiated on this issue.

**Issue #2: Was the notice provided to the parent informing him that the student no longer qualified for special education services inconsistent with law?**

When school personnel suspect that a child is no longer eligible for special education and related services, a reevaluation must be conducted to determine if the child is no longer a child with an exceptionality (K.S.A. 72-986(l)(1)).

The school must provide Prior Written Notice to the parents of the child that describes any evaluation procedures the school proposes to conduct (K.S.A. 72-986(b); K.S.A. 72-988; 34 C.F.R. 300.304(a)). The required content of that written notice was specified above in the Parents Rights section of this report.

If it is determined by the IEP team through a reevaluation that the child is no longer a child with an exceptionality, services may be discontinued. Typically, if an IEP Team determines that a child is no longer eligible, the reason is that the child no longer has a **need** for special education and related services. The district must provide the parents with Prior Written Notice of the proposed dismissal and obtain parent consent before services can be discontinued.

Requirements for this Prior Written Notice include the seven elements listed in the first section of this report. As was also stated in that earlier section, the written notice must be provided in the native language of the parent. Notice must also be provided to parents within a reasonable amount of time **before** the date the school takes the proposed action [See 34 C.F.R. 300.503(a)].

If the IEP Team determines that a student is no longer in need of special education services and is therefore ineligible for service but the parent disagrees, the district must continue to provide services. However, the team could continue to try to reach consensus with the parent. If the parents continue to refuse to provide consent to ending services, then the school could request mediation and/or a due process hearing.

The IEP for this student dated January 15, 2015 states that the student was to receive 10 minutes of Occupational Therapy (OT) service and 10 minutes of Physical Therapy (PT) services per quarter for "36 months (sic)." A prior written notice form signed by the parent on that same date states the district proposed to "provide **consultative** (emphasis added) OT and PT services approximately 10 minutes, one day per nine weeks for an estimated 36 instructional weeks." The document states that consultative services "with the teaching staff is the most beneficial to (the student) at this time." Both the IEP and the prior written notice form were written in English. Signatures on the IEP indicate that an interpreter was present. A general education teacher's signature was not included on the document. Records provided by the district indicate that the IEP was given to a district translator on April 27, 2015. There is no indication that the prior written notice documents were translated for the parent nor is there any record to show when or if the IEP was translated and presented to the parent.

On August 21, 2015, the parent and the Occupational Therapist serving the student met and amended the student's January 2015 IEP. Written notice of the

meeting was provided to the parent in English. The parent gave written consent to an amendment, also written in English, which stated:

“Due to surgery on 8/6/2015 for hardware removal in both her legs, (the student) requires assistance from staff to complete toileting activities at school. During the time that (the student) requires the use of a wheelchair, she will have assistance for approximately 30 minutes/day (3-10 minute bathroom breaks) during the school hours. This will continue until she is released from the physician, which is estimated to be around September 21, 2015. At that time, these services will be discontinued, and the current IEP will continue as written.”

The change proposed by the district represented a material change in services and a substantial change in placement for the student. The parent was provided with prior written notice – in English – of the district's proposed action and gave written consent for the change. No record was provided by the district to show that the parent was given prior written notice in Spanish of the district's proposed change in services and placement.

An IEP Team meeting was held on January 12, 2016. Prior notice of the meeting was provided to the parent in English. A Spanish language interpreter was present at the meeting as was the district's Parent Liaison for Spanish speaking parents. The team recommended that the student receive 20 minutes of direct Occupational Therapy and 20 minutes of Physical Therapy a week “for the duration of the IEP” (until January 12, 2017). It was noted that the student would “participate w/non-disabled student the entire school day w/the exception of the pull out time spent in direct OT & PT services each week.” It was also noted that she would “miss academic time to participate in therapy.” The parent was given prior written notice (in English) of the proposed change in services and placement for the student and gave his written consent for the provision of direct therapy services.

At the January 12<sup>th</sup> IEP Team meeting, the district proposed to conduct a reevaluation of the student in the areas of health/motor ability, vision, hearing, social/emotional status/behavioral status and academic performance. The prior written notice given to the parent was written in English. According to the document, a translator was present when the form was presented to the parent who gave his written consent for the reevaluation.

The results of the reevaluation were reviewed with the parent at a meeting on March 3, 2016. Prior written notice of this meeting was provided to the parent in English. The evaluation report developed at the meeting shows that the district determined that the student did not meet eligibility for special education services. The parent, Family Liaison, and Principal indicated on the Evaluation/Eligibility Report that they disagreed with the conclusions of the reevaluation; other meeting participants including the Occupational and Physical Therapists, School

Psychologist, Assistant Director of Special Education, and classroom teacher agreed that the student was not eligible for services.

At the March 3<sup>rd</sup> meeting, the student's IEP was revised to reflect the district's proposal for services stating "(The student) will receive Direct OT services for approx 20 min 1 day/week until the end of 2016 school year. (The student) will be dismissed from special education @ the end of the 2015-16 school year. (The student) will receive direct PT for approx. 25 min 1 day per week until the end of 2016 school year. (She) will be dismissed from special education services."

A prior written notice form dated March 8, 2016 states (in English) that the district proposed that the student be withdrawn from special education – a material change in services and a substantial change in placement. The form stated that "the student no longer meets eligibility (sic) for special education services " and "no longer qualifies for services," but the team "would like to continue until the end of the school year." The parent signed the form noting that he did not give his consent for the district's proposed action stating, "I do not agree to dismissing services only." The parent initialed the form to show that he was given a copy of his parental rights in Spanish.

#### District Process for the Translation of Documents into Spanish

According to the Assistant Director of Special Education, the following process is followed by the district in instances when the native language of a parent is Spanish:

1. "The teacher contacts the (district) Special Education Office and asks the interpreters to contact the parent and set up an IEP meeting.
2. The IEP meeting is held and the Interpreter translates the meeting and all documents orally.
3. As parents are signing all forms necessary the Interpreter is explaining to the parent/s what is written and what they are signing.
4. After the IEP is concluded, the teacher sends the IEP back to the...Special Education Office where it is given to the secretary.
5. She copies the original IEP and any other forms requested by the parents, *date stamps it and enters it into an Excel spreadsheet with the date she gives it to the translator.*
6. The translator then translates the IEP narrative in a Word Document format and sends it to the parents as well as another forms the parent requested to be translated."

According to a spreadsheet provided by the district, IEPs for the student were sent to the translator on April 27, 2015 and February 16, 2016. There is no indication that any additional documents – including any prior written notice paperwork – were submitted for translation. Further, there is no record of when

documents are actually sent to the parents, and the district has provided a copy of only one document – the student’s March 2016 IEP – translated into Spanish. In a letter to the investigator dated May 17, 2016, the Assistant Director states that the translator is currently “approximately three months behind in translations.”

The Principal of the student’s elementary school told the investigator that she has participated in meetings involving other native Spanish-speaking parents. She reports that in some of those meetings, documents have been provided in Spanish *but notes that she has observed other meetings where no Spanish language forms have been used.*

#### Parental Request for an Independent Educational Evaluation

On March 23, 2016, the parent made a request for an independent educational evaluation (IEE) challenging the evaluation conducted by the district in January of 2016. The parent states that he asked to have documents related to his request translated into Spanish, but all the information sent to him has been in English.

The district stipulates that on April 8, 2016, the Director of Special Education wrote to the parent to notify him that his request for an IEE had been approved. All communication with the parent and all documents sent to him were written in English.

#### Findings

None of the prior written notice forms provided to this parent with regard to the scheduling of meetings or the placement of, and services for, the student have been written in the native language of the parent as required by law. A violation of special education laws and regulations is substantiated on this issue.

Further, as indicated earlier in this report, pursuant to 34 C.F.R. 300.503(a), the term "Prior Written Notice" means that written notice must be given to parents before implementation of any proposed change in services or placement. The report by the district of a three-month wait for the translation of forms points to a systemic problem with the timely provision of special education documents to Spanish-speaking parents.

#### 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 been identified with regard to 34 C.F.R. 300.503(c)(1) which requires that prior written notice to parents be provided in the native language of the parent.

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 Early Childhood, Special Education and Title Services stating that it will comply with 34 C.F.R. 300.503 (c)(1) by providing prior written notice of special education actions in the native language of the parent, and 34 C.F.R. 300.503(a) by providing prior written notice of special education action before implementing proposed changes to an IEP.
2. Upon receipt of this report, USD #        is directed to take the following actions:
  - a. Unless or until the placement of this student has been changed with the informed written consent of the parent, continue to provide this student with 20 minutes per week of direct Occupational Therapy and 25 minutes per week of direct Physical Therapy.
  - b. Within 10 calendar days of the receipt of this report, provide this parent with Prior Written Notice regarding the services outlined in (a) above in the native language of the parent.
  - c. Provide Early Childhood, Special Education, and Title Services a copy of the prior written notice outlined above in 2(a).
  - d. Within 30 days of the receipt of this report, conduct an internal audit regarding the provision of prior written notice to all Spanish-speaking parents of special education students currently being served by the district to determine whether there has been any failure to provide appropriate prior written notice in the native language of a Spanish-speaking parent.
  - e. No later than August 1, 2016, provide Early Childhood, Special Education and Title Services with a summative report of the audit referenced above in item 2(d).
  - f. If the audit confirms a failure to provide appropriate notice to Spanish-speaking parents in their native language, (a) take immediate steps to provide the appropriate notice to those parents in Spanish; (b) provide Early Childhood, Special Education and Title Services with a list of the names of parents who were provided the notices referred to above and the date the notices were sent; and (c) present to Early Childhood, Special Education and Title Services no later than August 1, 2016 a plan to address the systemic problem and ensure that appropriate prior written notice

will be provided to these parents in Spanish and before taking any action proposed in the notice.

Further, USD #      shall, within 10 calendar days of the date of this report, submit to Special Education Services one of the following:

1. A statement verifying acceptance of the corrective action or actions specified in this report;
2. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
3. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

### **Right to Appeal**

Either party may appeal the findings 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  
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).

# 16FC17

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON SEPTEMBER 16, 2015

RECEIVED  
OCT 23 2015  
KSDE

DATE OF REPORT: OCTOBER 15, 2015

This report is in response to a complaint filed with our office by Catherine Johnson of the Disability Rights Center of Kansas on behalf of her client,

In the remainder of this report, \_\_\_\_\_ will be referred to as "the student."

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, spoke with USD # \_\_\_\_\_ by telephone on September 29, October 8, and October 12, 2015. The following staff persons were interviewed:

- \_\_\_\_\_, Special Education Director
- \_\_\_\_\_, Paraeducator at \_\_\_\_\_ Support Services (\_\_\_\_\_)
- \_\_\_\_\_, Paraeducator at \_\_\_\_\_ during extended school year
- \_\_\_\_\_, Attorney for USD # \_\_\_\_\_
- \_\_\_\_\_, Special Education Administrative Assistant

The Complaint Investigator spoke by telephone to the complainant and parties on September 24, October 1, and October 9, 2015. The following persons were interviewed:

- Catherine Johnson, Attorney at Disability Rights Center of Kansas
- \_\_\_\_\_ Student
- \_\_\_\_\_, Parent

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

- An IEP and Behavior Intervention Plan (BIP) for the student dated October 3, 2014

- An IEP Amendment Between Annual IEP Meetings for the student regarding Extended School Year (ESY) dated May 21, 2015
- Prior Written Notice (PWN) for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated February 6, 2015
- PWN, and Request for Consent dated May 22, 2015
- A Manifestation Review dated February 6, 2015
- A letter from [redacted] Assistant Principal, dated February 6, 2015 recommending long-term suspension
- A letter and the attached discipline documents from [redacted] Assistant Principal, dated February 6, 2015 scheduling a long-term suspension hearing for February 12, 2015
- A letter from [redacted] Executive Director of Human Resources – Hearing Officer, dated February 12, 2015 extending the student's long-term suspension/expulsion through the remainder of the spring semester of the 2014-15 school year and allowing the student to attend the Support Services ( ) program so as to continue with academic services
- Email correspondence between the parent and the USD # [redacted] school staff regarding ESY dated May 29 – June 22, 2015
- Attendance records for the student for the 2014-15 school year
- Non-Resident Student Admission Request dated August 14, 2015
- The USD # [redacted] letter dated September 28 2015, responding to the allegations
- The Formal Complaint letter from the complainant received on September 16, 2015

### **Background Information**

This investigation involves a 19 year-old student who was enrolled in the 12<sup>th</sup> grade at the [redacted] High School in USD # [redacted] as a non-resident student during the 2014-15 school year. The student attended USD # [redacted] as a non-resident student beginning in the 7<sup>th</sup> grade during the 2009-2010 school year. The student was determined eligible for special education and related services under the primary disability category of Autism and the secondary disability category of Other Health Impaired by USD # [redacted] on October 25, 2011. USD # [redacted] has developed and implemented an Individualized Education Program (IEP) for the student since that date. The student's most current Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) is dated October 3, 2014.

## Issues

The complainant raised three issues which were investigated.

**ISSUE ONE:** USD # [REDACTED], in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate disciplinary procedures, specifically by expelling [REDACTED] from USD # [REDACTED] after determining the conduct resulting in the disciplinary action was a manifestation of his disability during the 2014-15 school year.

### Findings:

Federal regulations, at 34 C.F.R. 300.530(e), require that within ten (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, the local educational agency, the parent, and relevant members of the IEP Team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or, if the conduct in question, was the direct result of the local educational agency's failure to implement the IEP.

Federal regulations, at 34 C.F.R. 300.530(f) and C.F. R. 300.530(g), require that if the local educational agency, the parent, and relevant members of the IEP Team determine that either the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or, if the conduct in question, was the direct result of the local educational agency's failure to implement the IEP applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement. If the child already has such a behavioral intervention plan, the IEP Team must review it and modify it, as necessary, to address the behavior. Unless the removal is due to weapons, drugs, or serious bodily injury, the child must be returned to the placement from which the child was removed,

unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

In this case, the student verbally threatened to bring a gun to school to shoot specific students which resulted in school discipline on January 30, 2015 and USD # [redacted] suspended the student for 10 school days beginning on that date.

On February 6, 2015, USD # [redacted] recommended a long term suspension for the student and scheduled a hearing on the proposed extended suspension/expulsion for February 12, 2015. Also on February 6, 2015, USD # [redacted] conducted a Manifestation Determination Meeting with the following participants: the student, the parent of the student, the student's Targeted Case Manager, three general education teachers of the student, three special education teachers of the student, two [redacted] High School administrators, the school psychologist, the school counselor, and the Director of Special Education. The team considered the student's behavior, the student's IEP goals and progress, teacher observations, and information provided by the parent including medical diagnoses. As a result of this consideration, the team determined the conduct resulting in the disciplinary action was a manifestation of the student's disability. The PWN for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement and Request for Consent dated February 6, 2015 documents the team determined the behavior was a manifestation of the disability and proposed that the student attend [redacted] on the 11<sup>th</sup> day of suspension. Both the parent and student acknowledged and consented for the proposed action. However, as indicated in the findings in Issue Two of this report, the PWN provided to the parent and the student did not provide sufficient information to enable the parent and student to give informed consent.

The hearing on the proposed extended suspension/expulsion was held on February 12, 2015 and resulted in a decision by USD # [redacted] to extend the student's suspension for the remainder of the 2014-15 school year and to allow the student to attend [redacted] so as to continue with academic services. Attendance records document the student was out of school suspended for a total of 69 days beginning on January 30, 2015 through May 22, 2015.

The allegation of a violation of special education laws and regulations on this issue is substantiated as there is no evidence to demonstrate the student's IEP Team at USD # [redacted] reviewed or modified the student's BIP, as necessary, to address the behavior. The student's removal was not due to weapons, drugs, or

serious bodily injury; therefore, the student should have been returned to the placement from which the student was removed since the parent and USD # did not change the student's placement as part of the modification of the behavioral intervention plan.

**ISSUE TWO:** USD # . in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide prior written notice to and obtain consent from the parents of prior to making a material change in services and / or placement during the 2014-15 school year.

Findings:

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.

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 25% or more of student's day.

In this case, USD # provided the student and parent with PWN for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent on February 6, 2015. The purpose of the PWN is listed as notification only due to no changes to the IEP, services, or placement , and notes that parental consent is not required. However, documentation shows the student and parent signed acknowledgement and consent for the proposed action on February 6, 2015. The action proposed was described as the student will attend on the 11<sup>th</sup> day of suspension as a result of the manifestation determination that the

behavior resulting in the disciplinary action was a manifestation of the student's disability.

The student's current IEP as of the date of the PWN was dated October 3, 2014. The services required by that IEP included 49 minutes per day of specialized instruction in math, 49 minutes per day of specialized instruction in reading, and 49 minutes per day of specialized instruction in social skills to be provided in the special education setting. The IEP also required 147 minutes of instructional support per day in reading to be provided in the general education setting. The IEP documents the student will participate in the general education setting 65% of the time weekly. The prior written notice provided to the parent and the student on February 6, 2015, did not notify the parent or student of any change to these IEP provisions. Beginning on February 18, 2015, the student began attending \_\_\_\_\_ for 180 minutes per day receiving 50 minutes per day of specialized instruction in reading, 50 minutes per day of specialized instruction in math and 80 minutes per day of instruction support. These services were provided by a paraprofessional under the supervision of a special education teacher with 0% of the student's day spent in the general education setting as \_\_\_\_\_ is reported as a special day school. A special day school is described as meaning special education services are delivered in a special purpose school, building or any other segregated program for students with disabilities. At the end of the 2014-15 school year and 2015 ESY, the student failed to earn 2 ½ credits required to graduate.

The allegation of a violation of special education laws and regulations on this issue is substantiated as the student's instructional support services were reduced from 147 minutes per day to 80 minutes per day, the student's specialized instruction in social skills was reduced from 49 minute per day to 0 minutes per day, and placement was changed from 65% of the student's day being spent in the general education setting to 0% of the student's day being spent in the general education setting. This reflects a decrease of more than 25% of the student's day requiring PWN and consent. While consent was obtained, the PWN provided to the student and parent on February 6, 2015 did not accurately describe this material change in services and substantial change in placement.

**ISSUE THREE:** USD # \_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_, specifically by not providing the special education and related services required by the IEP beginning February 18, 2015.

## Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

The findings of Issue Two are incorporated herein by reference.

The allegation of a violation of special education laws and regulations on this issue is substantiated as the student's IEP required 147 minutes per day of instructional support in the general education setting and 49 minutes per day of specialized instruction in math, 49 minutes per day of specialized instruction in reading, and 49 minutes per day of specialized instruction in social skills to be provided in the special education setting. Beginning on February 18, 2015, the student only received 50 minutes per day of specialized instruction in reading, 50 minutes per day of specialized instruction in math, and 100 minutes per day of instructional support in reading in the special education setting. The student did not receive any specialized instruction in social skills nor any instructional support in the general education setting after February 18, 2015.

## **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 three areas:

- 34 C.F.R. 300.530(e), 34 C.F.R. 300.530(f), and 34 C.F.R. 300.530(g) which require specific procedures and actions when a student with a disability is long term suspended and a determination is made that the conduct resulting in the disciplinary action was a manifestation of the student's disability. Specifically, USD #      failed to review or modify the student's BIP, as necessary, to address the behavior resulting in the disciplinary action. The student's removal was not due to weapons, drugs, or serious bodily injury and USD #      failed to return the student to the placement from which the student was removed or change the student's placement as part of the modification of the behavioral intervention plan.
- 34 C.F.R. 300.503 and K.A.R. 91-40-27(a)(3), which require prior written notice and parent consent before making a material change in services and/or a substantial change in placement . Specifically, USD #

substantially changed the student's placement and failed to provide appropriate prior written notice and obtain consent for the proposed change of placement from 65% of time in general education setting to 0% of time in the general education setting.

- 34 C.F.R. 300.17 which requires that special education and related services be provided in conformity with an IEP. Specifically, USD # failed to provide 47 minutes per day of specialized instruction for social skills in the special education setting and 147 minutes per day of instructional support in the general education setting beginning February 18 2015.

As a result of these violations, the student was denied a free appropriate public education and subsequently did not graduate at the end of the 2014-15 school year.

Therefore, 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 Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.530(e), 34 C.F.R. 300.530(f), and 34 C.F.R. 300.530(g) by following appropriate procedures when long term disciplining students with IEPs; and
  - b) comply with K.A.R. 91-40-27 (a)(3) by obtaining the written consent of the parent before making a material change in services and/or a substantial change in placement; and
  - c) comply with 34 C.F.R. 300.17 by implementing the IEPs of students as written; and
  - d) comply with 34 C.F.R. 300.503 by providing prior written notice of any proposed change in placement or services.
2. Within 30 calendar days of the receipt of this report, central office administrators and special education staff as well as building level

administrators, counselors, and school resource officers, will be trained on the special discipline process required for students with IEPs and document who provided the training, the content of the training, and who attended the training.

3. Within 30 calendar days of the receipt of this report, meet with the student and his representatives to develop a plan to provide compensatory services for a total of 46 hours of specialized instruction in social skills and a total of 138 hours of instructional support in the general education setting in order to earn the required 2 ½ credits required for graduation.
  - a) 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.
  - b) A copy of the plan to provide the compensatory services shall be submitted to Early Childhood, Special Education and Title Services, within 5 days after the meeting with the student and his representatives.
4. Further, USD #      shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.

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

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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)

# 16FC18

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

### REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # ON OCTOBER 29, 2015

DATE OF REPORT: NOVEMBER 27, 2015

This report is in response to a complaint filed with our office by Catherine Johnson of the Disability Rights Center of Kansas on behalf of \_\_\_\_\_. In the remainder of this report, \_\_\_\_\_ will be referred to as “the student.”

#### **Investigation of Complaint**

Nancy Thomas, Complaint Investigator, spoke with USD # \_\_\_\_\_ by telephone on November 9, November 23, and November 24, 2015. The following staff persons were interviewed:

- \_\_\_\_\_, Assistant Director of Special Education
- \_\_\_\_\_, Second Grade Teacher at \_\_\_\_\_ Elementary
- \_\_\_\_\_, Principal at \_\_\_\_\_ Elementary
- \_\_\_\_\_, Special Education Teacher at \_\_\_\_\_ Elementary
- \_\_\_\_\_, Autism/Behavior Consultant for \_\_\_\_\_ Elementary

The Complaint Investigator spoke by telephone to the complainant and Parent of \_\_\_\_\_ on November 20, November 24, and November 25, 2015. The following persons were interviewed:

- Catherine Johnson, Attorney at Disability Rights Center of Kansas
- \_\_\_\_\_, Parent

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

- 2014-2015 Student Support Plan (SSP) Parent Communication Timeline
- SSP for \_\_\_\_\_ dated August 31, 2014
- SSP Team Meeting Notes dated September 10, September 29, October 22, and November 17

- A letter dated November 24, 2014 from \_\_\_\_\_ requesting an initial evaluation for special education and a functional behavioral assessment
- Special Services Team Meeting Notes dated December 3, 2014
- Prior Written Notice (PWN) and consent for initial special education evaluation dated December 8, 2014
- An Evaluation Report dated February 26, 2015
- PWN for initial eligibility dated February 26, 2015
- An IEP and Behavior Intervention Plan (BIP) for the student dated March 10, 2014
- PWN and consent for initial services dated March 10, 2015
- Visual Schedules for mornings, afternoons, and Wednesdays for \_\_\_\_\_
- Daily Behavior Logs for \_\_\_\_\_ dated March 11 through May 19, 2015
- Social Work Logs for \_\_\_\_\_ dated March 13 through May 15, 2015
- Consultant Notes written by \_\_\_\_\_ dated March 12, March 13, March 23 and May 6
- Copies of emails between \_\_\_\_\_ and school staff during the 2014-15 school year
- Copies of emails between Mary Morningstar, PhD and \_\_\_\_\_ dated December 10, 2014 through April 14, 2015
- Copy of an email between Mary Morningstar, PhD and David Williams dated February 17, 2015
- USD # School Board Policy GAAF for Emergency Safety Interventions
- Notes of meeting between parent, University of Kansas Behavior Team, and school staff dated May 14, 2015

### **Background Information**

This investigation involves an eight year-old student who is enrolled in USD # and attended \_\_\_\_\_ Elementary school for kindergarten, first and second grades but now attends \_\_\_\_\_ Elementary School for third grade. The student was determined eligible for special education and related services under the primary disability category of Emotional Disturbance by USD # on February 26, 2015. USD # developed and implemented an Individual Education Plan (IEP) for the student on March 10, 2015. The student's most current Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) is dated March 10, 2015.

## **Issues**

The complainant raised five issues which were investigated.

**ISSUE ONE:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_, specifically by not implementing the behavior intervention plan (BIP) as written during the 2014-15 school year.

### Findings:

Federal regulations, at 34 C.F.R. 300.324.(a)(2)(i) require that in the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the student attended the \_\_\_\_\_ Elementary School as a second grade student during the 2014-15 school year. An initial IEP was developed for the student on March 10, 2015 which included a BIP. Documentation shows the parent participated in the development of the IEP including the BIP and provided written consent to initiate the special education and related services on March 10, 2015. The last day of the 2014-15 school year was May 19, 2015.

The BIP requires the following proactive strategies:

1. Create opportunities for the student to engage in and earn preferred activities (computer, coloring, step by step drawing, making and building things).
2. Provided choices on how his individual workspace is organized and arranged.
3. Create an environment that allows him to be successful. He is the most successful in one to one instruction, small group instruction and environments free of distractions.
4. Visual schedule with pictures to let him know what is coming next.
5. Use visuals to support communicating clear and consistent appropriate learner behaviors and other expectations.
6. When completing work use icons to provide choices what he wants to work on. When the student sits down to work, present him with 3 icons (2 less preferred activities and 1 preferred activity.) Let him choose what he wants to work on from the 3 icons presented to him. If he chooses the

preferred activity then set the timer for 7 minutes. When the timer goes off, have him stop the preferred activity and return to his office space. He will then choose a non-preferred activity from remaining two choices. If he does not choose an activity from the two choices then pick the activity that he looked at first and start that activity. You can replace the nonpreferred activity with a preferred one and remind him that when he is done then he can pick a new activity to work on.

Interviews with the Principal, Special Education Teacher, General Education Teacher, and Autism/Behavior Consultant along with documentation found the student was provided individual instruction in a distraction free environment in Room 143 which is a separate special education classroom beginning on March 11, 2015. In this setting, the student was provided a daily visual schedule with ongoing opportunities for choices between preferred and nonpreferred activities.

The BIP also includes Reactive Strategies for the following types of behaviors:  
Elopement:

- a) Staff should remain calm and neutral.
- b) Staff should ensure that visual supports communicating schedule and the motivation system are present and within in the student's view.
- c) Staff should not respond to eloping if the student doesn't leave the immediate area (e.g., the classroom). Staff should minimize attention, but always monitor for safety.
- d) If the student leaves the immediate area, staff should follow at a distance while delivering as little attention as possible. If he does not return to the instructional area within a short time (approximately 3 minutes), staff should verbally direct him to return to the instructional area. If his safety is at risk, staff should physically block him from further movement out of the instructional area.
- e) Staff should then refer to the noncompliance reactive strategies.

Noncompliance

- a) Staff should remain calm and neutral
- b) Staff should ensure that visual supports communicating schedule and the motivation system are present and within in the student's view.
- c) The instruction should not be re-delivered and the demands should not be removed.
- d) Staff should wait 3 seconds, then prompt to follow through with the instruction/activity if possible. Use the least-intrusive physical prompt necessary to gain compliance and keep the student and others safe

(starting with gestural prompts, proximity control and then moving to physical prompting).

e) If physical prompting is not possible due to safety concerns (signs of increase escalation), staff may attempt to re-engage the student in the activity or original direction with the following strategies: referring to visual supports, asking neutral questions that would likely initiate a “yes” response to gain compliance momentum ie- can you press start on the timer

f) Structuring the wait time – if the student is noncompliant and refusing to respond but is not a safety concern, provide structured wait time. Using the strategy of putting a time limit on the non responsive time. At the end of the time re-engaging him to continue the ask/transition.

g) Staff should not respond to vocal opposition or inappropriate comments

h) All attempts should be made to gain compliance in the environment where the instruction was given and the noncompliance occurred.

However, staff should remove the student from an inclusive environment when he becomes too disruptive for other students/teachers to learn/teach.

i) Staff should use appropriate methods to move the student to an individual environment.

j) If necessary the staff working with the student can rotate, however the new staff should follow through with the original expectations

k) Staff should continue with prompts in the individual environment to gain compliance.

#### Inappropriate Use of Materials

a) Staff should remain calm and neutral

b) Staff should ensure that visual supports communicating schedule and the motivation system are present and within in the student’s view.

c) Staff should use clear language about the function of the item and where it needs to be (i.e. - your friends need those pencils for writing for today, please them in the basket)

d) Staff should wait 3 seconds, then prompt to follow through with the instruction, if possible. Use the least-intrusive physical prompt necessary to gain compliance and keep the student and others safe (starting with gestural prompts, proximity control and then moving to physical prompting).

e) If physical prompting is not possible due to safety concerns (signs of increase escalation), staff may attempt to re-engage the student in the activity or original direction with the following strategies: referring to visual supports,

- f) Structuring the wait time – if the student is noncompliant and refusing to respond but is not a safety concern, provide structured wait time. Using the strategy of putting a time limit on the non responsive time. At the end of the time re-engaging him to continue with the original instruction.
- g) Staff should not respond to vocal opposition or inappropriate comments
- h) Staff should use appropriate methods to move the student to an individual environment.
- l) Staff should remove items from immediate view if possible or restructure environment to be void of that item

Inappropriate Physical Contact

- a) Staff should remain calm and neutral
- b) Staff should ensure that visual supports communicating schedule and the motivation system are present and within in the student’s view.
- c) Staff should use attempt to determine a communicative function for the contact: “Did you need something?” if there is no response staff should move out of arms distance or prompt the peer to do the same.
- D) Redirect the student to the current task or activity
- E) Follow the strategies for Noncompliance if necessary

Interviews and Daily Behavior Logs dated March 11 through May 19, 2015 were found to document that these procedures were consistently followed by school staff working with the student.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as there is evidence to demonstrate USD # implemented the student’s BIP as written during the 2014-15 school year.

**ISSUE TWO:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of \_\_\_\_\_, specifically by not providing special education and related services when \_\_\_\_\_ was placed in the seclusion room during the 2014-15 school year.

Findings:

Federal regulations, at 34 C.F.R. 300.17, require that a student’s IEP be implemented as written.

The complainant and parent report the student was placed in seclusion and segregated from peers for 6,242 minutes between December and May during the 2014-15 school year and that during this timeframe the student did not receive any educational services. The parent reports the student was educated in a room with a sign on the door stating "bathroom out of order." The parent also alleged that USD # did not provide her with a final copy of the IEP after the March 10, 2015 IEP meeting.

The findings of Issue One are incorporated herein by reference.

In this case, the school staff reported that the student was placed in multiple classrooms during the 2014-15 school year. Room 119 was the student's general education second grade classroom. Room 122 was a general education independent learning space consisting of a workroom with an attached staff bathroom. Room 105 was the seclusion room where procedures outlined in the School Board Policy for Seclusion and Restraint were implemented. Room 143 was the separate special education classroom.

The student's March 10, 2015 IEP requires special education services for behavior and emotional needs for 285 minutes per day for four days per week and 265 minutes per day for one day per week in the special education setting for a total of 1405 minutes per week. The IEP also requires special education support during the general education class for 120 minutes for four days per week and 45 minutes per day for one day per week for a total of 525 minutes per week.

Interviews with the Principal, the Special Education Teacher, the General Education Teacher, and the Autism/Behavior Consultant as well as documentation found the student was scheduled to receive special education services in the special education setting in Room 143 for a total of 1405 minutes per week beginning March 11, 2015. The student was scheduled to receive special education support in the general education setting for recess, lunch, art/music/physical education, instructional support math, and group reading for a total of 900 minutes per week. The Special Education Teacher reported that he sent a copy of the March 10, 2015 IEP home to the parent approximately ten days following the IEP meeting.

The School Board Policy for the use of seclusion and restraint requires written documentation and parent notification of each incident when seclusion and/or restraint are utilized with a student. Documentation shows the student was

secluded in Room 105 and/or restrained on eight separate occasions between March 11 and May 19, 2015. Documentation shows the use of seclusion and restraint with the student lasted less than 30 minutes total during this timeframe.

It is noted that prior to the implementation of the IEP on March 10, 2015, the student participated in a response to intervention model in the district's Comprehensive Intervention Three Tier supports through a Student Support Plan (SPP) with placement in a general education independent learning space in Room 122. The principal acknowledged there was a "bathroom out of order" sign placed on the door of Room 122 so that school staff would not enter the independent learning space and disrupt the one-to-one instructional support being provided to the student prior to placement in special education.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as the evidence supports that USD # provided the student special education and related services as required by the IEP after March 10, 2015 when the initial IEP was implemented and for the remainder of the 2014-15 school year. The discrepancy in the number of minutes of special education support in the general education setting between the IEP and the student's schedule appears to be the result of not including the amount of time the student spends at recess and lunch in the IEP.

The allegation that the parent was not provided a copy of the student's IEP was not included in the original child complaint filed on October 29, 2015. Note that not enough evidence was found to substantiate this allegation. USD # should provide the parent with another copy of the March 10, 2015 IEP if it has not already done so.

**ISSUE THREE:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), Failed follow appropriate disciplinary procedures, specifically by not reviewing/revising \_\_\_\_\_' behavior intervention plan (BIP) during the 2014-15 school year.

#### Findings:

Federal regulations, at 34 C.F.R. 300.530, require that a child with a disability who is removed from the child's current placement for more than ten school days must continue to receive educational services, so as to enable the child to

continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavior intervention services, and modifications that are designed to address the behavior violation so that it does not happen again. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement. If the child already has such a behavioral intervention plan, the IEP Team must review it and modify it, as necessary, to address the behavior.

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

In this case, interviews with school staff and documentation shows that the behavior report data and the student's BIP were reviewed on a bi-weekly basis by school staff. In addition, at parent request, the school staff communicated and met with Mary Morningstar, PhD, a behavior consultant from the University of Kansas. On May 14, school staff also met with a team of behavior consultants from the University of Kansas who had recently conducted an outside evaluation of the student but no changes were made to the IEP or BIP as a result of that meeting. Interviews with school staff and documentation found the student was not suspended more than ten school days during the 2014-15 school year.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # did not suspend the student from school for more than ten days during the 2014-15 school year and no special procedures were required. However, it is noted there is evidence that USD # was continually reviewing the data related to the student's BIP and considering outside behavioral consultant input at parent request.

**ISSUE FOUR:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide prior written notice to and obtain consent from the parents of \_\_\_\_\_ prior to making a material change in services and / or a substantial change in placement during the 2014-15 school year.

Findings:

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.

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 an increase or decrease of 25% or more of student's day.

The findings of Issue Two are incorporated herein by reference.

In this case, USD # provided the student and parent with PWN for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent on March 10, 2015. The purpose of the PWN is listed as notification and consent for initial services and placement. The action proposed was described as "the student is eligible for special education and will be placed in special education." The action was proposed "to meet his needs" and "not providing these supports would not meet his needs" was listed as the other option considered and why rejected. The PWN documents that it was provided to the parent in person by the Special Education Teacher on March 10, 2015 and was signed by the parent on that same date.

The IEP developed by USD # describes the special education and related services that are to be provided to the student including the location of these services.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD # did not make a material change in services and / or a substantial change in placement for the student during the 2014-15 school year.

**ISSUE FIVE:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to identify, locate, and evaluate students with disabilities for special education and related services, specifically by not conducting an evaluation of \_\_\_\_ until receiving a parent request for an evaluation in November 2014.

Findings:

Federal regulations, at 34 C.F.R. 300.111 require the State to have policies and procedures in effect that require schools to locate, identify and evaluate all children with disabilities from birth through age 21. Federal regulations, at 34 C.F.R 300.301, require that either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

The findings of Issue Two are incorporated herein by reference.

The complainant and the parent report that USD # should have suspected the student may be a child with a disability as early as October, 2014. The parent reported she alerted the school that the student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and would be taking medication at the beginning of the 2014-15 school year. The parent learned the school was secluding the student from general education classroom instruction and from interactions with his peers for the majority of the school day in Room 122 in September and requested a special education evaluation including a functional behavior assessment on November 24, 2014.

Interviews with the Principal, the Special Education Teacher, the General Education Teacher, and the Autism/Behavior Consultant as well as documentation found the student support team met with the parent on August 27, 2014 to discuss the implementation of a Student Support Plan (SSP) for periodic one-to-one instruction in Room 122. The student's behavior was monitored and included eloping from the classroom, jumping from desk to desk, knocking over filing cabinets, and using pencils to mimic Wolverine's claws while interacting with peers. On September 29, 2014, the General Education Teacher and the parent discussed and agreed to the SSP action plan to provide direct instruction of positive learner behavior through a general education intervention of the student regularly working one-to-one with general education staff in Room 122. School staff acknowledged the awareness of the student's ADHD diagnosis in August 2014.

The allegation of a violation of special education laws and regulations on this issue is substantiated as USD # had reason to suspect the student was a child with a disability prior to the parent's request for an initial special education evaluation. USD # was aware of the student's medical diagnosis of ADHD and had data suggesting the student was displaying behavior that was interfering with his learning and the learning of his peers in the general education setting. As part of the response to intervention model utilized by USD # , the SSP plan regularly removed the student from the general education setting for the majority of the school day.

### **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 one area:

- Federal regulations, at 34 C.F.R 300.301 which require that either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. Specifically, USD # had reason to suspect the student was a student with a disability but failed to initiate a special education evaluation to determine eligibility in a timely manner.

As a result of these violations, the student was denied a free appropriate public education during the 2014-15 school year.

Therefore, 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 Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with Federal regulations, at 34 C.F.R 300.301 which require that either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability

2. Within 45 school days of the receipt of this report, building level administrators, counselors, and other appropriate school personnel will be trained on child find policy and procedure as well when to suspect a disability. USD # will document who provided the training, the content of the training, and who attended the training.
3. Within 45 school days of the receipt of this report, USD # will reconvene the student's IEP team to determine the amount of compensatory services owed to the student from October 2014 through March 10, 2015, and to develop a plan to provide compensatory services to the student. A minimum of 300 hours of compensatory specialized instruction must be provided to the student.
  - a) 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.
  - b) A copy of the plan to provide the compensatory services shall be submitted to Early Childhood, Special Education and Title Services, within 5 days after the meeting with the student and his representatives.
4. Further, USD # shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.

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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)

# 16FC19

RECEIVED MAY 18 2016

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

### REPORT OF COMPLAINT FILED AGAINST PUBLIC SCHOOLS, USD # ON MAY 9, 2016

DATE OF REPORT: MAY 13, 2016

This report is in response to a complaint filed with our office by \_\_\_\_\_ and \_\_\_\_\_ on behalf of their son, \_\_\_\_\_ 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 the parents on May 10, 2016. On May 11, 2016, the investigator spoke by telephone with \_\_\_\_\_, Director of Special Education for the \_\_\_\_\_ Public Schools.

- Materials submitted by the parents when filing their formal complaint including the following:
  - A statement of concerns which included a letter from the parents to the Superintendent of the district
  - A letter from a Coordinator of Special Education to the parents dated April 15, 2014
  - An email from the student's father to the Superintendent of the district dated April 11, 2014
  - An email from the student's father to the Superintendent of the district dated May 2, 2014

#### Background Information

This investigation involves a young boy with a diagnosis of Autism. The student was first identified by the district at age 3 as a child with an exceptionality and began receiving Early Childhood Special Education Services in December of 2008. He transitioned to \_\_\_\_\_ Elementary School as a Kindergartner in August of 2010. He received general and special education services at \_\_\_\_\_ until January 2011 when he was withdrawn by his parents to be home schooled. At the request of the parents he was transferred to \_\_\_\_\_ Elementary in August of 2011 and reenrolled as a Kindergartener. He again received both general and special education services until January 2014 when he was again withdrawn to be home schooled. The parents confirm that the

student has not returned to the district since his January 2014 withdrawal.

### Issues

Formal complaint is one of the methods parents or others have to resolve special education disagreements with the school district. Kansas regulations, at K.A.R. 91-40-51, state that "any person or organization may file a written, signed complaint alleging that an agency has violated a state or federal special education law or regulation." The regulations specify the elements that must be contained in the complaint including the following:

- (1) A statement that the agency has violated a requirement of state or federal special education laws or regulations;
- (2) the facts on which the statement is based;
- (3) the signature of and contact information for the complainant; and
- (4) if the complaint involves a specific child, the following information:
  - (A) The child's name and address of residence, or other contact information if the child is a homeless child or youth;
  - (B) the name of the school the child is attending;
  - (C) a description of the problem involving the child; and
  - (D) a proposed resolution to the problem, if a possible resolution is known and available to the complainant.

This complaint included a number of concerns that did not identify specific violations of law and were not investigated. However, the complaint did contain eight specific allegations and some factual support for these allegations. Those allegations are listed separately below.

The regulations go on to state "the complaint shall allege a violation that occurred **not more than one year before the date the complaint is received** and shall be filed with the commissioner of education." As indicated in the "Findings" portion of this report, none of these allegations met this time requirement. The allegations are as follows:

**Allegation #1: Strategies used to address behavior were developed without an understanding of why the behavior was occurring.**

According to the parents, the student was inappropriately directed by his classroom teacher to eat a school lunch, and the school then failed to recognize that subsequent behaviors had been triggered by allergies. The parents contend that the reaction of school personnel to the student's behavior "set in motion a pattern of interaction and response" that led to a lack of trust on the part of the student.

The parents further contend that the building principal assumed greater responsibility in the running of meetings at the start of the student's second grade year, establishing himself as the primary contact at the school for the parents.

The parents assert, however, that the principal was untrained in special education and was not properly trained to make educational decisions regarding their son. It is the position of the parents that the principal responded to the student's behavior with disciplinary consequences that failed to take into account the reasons for the student's actions, his communication difficulties, or his disability.

The parents also assert that the student was on at least one occasion required to spend up to 5 hours in the principal's office and on at least one other occasion was required to spend 3 hours in the "safety seat." The parents also object to the use of an "all call" in an incident involving the student, to the isolation of the student, and to the evacuation of other students during a behavioral incident.

**Allegation #2: Discriminatory treatment was afforded to the student due to his disability.**

The parents report that their son was suspended from school following a behavioral incident. The parents contend that standard disciplinary practices were not put in place for the student when he returned to school after his suspension. Specifically, the parents assert that while other students were afforded the opportunity to talk to an administrator upon their return, that opportunity was not provided to the student.

In another instance, the parents state that the principal failed to interview the student when he "tackled a boy in line coming in from recess" but did interview all the other involved parties. It is the parent's position that by failing to talk to the student about the incident, the principal denied the student the right to state his side of the situation.

**Allegation #3: The district's observation policy restricted the parents' access to the school.**

The parents assert that the observation policy implemented at the student's elementary school is onerous and restrictive. They assert that the policy prohibited them from observing their son in the school setting despite their repeated requests. According to the parents, they were required to make a request for an observation after which a "chaperone" would have to be assigned and a time for the observation established. Further, the principal was required to be on site at the time of the observation to explain observation procedures.

According to the parents, they made 6-8 requests to observe, and three observations were cancelled. Parents report that one observation was cancelled by the principal himself due to the illness of his own child.

**Allegation #4: The district implemented ineffective and restrictive communication policies.**

According to the parents, the principal established himself as the primary contact for home-school communication. After the parents contacted several staff members in November of 2013, they received an email from the principal asking that they submit questions to him so that he could solicit responses from staff and stating that questions could then be addressed at a meeting scheduled for the following week. That meeting was cancelled because of the illness of the principal's child. The parents then canceled a rescheduled meeting set up for the next week because they had a sick child. The parents state that the meeting was never held.

**Allegation #5: Requests for information from district staff were not fulfilled.**

The parents report that during parent/teacher conferences with the student's special education teacher and his general education classroom teacher in the Fall of 2013, the student's mother requested a copy of the behavior data being collected on the student. The student's mother reports that she was told at that time that the data could be sent by email or in the student's backpack; the decision was made to send the data home in an envelope with the student. When the data did not arrive, the parents state that they made two follow-up requests to the principal 2 and 4 weeks later.

According to the parents, a special education administrator told them that staff had no recollection of such a request being made, and the district has never provided the parents with the requested behavior data.

The parents also assert that the student's mother asked the district autism specialist for a short report of a behavioral incident but the district never provided such a report.

The parents report that in April 2014 the student's father sent a letter to the Superintendent asking in part "how an 'appropriate' education setting would be determined if (they) were to reenroll (the student) in \_\_\_\_\_ schools."

According to the parents, they received a response from a Special Education Coordinator and the principal of the student's elementary school. The parents felt it was inappropriate for these individuals to address the issues they had raised; the student's father then emailed the Superintendent stating that the response "left (the parents) with more questions and concerns..." and asking the superintendent whether he was "in agreement" with the response the parents had received. The parents report that the superintendent did not respond.

**Allegation #6: Staff did not follow the IEP with regard to the allergy needs specified of the student.**

According to the parents, the student's classroom teacher directed the student to get a school lunch on the first Friday of the 2013-14 school year, even though the student had his allergen free lunch in his backpack. The parents contend that the student suffered a severe allergic reaction as a result of the teacher's actions.

The parents contend that in directing the student to take a school lunch, she failed to follow the student's February 12, 2013 IEP.

**Allegation #7: Staff did not follow the IEP with regard to the IEP provision for one-to-one aid for the student.**

According to the parents, when the student's mother came to his classroom in the Fall of 2013 as a field trip volunteer, she observed a portion of a math lesson that was being delivered. At that time, the mother saw that a Paraeducator was assisting the student and another child even though the parent contends that the student's February 12, 2013 IEP calls for him to have one-on-one assistance.

**Allegation #8: A call for help from the parents to the district was not returned.**

The parents state that the student's mother contacted a Special Education Coordinator to ask for her help. Unable to reach the Coordinator, the parent left a message. According to the parents, an "administrative person" called the mother back to report that the Coordinator was out of town at a conference. The caller asked the parent about the nature of her concerns and assured the mother that the Coordinator would return her call. The parents state that the Coordinator never called the mother.

### **Findings**

In a telephone call to the parents on May 10, 2016, the investigator confirmed that all of the eight allegations listed above are based on alleged actions occurring more than two years before this complaint was filed. Because the complaint does not comply with the legal time requirement of not more than one year prior to the date the complaint was received by the office of Early Childhood, Special Education, and Title Services, the allegations could not be further investigated.

### **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*  
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  
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON JUNE 6, 2016

DATE OF REPORT: JULY 6, 2016

This report is in response to a complaint filed with our office by \_\_\_\_\_, 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."

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, spoke with USD # \_\_\_\_\_ by telephone on June 15 and June 27, 2016. The following staff persons were interviewed:

- \_\_\_\_\_, Director of Special Education
- \_\_\_\_\_, Principal
- \_\_\_\_\_, School Psychologist
- \_\_\_\_\_, Special Education Teacher
- \_\_\_\_\_, Special Education Coordinator for \_\_\_\_\_ Elementary School

The Complaint Investigator spoke to the complainant by telephone on June 10 and June 28, 2016. The following person was interviewed:

- Parent

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

- Evaluation Report of the student dated November 14, 2014
- Individualized Education Program (IEP) for the student dated November 14, 2014
- IEP for the student dated April 7, 2015
- IEP Goal Progress Reports for the 4/07/15 IEP dated May 18, 2015; October 9, 2015; December 18, 2015; and March 11, 2016
- Evaluation Planner for the student dated February 9, 2016

- Prior Written Notice (PWN) of Re-Evaluation and Request for Consent for the student dated February 8, 2016 with parent's written consent dated February 9, 2016
- PWN of IEP Re-Evaluation Case Review / IEP Review / Revision of Meeting dated February 23, 2016 scheduling an IEP team meeting for April 1, 2016
- Parent Questionnaire completed by the parent and returned to \_\_\_\_\_, school psychologist, prior to March 31, 2016
- Re-Evaluation Report of the student dated April 1, 2016
- IEP for the student dated April 1, 2016
- PWN and Consent for Proposed Special Education Action Identification, Placement and/or Services dated April 1, 2016
- PWN of Meeting dated April 26, 2016 scheduling an IEP team meeting for May 2, 2016
- Amendment for an IEP Between Meetings dated May 2, 2016 for the student's April 1, 2016 IEP
- PWN of Re-Evaluation and Request for Consent dated May 4, 2016
- IEP Progress Report for 04/01/16 IEP dated May 20, 2016
- Copies of Email correspondence between the parent and school staff during the 2015-16 school year provided by USD # \_\_\_\_\_
- Copies of email correspondence between school staff and the parent during the 2015-16 school year provided by the parent
- Copy of the Multi-Tier Services for Support Summary for the student written by \_\_\_\_\_, school social worker, dated May 17, 2016

### **Background Information**

This investigation involves a five year-old student who was enrolled in kindergarten at USD # \_\_\_\_\_ and attended the \_\_\_\_\_ Elementary School during the 2015-16 school year. Records indicate the student transferred into USD # \_\_\_\_\_ during the 2014-15 school year from the \_\_\_\_\_ School District with a current evaluation report documenting eligibility for special education in the category of Developmental Delay and a current IEP, both dated November 14, 2014. Records show the student began attending the USD # \_\_\_\_\_ Early Childhood Special Education program in December 2014. Another IEP was developed for the student on April 7, 2015 requiring USD # \_\_\_\_\_ continue to provide special education and related services to the student during the remainder of the 2014-15 school year through the Early Childhood Special Education program and to provide special education and related services to the student in the regular education kindergarten classroom during the 2015-16 school year at \_\_\_\_\_

Elementary School. IEP Goal Progress Reports dated May 18, 2015; October 9, 2015; December 18, 2015; and March 11, 2016 show progress being made towards the two annual IEP goals. A Review of Existing Data was held on February 8, 2016 and USD # . proposed conducting a reevaluation for which the parent consented on February 9, 2016. An Eligibility Determination Meeting was held on April 1, 2016, and at that time it was determined that the student would continue to be eligible for special education and related services under the eligibility category of Other Health Impaired. An annual IEP meeting was also held on that same date to review and revise the student's IEP. At that IEP team meeting, it was determined to increase the amount of special education and related services provided to the student. On May 2, 2016, the IEP team met again and amended the IEP to again increase the amount of special education and related services provided to the student. A Prior Written Notice for a Reevaluation was provided to the parent on May 4, 2016 proposing a functional behavioral assessment.

### **Issues**

The complainant raised three issues which were investigated.

**ISSUE ONE:** The USD # , in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP of the student, specifically by not consistently providing her with a safety space during the 2015-16 school year.

### **Findings:**

Federal regulations, at 34 C.F.R. 300.17, require that a student's IEP be implemented as written.

In this case, the parent reports she believed the safe space was required by the student's IEP throughout the entire 2015-16 school year. The parent indicated that the student often reported she "didn't have a safe space" and that there was no obvious safe space when the parent visited the general education classroom. The parent stated that she expected the student's safe space to be a specific location in the classroom with a cushion or rug with pillows, emotion charts, and a variety of calming activities for the student to choose from.

Documentation shows the student had three IEPs in effect during the 2015-16 school year. The first IEP was dated April 7, 2015; the second IEP was dated

April 1, 2016; and the third IEP was an amended IEP dated May 2, 2016. Each of these IEPs document the student's behavior interferes with her learning or the learning of others.

The April 7, 2015 IEP shows these behaviors will be addressed through an IEP goal for following directions and includes program modifications/accommodations for providing "visual supports as needed (i.e. mini schedule, first/then, visual timer) and "consider adult support during transitions from location to location." This IEP requires 120 minutes per day of supplementary instruction in the regular education setting. There is no requirement for a safety space in the classroom included in this IEP.

The April 1, 2016 IEP shows the inappropriate behavior will be addressed through an IEP goal for remaining in the classroom without elopement and includes program modifications/accommodations putting in place "visual supports (social narratives, schedule)", "consider using a transition object when transitioning back to the classroom", use "First-Then language when presenting directions", "provide a safe place in the classroom for the student to go to when upset", "close proximity to the teacher", and provide sensory breaks in both the regular education and special education classrooms. This IEP also includes a Behavioral Intervention Plan (BIP). Special education services for 150 minutes per week in the special education setting; special education services for 600 minutes per week in the regular education setting; speech/language therapy for 30 minutes per week in the special education setting; speech/language therapy services for 30 minutes per week in the regular education setting; and occupational therapy consultation for 30 minutes per month are required by the student's April 1, 2016 IEP.

The May 2, 2016 amendment of the April 1, 2016 IEP shows the special education instruction in the special education setting is increased from 150 minutes per week to 450 minutes per week in the special education classroom. It also removes the 30 minutes per week of speech/language therapy in the general education setting and adds an additional 30 minutes per week of speech/language services in the special education setting. All other components of the IEP remain the same as the April 1, 2016 IEP

Email correspondence dated October 1, 2015 between the social worker and the parent document the school staff tried using the special education resource room as a safe space for the student but found the student was distracted by the games, story books and learning manipulatives found in that setting. However, a

safe space choice in the principal's office or the classroom to take a break or complete her independent work seemed to be getting better results. Email correspondence dated October 5, 2015 between the parent and Ms. \_\_\_\_\_, Ms. \_\_\_\_\_, and Ms. \_\_\_\_\_ also document the use of a safe place in the classroom for the student.

During Interviews, school staff describe several different types of safe places that were used in the school setting with the student during the 2015-16 school year including a carpet square near the circle time area; a carpet square and pillow near the work tub area; a pillow, chair, and book at the end of a work table; and finally in mid-March using a carpet square, pillow, book and other self-calming activities near the learning line. The school staff report that the student often did not want to use the safe space and instead would wander in the classroom or elope; in those instances, the staff reported the safe spot was brought to the student to allow for her to calm and return to the activity. School staff reported the safe space was added as a program modification/accommodation at the April 1, 2016 IEP team meeting and has been available consistently since that time.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD #\_\_\_\_\_ did provide the student with access to a safe spot as required by the April 1, 2016 IEP. It is noted that USD #\_\_\_\_\_ provided several versions of a safe spot throughout the 2015-16 school year as a strategy suggested by the parent in the October 5, 2015 email as a method to address inappropriate behaviors in the general education setting although not required by the April 7, 2015 IEP.

**ISSUE TWO:** The USD #\_\_\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to a parent request for access to educational records, specifically the IEP team and school meeting notes regarding the student during the 2015-16 school year.

**Findings:**

Federal regulations, at 34 C.F.R. 300.613, require each public agency to permit parents to inspect and review any educational records relating to their children that are collected, maintained, and used by the local school district/public agency regarding their student without unnecessary delay and before any meeting regarding an IEP, hearing relating to the identification, evaluation, placement or

provision of FAPE, or resolution session and, in no case, more than 45 days after the request has been made.

In this case, the parent and USD #1 acknowledge that no IEP team meeting notes were kept for IEP meeting during the 2015-16 school year. In an interview, the parent reports making two specific requests for educational records during the 2015-16 school year.

First, she requested copies of the parent/teacher notes from a meeting between the parent and Ms. [REDACTED] held on March 9, 2016. The parent reported she requested a copy of these notes but only received a blank attachment in an email from Ms. [REDACTED]. An interview with Ms. [REDACTED] also found the parent had requested the March 9, 2016 meeting notes and that she had responded by emailing a copy of the notes to the parent at the end of the day on March 9, 2015; however, Ms. [REDACTED] reported she was unaware that the copy had not been received by the parent until May 27, 2016, when the parent again requested a copy of these notes. Ms. [REDACTED] indicated she provided a copy of the March 9, 2016 meeting notes to the parent on May 31, 2016. The parent acknowledged that she did receive a copy of the March 9, 2016 meeting notes from Ms. [REDACTED] at the end of May.

The second request for records made by the parent was made on May 13, 2016, in an email to [REDACTED], school social worker. The parent requested copies of quarterly reports regarding the student's therapy with Ms. [REDACTED] at school to share with the student's privately paid counselor outside of the school setting. Ms. [REDACTED] responded on May 16, 2016 stating "I do not keep reports for mental health services in the education system. They are simply documented as a service in her General Education plan (type of service, for what purpose, frequency, duration)." The parent responded on back on the same date requesting "any information that you can send me about her school year in therapy." The parent acknowledged receipt of a Multi-Tier Services for Support for the 2015-16 School Year summary prepared by Ms. [REDACTED] on May 17, 2016.

The allegation of a violation of special education laws and regulations on this issue is not substantiated as USD #1 did respond to the parent request for educational records of the student in a timely manner. The special education teacher responded to the first request for copies of the March 9 meeting notes the same day as the parent request was made. Unfortunately, the attachment was blank; however, as soon as the parent made the special education teacher aware of the problem on June 27, 2016, a copy of the March 9, 2016 meeting

notes were again provided to the parent within four days of the request. The second request for therapy notes was made by the parent on May 13, 2016 and a summary of the therapy provided during the 2015-16 school year was provided by the school social worker on May 17, 2016.

**ISSUE THREE:** The USD #100, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately respond to a parent request, specifically the request from the parent of the student to change schools for safety reasons at the May 2, 2016 IEP team meeting.

Findings:

Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents when the responsible public agency 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 refused by the agency; an explanation of why the agency refuses to take the action; a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposal or refusal; a statement that the parents of a child with a disability have procedural safeguards protection and the means by which a copy of the description of the procedural safeguards can be obtained; sources for parents to contact to obtain assistance in understanding their procedural safeguards; a description of other options that the IEP Team considered and the reasons why those options were rejected; and, a description of other factors that are relevant to the agency's proposal or refusal.

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 25% or more of student's day.

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

In this case, an email from the parent to Ms. [REDACTED] dated April 26, 2016 documents the parent requested a "team meeting" to discuss the increase in inappropriate behavior in the school setting and the student's safety.

An Amendment for an IEP Between Meetings dated May 2, 2016, documents an agreement between the parent, the principal and the special education teacher to amend the student's IEP without an IEP team meeting. This documentation shows the parent, Ms. [REDACTED], and Dr. [REDACTED] agreed to amend the student's IEP increasing the special education instruction in the special education setting from 150 minutes per week to 450 minutes per week which results in a 300% increase in the amount of special education instruction being provided to the student. The IEP amendment also removes the 30 minutes per week of speech/language therapy in the general education setting and adds an additional 30 minutes per week of speech/language services in the special education setting. This change along with the additional 60 minutes per day of special education instruction in the special education setting results in 21% increase per day in a more restrictive setting for the student. The reason for the action is described as the student "requires intensive specially designed instruction in order to keep her safe and make progress in the areas of social communication, phonemic awareness, and academic engagement." "Teacher observation, parent concerns, assessments and records" are shown as the basis for the action with no other relevant factors noted. The option to continue with the current services was rejected as the student's "level of need has increased for intensive instruction." Information about the procedural safeguards was provided to the parent on the IEP amendment form.

Interviews with the parent found that she shared concerns with the school staff at the May 2, 2016 team meeting regarding their ability to keep the student safe at [REDACTED] Elementary School. The parent based this concern on the increase in inappropriate behaviors at the school including disrobing, eloping from the classroom to areas within the school building, physical and verbal aggression towards staff and peers, threatening to burn down the school and kill people, an increase in the use of restraints with the student, as well as two instances where the student eloped from the classroom to outside the school building. The parent reports school staff told her "we can no longer keep her safe."

The parent reports school staff told her about an alternative program offered by USD # [REDACTED] in two other elementary school buildings where students with IEPs get small group instruction with five to six other students in the special education classroom for all academic areas and have the specials classes (art, music, PE)

with their typical peers. The parent indicated that this program sounded "like exactly what the student needed" and she wanted this program for the student. The parent indicated that school staff then told her they were not sure if space was available or if the student would be eligible for the program; however, the student would just need to be re-evaluated to determine eligibility for the program.

Based on the conversation, the parent believed this process was just a paperwork issue and a decision would be made prior to the end of the 2015-16 school year if the student could attend one of the elementary schools with the alternative program placement. The parent indicated she provided consent for a functional behavioral assessment (FBA) but was told in an email from the school psychologist on May 16, 2016, that although two observations of the student had already been completed, the re-evaluation would not be completed until October 25, 2016 and no decision could be made for the alternative program until the re-evaluation was complete.

In an interview, the principal, special education teacher and special education coordinator for [redacted] Elementary School reported that several placement options were discussed with the parent at the May 2, 2016 meeting but that the increase in special education instruction and speech/language therapy provided in the special education setting was chosen as the most appropriate for the student at this time. School staff acknowledged that parent requested a transfer to another elementary school for safety reasons but believed this request was for a change in location not a change in placement to a more restrictive program. USD # [redacted] did propose to conduct an FBA for the student on May 4, 2016. The reason for the action is shown as "a significant change in the student's program or services is being considered" with the April 1, 2016 Evaluation Report, parent and teacher information, and the current IEP as the basis for the action with no other relevant factors noted. The option considered is listed as "other assessments" but is shown as rejected because "evaluation team determined that this evaluation plan will provide the needed data." The attached evaluation plan includes observations by the special education coordinator and the behavior coach as well as teacher interviews by the school psychologist. Documentation shows the parent provided written consent for the FBA on May 6, 2016.

An email dated May 16, 2016 from the school psychologist and the parent states "When you met with the team on May 2, I understand you all discussed the possibility of a centralized program (what you may be referring to as alternative school) for the student. The evaluation results will provide the team with

information regarding the student's needs and then based on the level of support she needs, placement options will be determined. I apologize that we are not able to make that decision with you before May 23<sup>rd</sup>. I understand that you and the team are aware of difficulties with transition. When we get together to discuss evaluation results and determine appropriate placement (whether it is centralized program or not) as a team we will also need to talk about how to transition."

The allegation of a violation of special education laws and regulations on this issue is substantiated. While USD # [redacted] did provide appropriate prior written notice and obtain consent for the material change in services based on the IEP amendment dated May 2, 2016, evidence shows the parent was not provided with written notice refusing the request for the student to attend the alternative program (or centralized program) at one of two elementary schools in USD # [redacted]. Instead, the parent was provided with a prior written notice proposing to conduct an FBA to assist the IEP team in making a decision about the consideration of a significant change in the student's program or services no later than October 25, 2016.

IDEA requires public agencies to provide the parents with a written notice refusing their requests and informing them of the reasons for that refusal. In this case, USD # [redacted]'s position was that it needed to conduct an FBA to gather additional data before it could approve the parent's requests for the alternative program described by school staff in the two elementary school buildings in the district. USD # [redacted] was required to give the parents a PWN of this decision and the reasons for the decision.

### **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 one area:

- 34 C.F.R. 300.503 requires that written notice must be given to parents when the responsible public agency 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 refused by the agency and an explanation of why the agency

refuses to take the action. Specifically, USD # [redacted] failed to provide the parent with written notice refusing the request for placement in the alternative program in one of the two elementary school buildings where such a program is located and instead provided the parent with prior written notice for a reevaluation due to the "consideration of a significant change of placement or services" following the May 2, 2016 team meeting.

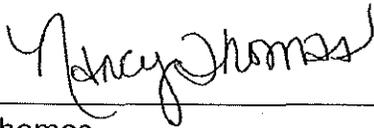
As a result of these violations, the student was denied a free appropriate public education. Therefore, USD # [redacted] is directed to take the following actions:

1. Within 10 calendar days of the receipt of this report, submit a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will:
  - a) comply with 34 C.F.R. 300.503 by providing the parent with written notice when refusing any requested change in placement or services.
2. No later than October 1, 2016, special education staff including the school social worker and school psychologist at [redacted] Elementary School will be trained on the special education requirements, regarding when to provide written notice to parents when refusing any requested changes in services and/or placement. USD # [redacted] will document who provided the training, the content of the training, and who attended the training and send that documentation to Early Childhood, Special Education and Title Services.
3. Prior to the beginning of the 2016-17 school year, USD # [redacted] shall reconvene the student's IEP team to discuss the parent request for a significant change of placement and services in the alternative program offered at the two elementary school buildings within the district. Following the IEP meeting, USD # [redacted] shall provide the parent with written notice regarding the IEP team decision.
4. Further, USD # [redacted] shall, within 14 calendar days of receipt of this report, submit to Early Childhood, Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;

- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (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 (c), which is attached to this report.



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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)

# 16FC20A

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

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced on June 6, 2016, with \_\_\_\_\_ filing a complaint on behalf of her daughter, \_\_\_\_\_, against Unified School District No. \_\_\_\_, \_\_\_\_\_ Pubic Schools. The complaint (16FC\_\_\_\_-003) alleged three violations of special education laws.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the Early Childhood, Special Education, and Title Services Team of the Kansas State Department of Education. Following the investigation, the complaint investigator issued an initial report, addressing the complaint, on July 6, 2016. That report concluded that there was a violation of special education requirements with regard to Issue Three. The report included specific corrective actions to address that violation. The report also contained findings and conclusions indicating there were no violations of special education law with regard to Issues One and Two.

Thereafter, on July 19, 2016, the district filed an appeal regarding issue Three in the Initial Report. The parent did not file a response to the district's appeal. Upon receipt of the appeal, an Appeal Committee was appointed pursuant to Kansas regulations, at K.A.R. 91-40-51(f). The Appeal Committee has reviewed the information provided in connection with this matter and now issues this final report.

### DISCUSSION OF ISSUE ON APPEAL

ISSUE 3: The district failed to appropriately respond to a parent request, specifically the parent's request to change schools for safety reasons at the May 2, 2016 IEP team meeting.

At the May 2, 2016, IEP meeting, the parent requested that her child be placed in a centralized program that offered: (a) small group instruction, with five to six other students in a special education classroom for academic areas; and (b) the opportunity to participate in selected non-academic classes, such as art, music, and PE with general education students. This program is offered in two elementary school buildings in the district, but is not offered in the student's neighborhood school.

The investigator interviewed district personnel, examined documents, and determined that the district was in violation of law because it did not give the parent a Prior Written Notice (PWN) responding to the parent's request for the centralized program. Instead, the district gave the parent a PWN proposing to conduct a Functional Behavioral Assessment (FBA) for the purpose of obtaining sufficient data on which to make a decision regarding the parent's request. Page 10 of the report indicates the school anticipated the FBA would be completed and a decision

regarding placement in the centralized program would be made no later than October 25, 2016. On page 11, in the corrective action portion of the report, the investigator also states that as a result of this violation the student was denied a Free Appropriate Public Education (FAPE).

The first basis on which the district appeals the conclusions of the investigator regarding Issue Three, is that the IEP team's answer to the parent's request for a centralized program was not an absolute "no." Rather, the team's response was that it wanted to gather data to determine if a change of placement was warranted.

The difficulty with the district's position is that special education law provides only two options for a school district when a parent makes a 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 to the child. In this instance, the parent requested a change of placement when she requested that her child attend a centralized program with a small group special education environment that also permitted access to non-academic classes with general education students. K.S.A. 72-988 states that when a parent makes this kind of request, the district must provide the parent with a PWN stating either that the district: (a) will change the child's placement as requested; or (b) is refusing to make the requested change. The law does not provide for a third option, as advocated for by the district. That is, the district does not have the option to unreasonably delay providing a response to the parents' request for a change in placement, and instead to offer to evaluate the student during the next school year. The district was required to provide a direct response to the parent's request for a change in placement, and to do so within a reasonable time. It is the long-standing policy of the Early Childhood, Special Education and Title Services Team that, barring unusual circumstances, a reasonable time in which to respond to a parent's request for a change in placement is fifteen school days (See Kansas Special Education Process Handbook, Chapter 1, Section D). Accordingly, the Appeal Committee agrees with the investigator's conclusion that the district was required to provide this parent with a PWN, and its failure to do so is a violation of law.

The second basis for appeal of Issue Three is that the investigator erred by concluding that the failure of the district to provide the parents with a PWN was a violation of the requirement to provide the student with a Free Appropriate Public Education (FAPE). The district makes this assertion because it observed that the investigator made no finding in the report that the failure to provide a PWN of the district's response to the parent's request caused a deprivation of educational benefits to the child or seriously hampered the parent's right to participate in the educational decision making process. The Appeal Committee agrees that there was no such finding made by the investigator, and the Committee could find no facts in the report that would support such a finding. Therefore, the conclusion on page 11 of the report, that the student was denied a FAPE, is reversed, and is stricken from the report.

Although the Committee strikes the conclusion that that the student was denied a FAPE, there remains a procedural violation that requires corrective action. In its appeal, the district states that the portion of the corrective action requiring a second IEP meeting is duplicative and will result in a repeat of the IEP meeting that occurred on May 2, 2016, with no possibility of a different outcome. The Committee notes that corrective action is not subject to appeal. However, an Appeal Committee may alter corrective actions on its own when it finds there is good reason to

do so. This case presents one of those situations. The Committee does not believe it is necessary in this case to require both of the parties to participate in another IEP meeting that both parties believe will serve no purpose. Therefore, the Committee amends Corrective Action 3 as follows:

No later than the beginning of the 2016-2017 school year, USD # \_\_\_ shall either reconvene the student's IEP team to discuss the parent's request for a change in placement, or provide the parent with a Prior Written Notice refusing the parent's request for a change in placement, and specifying the reasons for the refusal. However, if the parent requests another IEP team meeting to discuss her proposal for a change in placement, the district shall, within a reasonable time, schedule another meeting.

In another matter, the Committee wishes to comment on a footnote added to page two of the district's appeal. In that footnote, the district asserts that the requirement to tell a parent "no," while simultaneously agreeing to evaluate to gather data to make a decision, is problematic for four specified reasons.

First, the district states that this requirement can lead to confusion. While that is possible, the purpose of a PWN is to remove confusion. In this case, the report indicates that the parent believed the district's response "was just a paperwork issue and a decision would be made prior to the end of the 2015-16 school year..." The Committee believes that a properly written PWN in this instance would have prevented confusion, and, instead, would have provided the clarity the parent needed to understand the district's decision.

Second, the district states that this requirement can create discord among parents and school staff. Again, that is possible. However, the Committee believes that a PWN refusing a parent's proposal is an opportunity to ensure that responses to parents are based on sound reasoning and that the reasoning is explained to the parents in writing. It may take some skill to convey the message in a cordial manner, but the Committee believes the process itself is more conducive to understanding than to discord.

Third, the district states that this requirement can give the impression that the district has predetermined the student's placement. The Committee does not believe this requirement has any relationship with predetermination. Particularly in the very situation involved in this complaint, where a district is required to provide a PWN of its refusal of a parent's request while simultaneously proposing a reevaluation for the purpose of reconsidering the request after completion of the reevaluation, it is difficult to discern how this might give the impression of predetermination. The district's refusal to change the student's placement would have been based on current data and it is clear from the initial report that the district did not believe that current data supported the change in placement that the parent requested. After the district refused the request for a change in placement, nothing prevented the district from requesting the parent's consent to conduct a reevaluation to gather additional data and then to reconvene the IEP team to discuss the additional data and whether that data warranted a change in placement. That is precisely what the district did here. The district's mistake was not properly responding to the parent's request for a change in placement with a clear yes or no answer. Just because the district provides the parent with a refusal to change the child's placement, because it does not have sufficient data to believe this change is warranted at the time the request is made, does not mean

that the district has predetermined the decision the IEP team will make in the future regarding the child's placement following a reevaluation.

Fourth, the district states that this requirement can increase the likelihood of complaints and or due process hearings filed by parents. The Committee disagrees. The Committee believes it is far more likely that parents will file complaints or due process hearings when the procedural requirements of law are not followed. This very complaint was presented because the district did not follow the procedural requirements of law by providing the parent with a PWN.

Finally, with regard to the district's general comments in this footnote indicating this requirement may have unfortunate consequences, determining whether the requirement to provide a PWN in this kind of situation is a good or bad requirement is not something the Committee can consider when determining whether a district is in compliance with law, when the law is clear and unambiguous.

### CONCLUSION

For the reasons stated above, the committee reverses and strikes the conclusion in the report that the district failed to provide a Free Appropriate Public Education, and amends paragraph three of the Corrective Actions as specified above. The remainder of the report is sustained. This is the final decision of the state department of education with regard to this complaint. Kansas law allows no further review.

This Final Decision is issued this 3rd day of August, 2016.

### APPEAL COMMITTEE:

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Laura Jurgensen

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Julie Ehler

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Stacie Martin