

## Special Education Formal Complaint Decisions 2020-21

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, 21FC01 signifies a Formal Complaint filed in the 2021 fiscal year (July 1, 2020 to June 30, 2021). The case citation of 21FC02 Appeal Review signifies the decision of the state appeal committee for case number 21FC02. All files are PDF.

21FC01	Appeal Review	21FC09	
21FC02		21FC10	Appeal Review
21FC03	Appeal Review	21FC11	Appeal Review
21FC04		21FC12	
21FC05		21FC13	Appeal Review
21FC06		21FC14	
21FC07		21FC15	Appeal Review
21FC08			

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

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON JULY 17, 2020

DATE OF REPORT: AUGUST 15, 2020

This report is in response to a complaint filed with our office by Jack Robinson, attorney for \_\_\_ and \_\_\_\_\_ on behalf of the \_\_\_\_\_' son, \_\_\_\_\_. For the remainder of this report, \_\_\_\_\_ will be referred to as "the student." \_\_\_\_\_ and \_\_\_\_\_ will be referred to as "father" or "mother" respectively, or "the parents."

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone on July 22 and August 7, 11, and 12, 2020 with Terelle Mock, attorney for USD #\_\_\_. On July 22, 2020, the investigator also spoke by telephone with Mary Lakey, paralegal for the firm of Spies, Powers, & Robinson, P.C., the firm representing the parents in this complaint. The investigator and the paralegal communicated via email on August 5 and 7, 2020. On August 11, 2020, the investigator and the attorney for the parents communicated via email. The investigator spoke by telephone with the student's father on August 12, 2020 and communicated via email on July 27 and August 13 and 14, 2020.

The Kansas State Department of Education (KSDE) only has jurisdiction to investigate allegations of violations of special education statutes and regulations that occurred not more than one year prior to the date that KSDE receives a formal complaint. The time period for this complaint is July 17, 2019 to July 17, 2020. In order to better understand the background of this complaint, the investigator did review some materials that pre-date the one-year statute of limitations. Those materials are included in the following list:

- Report dated June 30, 2017 regarding a previous complaint filed by the parents against this district
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated July 21, 2017
- Revocation of Consent for All Special Education Services dated August 4, 2017
- Prior Written Notice for Termination of All Special Education Services, Related Services, and Supplementary Aids and Service Due to Parent's Revocation of Consent dated August 4, 2017
- Email exchange dated August 13-15, 2018 between the student's father and the principal of the high school
- Email dated March 29, 2019 from the student's father to the high school principal
- Email exchange dated March 19 and April 1, 2019 between the student's father and the high school principal
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated April 25, 2019
- Letter dated April 30, 2019 from an attorney for the Kansas Association of School Boards (KASB) to the attorney for the parents
- Email dated May 28 2019 from the high school principal to the parents
- Confidential Psychological Evaluation report dated June 11, 2019
- Email dated June 11, 2019 from the parents' attorney to the KASB attorney
- Email dated June 13, 2019 from the father to the director of the \_\_\_ interlocal #\_\_\_, the agency which provides special education and related services to member districts including USD#\_\_\_
- Email dated June 20, 2019 from the director of the interlocal to the father
- Email dated June 24, 2019 from the attorney for the parents to an attorney for KASB
- Email exchange dated June 25, 2019 between the attorney for the parents and an attorney for the district
- Email exchange dated July 9, 2019 between the KASB attorney and the parents' attorney

- Email dated February 13, 2020 from the student's father to the high school principal
- Audio recording of a meeting held on February 20, 2020 which included the parents, representatives from the district, and representatives of New Focus, the private residential treatment program in which the student was then enrolled
- Undated letter to the director of the interlocal from two staff members of Seven Stars, the private, residential treatment program
- Email dated August 7, 2020 from the paralegal employed by the firm representing the parents to the investigator
- Email dated August 11, 2020 from the parents' attorney to the investigator
- Online calendar for the district for the 2018-19 school year
- Online calendar for the district for the 2019-20 school year
- Cumulative record for the student covering grades one through nine

### **Background Information**

This investigation involves a seventeen-year-old student who was first enrolled in the district at age five. The student did not attend Kindergarten as would have been typical for his age but rather was placed in the first grade. At that time, the student was provided paraprofessional support which continued through the student's eighth grade year to address academic and behavioral issues related to his autism. The student was identified as gifted in the second grade and had a gifted class daily in third grade. In fifth grade, the student was provided two gifted classes daily. In sixth and seventh grade, the student participated in a gifted class once each week and also had a daily class with the autism specialist. In eighth grade, the student had paraprofessional support in all core classes plus a special education class daily and a gifted class once each week. At the ninth-grade level, the student earned passing grades in all subjects, with A's or B's in five of eight courses.

The parents filed a formal complaint against the district regarding services to the student in May of 2017 when the student was completing his ninth-grade

year. Corrective actions related to the complaint required the district to complete a reevaluation of the student, but the parents declined consent for the reevaluation and revoked consent in writing for the continued provision of all special education and related services for the student as of August 4, 2017, prior to the start of the student's sophomore year. On the same date, the school district provided the parents with prior written notice informing the parents that all special education services, related services and supplementary aids and services specified in the IEP of the student would cease because the parents revoked consent in writing for all special education services for the student and special education regulations require the school district to terminate all special education services under such circumstance.

In August of 2017, the parents enrolled the student in the \_\_\_\_\_ Virtual Education Program, an online educational program approved by the Kansas State Department of Education which is sponsored by a different Kansas school district, USD #\_\_.

The student's father and the USD #\_\_ high school principal exchanged emails over the period of August 13-15, 2018. On August 13, 2018, the principal wrote that he wanted to discuss the student's "potential enrollment" in the high school. The student's father responded, asking "what suggestions do you have for my son's schooling and my family?"

As stated in the parents' current complaint, the parents sent a letter to the district superintendent on August 25, 2018 stating that they had "found an appropriate [private] placement [blueFire – an adventure-based intervention program located in Idaho] for [the student] and requested that the School District agree to place [the student] there and to pay for the costs associated with that placement." According to their complaint, the parents requested reimbursement from the district for costs they had already incurred and would continue to incur in finding the private educational placement, transportation related to the placement, and any out of pocket costs they incurred related to the placement.

On August 27, 2018, the student's father met with the district superintendent to request that the district pay for expenses the parents had incurred in seeking alternative education for the student. The superintendent advised the parents that because they had revoked consent for the student to receive special education services in the district and had enrolled the student in another district, the district of residence was not responsible for the payment of any educational expense. The superintendent told the parents that if they opted to re-enroll the student, the district would complete an evaluation to determine the least restrictive placement for the student. The parents did not reenroll the student in the district at that time.

As noted in the report of a private psychological evaluation conducted in April of 2019, the program specified in the father's August 25, 2018 letter to the district did not accept the student and the student remained in the home.

In February 2019, the parents unilaterally placed the student in the Seven Stars Academy, a private residential facility in Utah that specializes in the treatment of students with autism.

On March 19, 2019, the student's father sent an email to the principal of the high school stating:

As you know by past experiences, the high school was unable to provide the types of services and education that [the student's] neurology needed. He is currently attending school in Utah at Seven Stars Academy. The school is accredited by the Utah board of education and also provides [the student] with the therapeutic support he needs and deserves. We would like to have [the student] enrolled into [the district] as soon as possible and request that the special education staff develop an IEP that supports [the student's] needs to remain at Seven Stars Academy...[Let] me know what we need to do on our end to make this happen as efficiently as possible.

The principal responded on April 1, 2019 stating “we stand ready, willing, and able to help.” The principal noted that the parents had elected to revoke their written informed consent for the provision of special education and related services and withdrew the student from the district in 2017. She stated that the school would therefore be required to conduct an initial evaluation to determine whether the student qualified for special education before enrolling him in special education. The principal wrote:

Due to the amount of time that has passed, the school as a part of the evaluation would likely need to conduct observations in the general education environment and monitor responses to any intervention[s] to ensure that data based documentation supports that the child needs special education and related services. If the child is determined eligible after that initial evaluation, the school would then develop an initial IEP. If this is the path you want to take, let’s set up a time to meet. Again, we are willing to help, but we must follow the process.

The principal sent the student’s father a second, follow-up email on April 1, 2019 stating “[the student] would have to be enrolled and in attendance at [the high school] and not somewhere else before a team could evaluate what his current needs are.”

The parent responded via email on April 3, 2019 thanking the principal for her quick response and stating “somebody will be contacting the school soon.”

On April 22, 2019, the attorney for the parents sent an email to the KASB attorney providing counsel to the district stating “[the student] is entitled to enroll in [the district]...[and], as a child with a disability, [the student] is entitled to an IEP that is reasonably calculated to provide him an appropriate education.” In the email, the parents’ attorney asserted that the parents had previously attempted to enroll the student, to make a special education referral, and to have the district develop an appropriate IEP for the student, but the district refused.

The KASB attorney responded to the parents' attorney by letter on April 30, 2019. The letter included enrollment forms for the district as well as prior written notice and request for consent form dated April 25, 2019 which requested parental permission for the district to conduct an initial evaluation of the student. The letter also included a Parents Rights Information document and an affidavit from the district superintendent which the KASB attorney stated provided evidence that the district neither refused to enroll the student nor refused to evaluate him for special education services.

The parents gave written consent on May 10, 2019 for the district to conduct an initial evaluation of the student.

On June 13, 2019, the student's father sent an email to the director of the interlocal stating that the student was "ready to transition to his next school." The father stated that he and the student's mother had submitted "all of the paperwork to re-enroll [the student] back in USD \_\_\_ and we have received an e-mail from the high school principle [sic] that they are ready to work on [his] schedule."

In his email, the parent provided a copy of the report of an evaluation of the student conducted by a private psychologist which the parent stated "should greatly help in your development of [the student's] IEP." The parent's email of June 13, 2019 included an excerpt from the report in which the evaluator recommended that after the student completed the Seven Stars program, he should:

[A]ttend a residential treatment program specializing in the treatment of adolescents with autism in which he receives 24/7 therapeutic support. Without 24/7 supervision, will [sic] be unable to fully access and benefit from his education. He should transfer directly to his next placement setting from Seven Stars rather than returning home. Returning home would greatly disrupt [the student's] treatment and progress due to the significant change in

structure, supervision, and care that would occur by returning home. In [the student's] next placement, he is still in need of a high level of structure and supervision. He needs to be in a residential treatment setting that can monitor his aggression towards others and set healthy boundaries with him. [The student] needs a high level of supervision as he continues to learn alternate behaviors and coping skills.

The director of the interlocal responded to the parent via email on June 21, 2019, stating that "eligibility decisions and determination of need for special education and related services are made by a team of qualified professionals and the parents of the child who has been evaluated." The director wrote:

[W]e provided you with a prior written notice requesting consent for a special education initial evaluation. While the team will consider the results of the evaluation you provided, there is additional data (the team) will need to collect...[The team] will need to determine [the student's] response to general education intervention, which will assist the team in determining the least restrictive environment. Regulations clearly state that the evaluation must result in determining the content of an IEP [assuming eligibility] including information related to the [sic] enabling [the student] to be involved in and progress in the general education in the least restrictive educational environment [sic]. As the team has not been involved with [the student] in almost two years, part of their proposed evaluation plan was to work with him directly in the local agencies [sic] education setting. Do you have a plan for producing [the student] for completion of the evaluation? The evaluation team will want to ensure that any team decisions considered [the student's] right to access a Free and Appropriate Public Education in the least restrictive environment.

On August 1, 2019, the student transitioned to the New Focus Academy, another private therapeutic residential program in Utah that also specializes in

the education and treatment of children with autism. The student remained in Utah through the summer and into the fall of the 2019-20 school year. At the time of the filing of this complaint, the student was still enrolled in New Focus with expectations of graduation in May of 2021.

The parents filed a notice of special education due process on October 23, 2019. The district and the parents mediated the issues in that dispute on January 10, 2020 and reached agreement to collaborate and develop a proposed evaluation process. The parents, as well as staff from New Focus Academy, the district, and the interlocal participated in a telephone conference on February 20, 2020 regarding the student's current behavioral and academic status. At the meeting, the district became aware that the student had not been receiving services under an IEP while in Utah, had not been evaluated by either a certified speech and language pathologist or a certified occupational therapist, had not undergone a functional behavior assessment, and did not have an individualized behavior intervention plan. No formal behavioral data had been compiled on the student in the residential setting. Following the meeting, the district requested and received additional information from New Focus staff.

Because he had achieved certain markers required by New Focus, the school allowed the student limited home visits, the first being February 12-24, 2020 for his birthday. Additional visits were scheduled for March 10-19 (Spring Break) and July 5-14, 2020 (Summer Break). The district was unaware that the student would be home in February until February 13, 2020, when the student's father sent an email at 4:30 p.m. that day informing the district that the student had come home, and first learned from the parents during the January 2020 mediation conference that the student would be coming home for Spring Break as well as for the summer break.

On March 16, 2020, the district sent an email to the parents and New Focus staff indicating that district staff would need to observe the student in the general education environment and recommended that the student be in the general education setting for at least 30 school days. According to the attorney for the district, the parents did not respond to the email, but the parents'

attorney did advise the district that the student would not be made available for evaluation. On March 13, 2020, the district announced that schools would be closed for two weeks due to COVID-19 virus. On March 18, 2020, the governor of the state of Kansas issued an executive order closing all school buildings in the state for the remainder of the 2019-20 school year in an effort to slow the spread of the virus.

Ultimately, the mediation agreement did not fully resolve all of the issues in dispute and the due process complaint was set to go to a hearing, but the parents filed a motion on May 4, 2020 to dismiss their complaint without prejudice. The hearing officer granted that motion.

### **Issues**

The parents have raised three issues in their complaint.

In a letter to the parties dated July 20, 2020, Tiffany Hester, Dispute Resolution Coordinator for Special Education and Title Services (SETS) at KSDE stated the following:

The Department's Special Education and Title Services team has authority to investigate only complaints alleging a violation of state and federal special education statutes and regulations that occurred not more than one year from the date the complaint is received (K.A.R. 91-40-51(a), (b)(1); 34 C.F.R. 300.153(b)(1), (c)). The investigator, in her judgement, may determine that one or more allegations are beyond the jurisdiction of a state complaint. Any allegation in the complaint that does not relate to special education laws, or that occurred prior to July 17, 2019 will not be investigated. The terms of a mediation agreement written and agreed upon by the parties do not constitute requirements of IDEA Part B, the Kansas Special Education for Exceptional Children Act, or their implementing regulations. Accordingly, any allegations as to whether the school district implemented the terms of a mediation

agreement will not be investigated. The proper venue to seek enforcement of a special education mediation agreement is in state or federal court (K.S.A. 72-3438(f)(4); 34 C.F.R. 300.506(b)(7)).

Further, it is noted that the complainants seek reimbursement for costs associated with the student's placement at two private facilities in their proposed resolution to the complaint. Should the investigator find a violation of any special education requirements, appropriate corrective action will be ordered; however, the investigator does not have authority to order reimbursement of the cost of the private placement. The proper venue to seek reimbursement for the cost of education at a private facility is through due process or in court (K.A.R. 91-40-41(a)(1); 34 C.F.R. 300.148(c)).

**ISSUE ONE:** The district failed (and continues to fail) to provide the student a free appropriate public education (FAPE).

### **Applicable Statutes and Regulations**

United States Code (USC) is described as a consolidation and codification by subject matter of the general and permanent laws of the United States. It is prepared by the Office of the Law Revision Counsel of the United States House of Representatives. USC are the actual laws passed by Congress. The Code of Federal Regulations (CFR) are the rules published in the Federal Register and reflect an interpretation of USC by relevant departments of the government. CFR often includes more information about the implementation of the laws. State statutes and regulations provide additional direction regarding implementation.

### **Reimbursement of Costs for District Failure to Provide FAPE:**

Title 20 of the USC applies to education, including, in Chapter 33, the Education of Individuals with Disabilities (IDEA). In their complaint, the parents' attorney alleges a violation of 20 U.S.C. § 1412(a)(10)(C)(II), later amended in an email to the investigator on August 7, 2020 to 20 U.S.C. § 1412(a)(10)(C)(ii). That section

of the Code falls under the broad category of policies related to “Children in Private Schools.” It describes requirements related to payment for the education of children enrolled in private schools without the consent of or referral by a public agency (school district). In the complaint, counsel specifically cites the section which describes the following situation:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, *a court or a hearing officer* [emphasis added] may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

The Individuals with Disabilities Education Act (IDEA) is a law that makes available a FAPE to eligible children with disabilities throughout the nation and ensures special education and related services to those children. A complaint investigator has authority to determine whether or not a district has provided a FAPE. However, as noted above and in the July 20, 2020 letter to the parties from the Dispute Resolution Coordinator, the investigator does not have authority to order reimbursement of the cost of the private placement. The proper venue to seek reimbursement for the cost of education at a private facility is through due process or in court (K.A.R. 91-40-41(a)(1); 34 C.F.R. 300.148(c)).

Unilateral Placement by Parents:

Kansas special education regulations at K.A.R. 91-40-41(a)(1) and federal special education regulations at 34 C.F.R. 300.148(c) state that if the parents of an exceptional child who was previously receiving special education and related services from a district enroll that child, without the consent of or referral by the district, in a private school because the parents believe the child was not receiving a FAPE from the district, *a court or special education due process hearing officer* may require the district to reimburse the parents for the cost of that

enrollment only if the court or due process hearing officer makes both of the following findings:

(A) The agency did not make FAPE available to the child in a timely manner before the private school enrollment.

(B) The private school placement made by the parent is appropriate to meet the needs of the child.

Revocation of Parental Consent:

Kansas regulations at K.A.R. 91-40-27(i) and federal regulations at 34 C.F.R. 300.300(b)(4) state the procedures districts must follow if, at any time after the initial provision of special education and related services, a parent revokes consent in writing for the continued provision of all special education, related services, and supplementary aids and services.

1. The district may not continue to provide special education, related services, and supplementary aids and services to the child but must provide prior written notice to the parents in accordance with K.A.R. 91-40-26 and 34 C.F.R. 300.503 before ceasing the provision of those services.
2. The district shall not implement procedures in K.S.A. 72-3415 or K.S.A. 72-3438, and associated amendments, or K.A.R. 91-40-28, including the mediation procedures and the due process procedures, in order to obtain an agreement or a ruling that the services continue to be provided to the child.

Once a parent has revoked consent, a district will not be considered to be in violation of the requirement to make a FAPE available to the child because the district has not provided the child with further special education services, related services, and supplementary aids and services (K.A.R. 91-40-27(i)(3); 34 C.F.R. 300.300(b)(4)(iii)). Additionally, the district will not be required to convene an IEP team meeting or develop an IEP for the child for further provision of special education, related services, and supplementary aids and services (K.A.R. 91-40-27(i)(4); 34 C.F.R. 300.300(b)(4)(iv)).

The Office of Special Education Programs (OSEP) within the United States Department of Education writes and enforces the federal regulations that implement the IDEA. When asked to clarify the procedures to be followed when a parent revokes consent and then subsequently requests “re-enrollment” in special education, OSEP made this statement in the Federal Register (73 Federal Register, December 1, 2008, page 73015):

If a parent who revoked consent for all special education and related services later requests that his or her child be re-enrolled in special education, an LEA must treat this request as a request for an *initial* [emphasis added] evaluation under § 300.301 (rather than a reevaluation under § 300.303).

OSEP also clarified the provisions in 34 C.F.R. § 300.300(b)(4)(iii) stating (73 Federal Register, December 1, 2008, page 73010):

§ 300.300(b)(4)(iii) provides that, if the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.... *Revocation of parental consent releases the LEA from liability for providing FAPE from the time the parent revokes consent for special education and related services until the time, if any, that the child is evaluated and deemed eligible, once again,* [emphasis added] for special education and related services.

#### Provision of FAPE:

Federal regulations, at 34 C.F.R. 300.17, require that a student who has been determined eligible for, and in need of, special education services, and whose parents have provided written consent for the provision of those services, be provided with a FAPE. Public agencies must provide special education and related services in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. Decisions regarding eligibility are made by a team of qualified professionals and the

parents of the child *after* the child has been evaluated (K.A.R. 91-40-10(a)(1); 34 C.F.R. 300.306(a)).

### Parents' Position

The parents assert that the district has failed in its obligation to provide the student with a FAPE.

### District's Position

It is the position of the district that the student was not entitled to a FAPE under the circumstances of this complaint. The district asserts that in August of 2017, the parents revoked consent for the district to provide special education and related services and supplementary aids and services thereby removing the district from the responsibility to provide a FAPE to the student. The district further contends that the parents' refusal to make the student available for evaluation made it impossible for the team to complete the initial evaluation required by law in order to determine whether or not the student was eligible to receive a FAPE in the least restrictive environment.

### Investigative Findings

As noted previously under the Background Information section of this report, the parents decided to revoke consent for all special education and related services to the student in August of 2017 and enrolled the student in an on-line education program.

The parents and district staff communicated in August of 2018, February of 2019, March 2019 and April of 2019 culminating in the parents' completion of enrollment forms and the provision of informed written consent for an initial evaluation of the student on May 10, 2019.

In compliance with K.A.R. 91-40-8(f), a 60 school-day timeline for the evaluation began on May 10, 2019 with the district's receipt of the parents' signed consent; the evaluation was to be completed by October 28, 2019.

On June 21, 2019, in response to a June 13, 2019 email from the student's father reminding the father that the district had requested and obtained consent for an initial evaluation and asking the parent whether he had a plan for producing the student in order for the evaluation to be completed. In response, the parents and their attorney produced a series of documents from mental health providers and others offering opinions regarding the potential harm that the student might incur were he to return to Kansas for evaluation.

On June 25, 2019, the KASB attorney sent an email to the parents' attorney stating:

The district is both obligated under state and federal law and has a right to conduct their own evaluation, particularly in this case, as the parents withdrew [the student] and the district has not provided services to the student in the last 2 years. The district has previously communicated to you and your client that they are ready, willing and able to conduct the evaluation and it is dependent on when the parents can make the student available to do the evaluation. Our timeline is dependent on when he will be available in order for the district to complete their evaluation.

The unilateral placement of the student in the Seven Stars program continued until August 1, 2019 when the student was transferred by his parents to New Focus, another private residential treatment program in Utah. The student's unilateral placement at New Focus has continued through the date of the filing of this complaint. According to the student's father, the student has not received special education services under an IEP in either of the private residential programs.

The parents filed a due process complaint on October 23, 2019, the day before the 60 school-day deadline for completion of the initial evaluation.

The student did not return to the district at any time during the 60-day timeline established for the district to complete its evaluation. The first time the residential program allowed the student to return to his home was February 12-

24, 2020, well past the end of the 60 school-day timeline initiated by the parents' provision of signed written consent for evaluation. During a January mediation conference, the parents informed the district that the student would be coming home for Spring Break (March 10 – 19, 2020) and for Summer Break in July of 2020. While the student was at home during the period of February 12 – 24, 2020, the district was not made aware until February 13, 2020 that the student would be coming home. During that period, school was in session for a total of 4 days, three of which were scheduled parent/teacher conference days.

### Summary and Conclusions

On August 4, 2017, the parents declined permission for the district to conduct a reevaluation ordered as a part of corrective action related to a previous formal complaint. On that same date, the parents revoked consent in writing for the district to continue to deliver special education and related services to the student, acknowledging at that time that the district would no longer be required to develop an IEP for the student. The parents also acknowledged that before the student could be reenrolled in special education, an *initial* evaluation – not a reevaluation – would have to be conducted in order to determine whether the student qualifies for special education and related services.

No evidence was provided by the parents to show that this district or any other district determined that the student was eligible for and in need of special education services at any time after the parents revoked consent in writing for the provision of special education services. By report of the student's father, the student has not been provided special education services under an IEP at any time since August of 2017.

While the parents gave written consent on May 10, 2019 for the student to be evaluated, the parents have not made the student available for the district to conduct an initial evaluation. Though paperwork was completed for the student to be enrolled for the 2019-20 school year, the student did not attend any classes during that school year and was not physically present in the district until February 12, 2020, after the parents had initiated a due process hearing alleging that the district had failed to provide a FAPE to the student and had

failed to evaluate the student. The parents informed the district during a January mediation conference that the student would be home for Spring Break in March and again for Summer Break in July. The district was not, however, given prior notice that the student would be available in February 2020 and learned that he was home through an email from the student's father sent one day after the student's arrival.

Districts are required to provide FAPE to students who have been determined through an evaluation to be eligible for and in need of special education and related services and whose parents have consented to the delivery of those services. Prior to the parents' revocation of consent for services in August of 2017 the student had been determined to be an exceptional child. However, the parents' voluntary revocation removed the district's responsibility for the development and implementation of an IEP and the provision of a FAPE. At no time during the twelve-month period covered by this complaint (July 17, 2019 to July 17, 2020) has the student been determined through the initial evaluation process to be a student who is eligible to receive special education services. Under these circumstances, the district is not required to provide a FAPE. A violation of special education statutes and regulations is not substantiated on this issue.

**ISSUE TWO:** The district failed (and continues to refuse) to perform a reevaluation of the student. The scope and conditions imposed by the district regarding reevaluation are unreasonable, are impossible to accomplish, are contrary to the parties' agreement, and are in violation of the IDEA.

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

The student has not – since the voluntary written revocation of parental consent on August 4, 2017 outlined above – been determined to be a student with a disability under federal or state law. Therefore, the student has not been entitled to a “reevaluation.” The parents provided signed written consent for an *initial* evaluation on May 10, 2019. The investigator limits the investigation of Issue Two to the allegations related to the May 10, 2019 evaluation. A second prior written notice and consent for an initial evaluation was signed by the

parents as a part of a mediation agreement connected to the parents' now withdrawn due process complaint. The parents' allegations regarding a violation with regard to the second notice and consent were not investigated because the complaint investigator does not have the authority to investigate alleged violations of a mediation agreement. As noted above, in a July 20, 2020 letter to the parties, the Dispute Resolution Coordinator for SETS stated:

The Department's Special Education and Title Services team has authority to investigate only complaints alleging a violation of state and federal special education statutes and regulations... (K.A.R. 91-40-51(a), (b)(1); 34 C.F.R. 300.153(b)(1), (c)).... The terms of a mediation agreement written and agreed upon by the parties do not constitute requirements of IDEA Part B, the Kansas Special Education for Exceptional Children Act, or their implementing regulations. Accordingly, any allegations as to whether the school district implemented the terms of a mediation agreement will not be investigated. The proper venue to seek enforcement of a special education mediation agreement is in state or federal court (K.S.A. 72-3438(f)(4); 34 C.F.R. 300.506(b)(7)).

### Applicable Statutes and Regulations

In their complaint, the parents' attorney alleges a violation of 20 U.S.C. § 1414(a) which outlines procedures related to evaluations, parental consent, and reevaluations and states that a parent or district may initiate a request for an evaluation to determine if a child is a child with a disability.

#### Child Find:

Kansas child find requirements require the district of residence to evaluate children who are suspected to have exceptionalities and need special education, including children attending a private school (K.A.R. 91-40-7(a)(1)). Accordingly, parents of a child who is attending a private school may request a special education evaluation from either the district where the private school is located (under federal law, 34 C.F.R. 300.131(a)) or from the district where the student resides (under state law, K.A.R. 91-40-7(a)(1)).

The Office of Special Education Programs has clarified a district's child find responsibilities for students whose parents have revoked consent for special education and related services:

Children who have previously received special education and related services and whose parents subsequently revoke consent should not be treated any differently in the child find process than any other child.... A parent who previously revoked consent for special education and related services may continue to refuse services; however, this does not diminish a State's responsibility under 300.111 to identify, locate and evaluate a child who is suspected of having a disability and being in need of special education and related services.... Section 300.300(b)(4) clarifies that parents have the right to withdraw their child from special education and related services. After revoking consent for his or her child, a parent always maintains the right to subsequently request an *initial evaluation* [emphasis added] to determine if the child is a child with a disability who needs special education and related services.... If a parent who revoked consent for special education and related services later requests that his or her child be re-enrolled in special education, an LEA [district] must treat this request as a request for an *initial evaluation* under § 300.301 (*rather than a reevaluation* under § 300.303) [emphasis added]. (73 Federal Register, December 1, 2008, pages 73012, 73014, 73015).

Initial Evaluation:

State regulations, at K.A.R. 91-40-8(a), outline steps a district must follow with regard to the initial evaluation of a child being considered for special education and related services. Each evaluation must include procedures to determine

- whether the child is an exceptional child, and
- what the educational needs of the child are.

In implementing these requirements, the initial evaluation must be conducted in accordance with procedures described in K.A.R. 91-40-9. The results of the evaluation are used by the child's IEP team to develop the child's IEP, and the evaluation is conducted before the initial provision of special education and related services to the child (K.A.R. 91-40-8(b)).

Timeframe for Completing an Initial Evaluation:

Federal regulations state that an initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation *or within the timeframe established by the State* [emphasis added] (34 C.F.R. 300.301(c)(1)(i)-(ii)). As permitted by the IDEA, Kansas has established a 60 school-day timeline (K.A.R. 91-40-8(f)). The term "school day" is defined as "any day, including a partial day, that all children, including children with and without disabilities, are in attendance at school for instructional purposes" (K.A.R. 91-40-1(eee); 34 C.F.R. 300.11(c)). The 60 school-day timeline for conducting an initial evaluation starts upon receipt of written parental consent to conduct the evaluation, and ends with the implementation of an IEP if the child is found eligible for special education services or completion of the evaluation report if the child is not found eligible for special education services (K.A.R. 91-40-8(f)(1)-(3)).

Federal and state law provide exceptions to this initial evaluation timeframe (K.S.A. 72-3428; K.A.R. 91-40-8(g); 34 C.F.R. 300.301(d)). A district will not be subject to the timeframe described above if either of the following conditions is met:

1. The parent of the child who is to be evaluated repeatedly fails or refuses to produce the child for the evaluation, or
2. The child enrolls in a different school before the evaluation is completed, and the parent and new school agree to a specific date by which the evaluation will be completed.

There is no definition of "repeatedly fails or refuses to produce the child" within federal and state special education statutes and regulations. Therefore, the investigator must look to case law and administrative rulings for precedence regarding this provision.

In a January 21, 2010 report (*In re: Student with a Disability*, 110 LRP 9348 (January 21, 2010)), a state review officer rendered a decision regarding the appeal of a finding in a due process complaint against the New York City Department of Education, which was later affirmed in *WG v. New York City Dept. of Educ.*, 801 F. Supp. 2d 142 (S.D.N.Y. 2011). The parents, in consultation with a private therapist, had determined that their child required a residential placement in a “treatment center” with a “therapeutic component” to address his disability. At the time of the placement, the student had not been determined by the district to be eligible for or in need of special education although the child’s private therapist had evaluated the student and given a diagnosis of oppositional defiant disorder. The parent advised the district that their son had been but was no longer attending a district high school. They requested that the district provide him with a FAPE and stated that they would be placing the student in the private treatment center until the district found him an appropriate placement. The district informed the parents about the evaluation process and informed the parents of an appointment for the completion of, among other things, a psychological and educational evaluation of the student. The parents told the district that they could not bring the student for assessment because doing so would “interfere and disrupt his program and schooling” in the residential center and would be “detrimental” to him. The student did not come to the scheduled appointment.

Subsequently, the district contacted the director of the treatment program and determined that while in the program the student had not been identified as a “special education student” and was not receiving special education services.

The state review officer overturned the due process hearing officer’s determination that the district should reimburse the parents for the cost of the student’s tuition at the private center finding that the parents unilaterally placed the student in an out-of-state treatment facility and refused to produce the child for the district’s initial evaluation.

In a June 22, 2014 decision regarding a due process complaint against the Avon Grove School District in Pennsylvania (*Avon Grove School Dist.*, 114 LRP 34095, (June 22, 2014)), the due process hearing officer did not support the district’s

assertion that a delay in conducting an evaluation of a student was excused by the parents' failure to make the student available. In this case, the district scheduled appointments for testing for a student, who had a history of absences, within the last two weeks of the 60-day deadline for completion of the evaluation. This delay was, in the opinion of the hearing officer, "virtually guaranteed to delay completion of the evaluation..."

In an October 10, 2019 report (*In re: Student with a Disability*, 119 LRP 45660 (October 10, 2019)) regarding an appeal of several hearing officer decisions in a due process complaint against a school district in the state of New York, the state review officer found that timelines for completing an evaluation do not apply if the "parent of a child repeatedly fails or refuses to produce the child for the evaluation." The state review officer goes on to note that "it is ultimately the responsibility of the parents not the district to deliver the student to any needed evaluations." In this case, the parents indicated that they wanted their child to be evaluated yet did not "successfully produce the student." The hearing officer noted that "if the student is going to be offered an appropriate placement, it is critical that he be evaluated."

The circumstances in this complaint are analogous to *Doe v. Cape Elizabeth School Dep.t*, 382 F. Supp. 3d 83 (D. Me. 2019) where a parent unilaterally removed the child and placed her in an out of state facility prior to the time during which the school was to have evaluated her for an IEP. In doing so, the court found the parents, "rendered Jane unavailable for testing" and held that "[w]hile Jane was unavailable and out of the state, [the school district] was under no obligation to conduct an evaluation," citing *CG v. Five Town Cmty. Sch. Dist.*, 2007 W.L. 494994 (2007) which determined that a school district had "no obligation to send its evaluators to Utah or to contract for evaluation by Utah-based third parties; rather, the Parents' decision to remove [the student] to Utah rendered her unavailable for testing." The court also quoted *Great Valley School Dist. v. DOUGLAS M.*, 807 A.2d 315 (Pa. Commw. Ct. 2002) holding that "a school district cannot be compelled to assume any responsibility for evaluating a child while [s]he remains outside [the state] in a unilateral placement." In *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462 (7th Cir. 2000) the court concluded that a mother's "lack of cooperation deprived the school district of a

reasonable opportunity to conduct an evaluation of [the student] and fulfill its obligations under the IDEA” when she unilaterally removed her son from the high school, placed him in another state, and “did not send [her son] back to the school district for evaluation”.

#### Outside Evaluations:

Numerous courts have held that if a parent wants a child to receive special education, or have the school pay for that special education, then that school is entitled to evaluate the child, and the district cannot be forced to rely on third party evaluations. For example, *Andress v. Cleveland Independent School Dist.*, 64 F.3d 176 (5th Cir. 1995) notes that “if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.” Similarly, in *Gregory K. v. Longview School Dist.*, 811 F.2d 1307 (9th Cir.1987), it is noted that “if the parents want [the student] to receive special education under the Act, they are obliged to permit such testing.” *Dubois v. Connecticut State Bd. of Ed.*, 727 F.2d 44 (2d Cir.1984) found that “the school system may insist on evaluation by qualified professionals who are satisfactory to the school officials.” *Vander Malle v. Ambach*, 673 F.2d 49 (2d Cir.1983) found that school officials are “entitled to have [the student] examined by a qualified psychiatrist of their choosing.”

Most federal circuit courts of appeal have held a school district is entitled to its own evaluation. In *MTV v. DeKalb County School Dist.*, 446 F.3d 1153 (11th Cir. 2006), the court agreed that “the school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest.”

In *Johnson by Johnson v. Duneland School Corp.*, 92 F.3d 554 (7th Cir.1996), the court found that “[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation.”

#### Least Restrictive Environment (LRE):

The IDEA also requires that children with disabilities receive a FAPE in the least restrictive environment (“LRE”). The LRE mandate provides that, “[e]ach public agency must ensure that [t]o the maximum extent appropriate, children with

disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and [s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” (34 C.F.R. § 300.114(a)(2)(i)-(ii)).

### Parents’ Position

It is the position of the parents that the district’s demands for “a 30-day in-person, in-school, observation of (the student)” for the “reevaluation” of the student are “unreasonable, are impossible to accomplish, are contrary to the parties’ [mediation] agreement, and are in violation of the IDEA.”

The parents assert that they have been willing to allow district staff to speak with staff from the residential program and have agreed to allow district staff to speak with the student or to come to Utah to observe the student.

### District’s Position

It is the position of the district that the parents have steadfastly refused to produce the student for evaluation and observation in a public education setting, thereby keeping the district from performing its evaluation. Further, the district contends that its proposed evaluation did not violate the IDEA, that the district was not required by law to rely upon the evaluations of third parties or to require its own evaluators to travel out of state to conduct an evaluation of the student, and that the evaluation and observation period recommended by the district was reasonable and required by Kansas law.

### Investigative Findings

On April 30, 2019, in a letter to the parents’ attorney from the KASB attorney providing counsel to the district, the district provided the parents with prior written notice and request for consent for:

[A]n initial evaluation to determine eligibility and need for special education services, and if found eligible, to assist in determining the appropriate special education and related services and develop an appropriate IEP. The initial evaluation to include the following:

- Review of all existing data
- Review of existing information to also include records from the past two years to include academics, social/emotional information, behavioral data, attendance records, and academic credits received
- Any recent medical and psychiatric evaluation records
- New data to include an individually standardized intelligence assessment, individually standardized academic assessment, assessment in the area of social/emotional behavior, language assessment of receptive, expressive, and pragmatic skills, occupational therapy evaluation for sensory integration, and assessment of transition skills
- New data to include a Functional Behavioral Assessment conducted by a Board Certified Behavior Analyst
- *New data to include response to general education interventions* [emphasis added]

According to the notice and consent form, the option of completing the evaluation using only existing information was considered, but was rejected due to “needing new, updated information [because] data available to the district is prior to May of 2017. The option of not completing an evaluation was rejected due to parent request for evaluation and the team needing new data in order to determine eligibility and need for special education services.” According to the form, the “evaluation *will include general education interventions to run concurrently with the special education evaluation* [emphasis added] in order to collect data in the general education environment to determine the appropriate instructional approach and special education needs while ensuring access to the least restrictive environment.”

Both parents provided signed consent for the proposed evaluation on May 10, 2019 thereby initiating a 60 school-day timeline, ending on October 28, 2019 for the completion of the evaluation.

On May 28, 2019, the principal of the high school sent an email to the parents to let them know that the enrollment packet for the student had been received.

On June 11, 2019, the attorney for the parents sent an email to the KASB attorney including a copy of a report of a neuropsychological evaluation completed by an evaluator in Utah. The parents' attorney asked the KASB attorney "what [additional] assessment the School District/Interlocal believes it needs in order to develop an IEP for [the student]." The parents' attorney also notes that the evaluator had in her report recommended that the student complete his program at Seven Stars and move to another residential treatment facility. According to the letter, the parents were "in the process of looking for an appropriate placement for [the student]...and would like the School District/Interlocal to be a partner in that search. Please have the necessary folks from the School District/Interlocal reach out to [the parents] to discuss [the student's] educational placement needs and how they can both partner together to find an appropriate educational placement and program for [the student]."

On June 13, 2019, the student's father sent an email to the director of the interlocal stating that the student had been doing so well in his private placement that the student was "ready to transition to his next school." The student's father stated that he and the student's mother had "submitted all the paperwork to re-enroll [the student] back into USD [\_\_\_] and we have received an email from the high school principle [sic] stating that they are ready to work on [the student's] schedule." The student's father included a copy of the report of an evaluation completed by a private psychologist affiliated with ClearView Psychological Services in Utah. According to the father's email, that report stated that following his completion of the Seven Stars program, it was strongly recommended that the student attend a "residential treatment program

specializing in the treatment of adolescents with autism in which he receives 24/7 therapeutic support.”

The director of the interlocal responded to the student’s father via email on June 21, 2019, stating that “eligibility decisions and determination of need for special education and related services are made by a team of qualified professionals and the parents of the child who has been evaluated.” The director listed the members of the team and stated that the outside evaluation report would be shared with the team for “further review.” The director wrote that “while the team will consider the results of the evaluation you provided, there is additional data they will need to collect” and stated that the team “will need to determine [the student’s] response to general education intervention, which will assist the team in determining the least restrictive environment. Regulations clearly state that the evaluation must result in determining the content of an IEP [assuming eligibility] including information related to enabling [the student] to be involved in and progress in the general curriculum in the least restrictive educational environment.” The director continues, “As the team has not been involved with [the student] in almost two years, part of their proposed evaluation plan was to work with him directly in the local agencies [*sic*] setting. Do you have a plan for producing [the student] for completion of the evaluation? The evaluation team will want to ensure that any team decisions considered [the student’s] right to a Free and Appropriate Public Education in the least restrictive environment.”

On June 24, 2019, the attorney for the parents sent an email to an attorney for the district asserting that the district’s demand that the student come to school for an evaluation is a violation of the IDEA. The parents’ counsel wrote:

[The student’s] therapist and treatment team at Seven Stars believe that it would be detrimental to [the student’s] physical and psychological well-being for him to return to Kansas to be evaluated. He has made so much progress to date and it would be catastrophic to force his return. I have sent you comprehensive evaluations that were just recently performed. If the School District believes the information contained therein is incomplete or insufficient, please

let me know what specific evaluations the School District believes it needs and we can work out a way to get that information. Also, the School District has full permission to speak with [the student's] therapist and evaluators and it is hoped that they will be included in any meetings to determine [the student's] eligibility and to develop his IEP. You still have not given me a timeline for the completion of the evaluation process. Let me know what that is so that the Parents can plan accordingly.

The district's attorney responded via email on June 25, 2019 stating:

[T]he district is both obligated under state and federal law and has a right to conduct their own evaluation, particularly in this case, as the parents withdrew [the student] and the district has not provided services to the student in the last 2 years. The district has previously communicated with you and your client that they are ready, willing and able to conduct the evaluation and it is dependent on when the parents can make the student available to do the evaluation. Our timeline is dependent on when he will be available in order for the district to complete their evaluation.

The parents' attorney responded to the attorney for the district via email on June 25, 2019 acknowledging that "the School District has a right to do its evaluation [and] an obligation under the IDEA to do so." The attorney continued, writing "obviously, the School District cannot cause harm to a child in the course of evaluating a child. So, given [the student's] unique circumstances, what is the School District's plan to evaluate him? How do we get this done as quickly as possible?"

The attorney for the parents sent an email to the KASB attorney on July 9, 2019 which included a letter from the student's psychologist and his therapist which outlined their opinion that it would be "harmful to [the student's] psychological and physical well-being to return to Kansas to be evaluated by the School District." The parents' attorney stated that he had:

provided comprehensive evaluations and have asked you to identify any further assessments your client believes is [sic] necessary in order to complete its evaluation, conduct an eligibility meeting and complete [the student's] IEP. You have never responded with that information. Pursuant to the IDEA, the School District/Interlocal was required to complete its evaluation of [the student] and hold an eligibility meeting by July 8, 2019. That date has now passed and the School District/ Interlocal is in violation of the IDEA. I have asked you repeatedly about the status of the evaluation and the School District's plan to complete the process and you have never responded. You have left the Parents no choice but to file a due process complaint to have this dispute decided at an impartial due process hearing.

The KASB attorney responded to the parents' attorney via email on July 9, 2019 stating "Kansas does not have year round schools. Kansas teachers and all special education staff members are under 172 days [sic] contracts which end the end of May. Your email of today is the first notice that your client is not going to assist in making [the student] available for an evaluation."

On July 9, 2019, the attorney for the parents sent an email to the KASB attorney stating (incorrectly) that:

[The] timeline for evaluation, eligibility and IEP development, are based on calendar days and not school days. There is no pause over summer breaks. Regarding the evaluations, the [parents] have never refused to assist in having [the student] evaluated. Quite the opposite. I have emailed you numerous times over the last two months about the evaluation process; have provided you comprehensive evaluation reports as I have received them; have given you and your clients unfettered access to the student, his treatment team, and his records; and have repeatedly asked you what the School District's plan was. You have never substantively

responded to my emails and your client has never taken [the parents] up on their offer to obtain direct (and current) information about [the student]. I have sent you case law about the School District's obligation to evaluate and develop an IEP for [the student] given his current situation. I have also informed you previously that it would be unsafe and harmful for [the student] to return to Kansas for a school evaluation. You have been most unresponsive and uncooperative in this urgent and important matter.

The student was not physically present in the district until February 12, 2020. At a mediation conference in January of 2020, the district was informed that the student would be home for spring break in March and for summer break in July. At 4:30 PM on February 13, 2020, in response to an email from the high school principal regarding the scheduling of a mediation-related conference, the student's father reported that the student was home for his birthday. According to the formal complaint, the student was home from February 12-24, 2020. School was in session for four days between the time of the email and the student's departure; three of those four days were scheduled for district-wide parent/teacher conferences.

### Summary and Conclusions

The student received special education and related services in a public-school setting for eight years before the parents voluntarily withdrew him from the district and revoked consent in writing for the continued provision of all special education and related services. The parents subsequently made the decision independent from the school district to place the student in a residential treatment program in another state.

Nearly two full years after the student had last been enrolled in the district and attended a public school, the student's father contacted the high school principal to request that the student be enrolled so that a special education team could as efficiently as possible develop an IEP that would support the student's continued placement in an out-of-state residential treatment center.

The district informed the parent and the parents' attorney that, because the parents had voluntarily withdrawn consent for the provision of all special education and related services in August of 2017, the district was required by law to conduct an initial evaluation of the student to determine whether or not the student was eligible to receive special education and related services. The district provided the parents with prior written notice and request for consent for that initial evaluation. The prior written notice and consent form included statements which reflected the district's intent to include "general education interventions" as a part of the evaluation process and stated that data would be collected with regard to the student's response to those interventions.

The parents provided signed written consent for the evaluation. However, when asked when the student would be made available for evaluation, the parents sent the district letters of support for their position that a return to the district for evaluation would be detrimental to the student's continued progress in the private school setting.

Extended correspondence between the attorneys for the district and the parents reflects that both parties were firm in their positions. The district asserted that they were compelled to conduct an "initial evaluation" of the student that required that data be collected to inform decisions regarding the least restrictive placement for the student. The parents remained steadfast in their insistence that the student would not be returning to the district for evaluation, and the district would need to develop a plan to evaluate the student in his current placement. The parents and their attorney insisted that the district was required to develop a plan for the evaluation, and the district stated that such a plan hinged on the availability of the student.

The parents told the district that that they would make the student available for the district to evaluate the student by allowing district staff to observe or interview the student in his private school classroom via Skype or would allow district staff to travel to Utah to observe the student on site. In the opinion of the district, the residential treatment center – where the average class size is 8

students and the student to adult ratio is 3:1 – was not a “general education” setting. The parents paid for a private psychological evaluation which they indicated would help the district to develop an IEP for the student.

Despite having given consent to the district for an initial evaluation, the parents did not make the student available in the district at any time during the 60 school-day timeline established for that evaluation. The parents filed a due process complaint before the timeline for evaluation ended (October 28, 2019) alleging among other things that the district had failed in its obligation to evaluate the student.

At a meeting in January 2020, the parents told district staff that the student would be coming home for short visits in March and July. In February 2020, the student’s father notified the district via email that the student had come home one day before the message was sent and would be available if staff had questions for him. That first home visit in February began more than 120 school days after the parents gave their written consent for the initial evaluation on May 10, 2019.

It is unreasonable to interpret Child Find to mean that – because the parents had voluntarily and unilaterally enrolled the student in a residential private school setting – district staff would be required to travel more than 1100 miles to Utah where they would only be able to observe the student in a setting entirely unlike the public school in which there would be no opportunity to ascertain how the student would function in the least restrictive environment of a general education classroom.

The district did not delay in attempting to evaluate the student and did not impose a restrictive schedule for conducting the initial evaluation. Rather, the district asked the parents when they would make the student available. In response to the district’s inquiry, the parents and their attorney made it clear that the student would not be made available in his home town, asserting that a return to his home would be detrimental to his progress in the private school setting. While the parents gave written consent for the district to conduct its

initial evaluation, it is clear that the student's enrollment in the district was intended solely to facilitate the development of an IEP that supported the parents' chosen placement.

At no point during the 60 school-day timeline established for the evaluation did the parents make the student available in the district. The first time the student was actually physically present in the district was February 12 -24, 2020. The district was notified on February 13, 2020 that the student was in town.

While the district would need to consider the results of the parent-initiated, one-day private evaluation, it is not unreasonable for the district to require that the student be evaluated by members of a team that would actually be responsible for the development of an IEP which would be based upon the results of the initial evaluation the law requires them to conduct. Further, it is not unreasonable for the district to assert that their evaluation of the student should be conducted in person rather than over Skype. Finally, it is not unreasonable for the district to require that data be collected in a general education setting – the least restrictive environment for a student whose need for special education is being determined through an initial evaluation.

It is the conclusion of the investigator that the parents did not make the student available for an initial evaluation which the district was required by law to conduct before determining his eligibility for special education and related services and before developing an IEP. Under these circumstances, the district could not complete its evaluation within the 60 school-day timeline. A violation of special education statutes and regulations is not substantiated on this issue.

**ISSUE THREE:** The district failed to timely develop an individualized education program for the student.

### **Applicable Statutes and Regulations**

The parents' attorney alleges a violation of 20 U.S.C. § 1414(d) which relates to the development of an Individualized Education Plan (IEP).

State and federal regulations require that a district must ensure that “an IEP is developed for each exceptional child within 30 days from the date on which the child is determined to need special education and related services” (K.A.R. 91-40-8(h); 34 C.F.R. 300.323(c)(1)). The determination of eligibility is based upon results of a full and individual evaluation of the child which must be conducted *before* the initial provision of special education and related services to the child (K.A.R. 91-40-8(b)(3); 34 C.F.R. 300.301(a)). The results of the evaluation are used to develop the child’s IEP (K.A.R. 91-40-8(b)(2); 34 C.F.R. 300.324(a)(1)(iii)).

The Individualized Education Program (IEP) is defined as “a written statement *for each exceptional child*” which describes that child’s educational program and is developed, reviewed, and revised in accordance with special education laws and regulations (K.S.A. 72-3404(r)).

#### Parents’ Position

It is the position of the parents that the district failed “to timely develop” an IEP for the student.

#### District’s Position

It is the position of the district that because the parents refused to make the student available for an initial evaluation, the district was unable to determine the student’s eligibility for special education and therefore could not develop an appropriate IEP.

#### Investigative Findings and Conclusions

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

As discussed above under Issue Two, the district was unable to conduct an initial evaluation of the student in order to determine whether or not he was eligible for and in need of special education services. Districts are required to develop IEPs only for eligible students. The district is not obligated to meet the

established 60 school-day timeline for completion of the initial evaluation and – if eligibility is established – the development of an IEP if the parents have failed to make the student available for evaluation. Under these circumstances, a violation of special education statutes and regulations is not established on this issue.

### Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are warranted.

### Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). Due to COVID-19 restrictions, the written notice of appeal may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. Such notice of appeal must be delivered within 10 calendar days from the date of this report.

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



Diana Durkin  
Complaint Investigator

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

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the

state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect.

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

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

(A) The issuance of an accreditation deficiency advisement;

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

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

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_  
\_\_\_\_\_ Community Schools: 21FC\_\_-001

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced with the filing of a complaint on July 17, 2020, by \_\_\_\_ and \_\_\_\_\_ through their attorney Jack Robinson, on behalf of their son, \_\_\_\_\_. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on August 15, 2020. That Complaint Report concluded that there was no substantiation of a violation of special education statutes or regulations.

Thereafter, the parents, through their attorney, filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parents' original complaint, the Complaint Report, the notice of appeal submitted by the parents' attorney, and the response to the parents' appeal submitted by the district through its attorney, Terelle Mock. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

### PRELIMINARY MATTERS

Scope of Inquiry: The Appeal Committee limits its inquiry to the issues investigated in the Complaint Report and presented in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report issued on August 15, 2020. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

Allegations Outside of State Complaint Jurisdiction:

*Discrimination* - The parents' notice of appeal alleges that the school district's requirement for general education assessments to be part of the evaluation is discriminatory (Notice of Appeal, p. 2). The Individuals with Disabilities Education Act (IDEA), the Kansas Special Education for Exceptional Children Act, and the federal and state regulations that implement these Acts do not address disability discrimination; therefore, the Appeal Committee does not have jurisdiction to address this allegation. A state complaint must allege violations of state and/or federal special education statutes and regulations (K.A.R. 91-40-51(a)), and an appeal of a state complaint is an appeal of the findings or conclusions of the Complaint Report (K.A.R. 91-40-51(f)).

*Violation of Mediation Agreement* – The parents' notice of appeal alleges that the school district has violated the terms of a written mediation agreement between the parties (Notice of Appeal, p. 3). The terms of a mediation agreement mutually agreed upon by the parties are not requirements of IDEA Part B, and thus are not within the jurisdiction of a special education state complaint (K.A.R. 91-40-51(a)). The proper venue to seek enforcement of a mediation agreement is in state or federal court (K.S.A. 72-3438(f)(4); 34 C.F.R. 300.506(b)(7)). Thus, the Appeal Committee does not have jurisdiction to address this allegation.

DISCUSSION OF ISSUES ON APPEAL

In their complaint filed on July 17, 2020, the parents stated three alleged IDEA violations:

1. The school district failed (and continues to fail) to provide [the student] a free appropriate public education in violation of 20 U.S.C. § 1412(a)(10)(C)(II) [*sic*].
2. The School District failed (and continues to refuse) to perform a reevaluation of [the student] in violation of 20 U.S.C. § 1414(a). The scope and conditions the School District has imposed for the reevaluation are unreasonable, are impossible to accomplish, are contrary to the parties' agreement, and are in violation of the IDEA.
3. The School District failed to timely develop an individualized education program for [the student] in violation of 20 U.S.C. § 1414(d).

The Complaint Report issued on August 15, 2020 did not substantiate a violation of special education statutes or regulations for any of the three allegations. In reviewing the parents' Notice of Appeal, it is unclear to the Appeal Committee whether the parents intended to appeal the findings and conclusions for all three allegations or only the findings and conclusions for allegation two.

Evaluation:

The Appeal Committee first addresses allegation two, as the outcome of this allegation is dispositive of allegations one and three. The allegation as stated in the parents' original complaint and in the Complaint Report, quoted above, refers to a "reevaluation." Though the parents have used the word "reevaluation" in their original complaint and in their Notice of Appeal, the investigator correctly treated this as an initial evaluation, rather than a reevaluation, because the parents revoked consent in writing for the continued provision of all special education and related services for the student on August 4, 2017. The parents also withdrew the student from the school district at that time (Complaint Report, p. 4). In March 2019, the parents requested the school district to develop an IEP for the student (Complaint Report, p. 5). As correctly stated on page 20 of the Complaint Report, the Office of Special Education Programs (OSEP) within the United States Department of Education has stated:

Section 300.300(b)(4) clarifies that parents have the right to withdraw their child from special education and related services. After revoking consent for his or her child, a parent always maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services.... If a parent who revoked consent for all special education and related services later requests that his or her child be re-enrolled in special education, an LEA must treat this request as a request for an initial evaluation under § 300.301 (rather than a reevaluation under § 300.303). [73 Federal Register, December 1, 2008, pages 73014, 73015].

The federal regulations implementing the IDEA require that "the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe" (34 C.F.R. 300.300(c)(1)(i), (ii)). Kansas has established its own *60 school-day initial evaluation timeframe* in K.A.R. 91-40-8(f). "School day" is defined as "any day, including a partial day, that all children, including children with and without disabilities, are in attendance at school for instructional purposes" (K.A.R. 91-40-1(eee); 34 C.F.R. 300.11(c)). However, both the federal and state special education regulations provide

exceptions to the initial evaluation timeframe, one of which is that the *timeframe does not apply if the parent "repeatedly fails or refuses to produce the child for the evaluation"* (34 C.F.R. 300.301(d)(1); K.A.R. 91-40-8(g)(1)).

The investigator concluded that the parents did not make the student available for the initial evaluation and because of that the school district could not complete its evaluation within the 60-school day timeframe; thus, a violation of special education law was not substantiated regarding allegation two (Complaint Report, page 34).

Noting correctly that neither statutes nor regulations define the term "repeatedly fails or refuses to produce the child," the investigator looked to case law and administrative rulings for precedence on this topic (Complaint Report, pages 22 through 25). On the whole, the precedence among these cases is that a parent fails or refuses to produce the child for evaluation when they unilaterally withdraw the student from the school district and place the student out of the state, and in such instances the initial evaluation timeframe does not apply (Complaint Report, see citations on pages 22 and 23). The Appeal Committee has further researched case law on this topic. The courts that have heard cases regarding this provision of the law (including federal circuit courts of appeal) have consistently held that school districts are not responsible for evaluating a student who is out-of-state in a unilateral parent placement. In *Patricia P. v. Board of Education of Oak Park and River Forest High School District No. 200*, 203 F.3d 462, 31 IDELR 211 (7<sup>th</sup> Cir. 2000) the court held:

[T]he School District's failure to examine [the student] was due to [the parent's] failure to cooperate with the School District.... [The parent] removed [the student] unilaterally from the state, knowingly frustrating the [School] District's ability to conduct its own timely evaluation, and has made no genuine offer to make [the student] available to the [School] District for an evaluation.... *[The parent's] actions deprived the School District of a reasonable opportunity to conduct an in-state evaluation of [the student] and to make an informed educational placement recommendation* for the school year [emphasis added].

In that case, the parent unilaterally placed her child in an out-of-state residential special education school where he remained for the duration of his high school education. The parent then filed a notice for a due process hearing seeking reimbursement for the cost of the student's private placement, before the school district had conducted an evaluation of the student. The court stated that the parent's "sole action evidencing a willingness to avail her son for evaluation for the 1995-96

school year was her offering to allow School District staff to travel to Maine, to evaluate [the student] at the Elan School.” The Circuit Court concluded that there was “no clear error in the district court’s finding that [the parent’s] lack of cooperation deprived the school district of a reasonable opportunity to conduct an evaluation of [the student] and fulfill its obligations under the IDEA...”

The 1<sup>st</sup> Circuit was consistent with the 7<sup>th</sup> Circuit when it affirmed a District Court decision which found that “The District had no obligation to send its evaluators to Utah or to contract for evaluation by Utah-based third parties; rather, the *Parent’s decision to remove [the student] to Utah rendered her unavailable for testing*’ [emphasis added] (C.G. and B.S. ex rel. A.S. v. Five Town Cmty. Sch. Dist., Civ. No. 05-237-P-S, 47 IDELR 132 (D. Me. 2007), *affirmed*, 513 F.3d 279, 49 IDELR 93 (1<sup>st</sup> Cir 2008)). In this case, the parents provided consent for the school district to evaluate their child after they had unilaterally placed their child out-of-state in a private residential facility for adolescent girls. The school district took the position that the student was unavailable for testing while out-of-state, and the parents argued that the school district could have sent an evaluator to Utah or found someone in Utah to conduct the evaluation. The parents also questioned the district’s need to conduct its own evaluation of the student and argued it was unacceptable for the district to evaluate the student when she returned home for a visit. The court found that “the District had a right to insist on conducting its own evaluation.”

Another case on point, out of Pennsylvania, is *Great Valley School Dist. v. Douglas and Barbara M.*, 807 A.2d 315, 37 IDELR 214 (Pa. Commw. 2002), *appeal denied*, 815 A.2d 1043, 572 Pa. 744 (Pa. 2003). In this case, the parents unilaterally placed their child in an out-of-state therapeutic wilderness program and then subsequently an out-of-state residential school; they then requested and signed consent for the school district to conduct an evaluation of the student. When the school district declined to send personnel out-of-state to conduct the evaluation, the parents filed a notice for a due process hearing. The Pennsylvania Commonwealth Court noted the similarities between this case and *Patricia P.* (discussed above) stating:

In both cases a child was removed to a remote private placement without prior discussions with school officials about possible accommodations. In both cases, the school district requested the opportunity to perform an IDEA-required evaluation in the home state. In both cases, the child was not returned to the home state for evaluation. The Appeals Panel distinguished *Patricia P.* from this case on the basis of the severity of [the student’s] problems. However, the problems complicating [the student’s]

return to Pennsylvania are the same problems that existed when [the student's] parents removed him from Pennsylvania and sent him to private placement in Idaho and then California. The only change is [the student's] location, a change in which the School District had no say.

This court overruled an Appeals Panel order and held:

Federal courts have uniformly held that in the absence of a violation of the IDEA, a unilateral private placement that interferes with a school district's ability to evaluate a child imposes no burdens on the school district [citations omitted].... These cases were decided not on the extent of the child's problems but on the extent the school district was deprived of the cooperative process preferred by the IDEA.... Thus, *a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside [the state] in a unilateral placement*.... It is clear beyond reasonable contention to the contrary that under the IDEA a school district has a right to use its own staff to evaluate a student, *even over objections that the testing would harm the child medically or psychologically*. [citations omitted]. There is no exception to this rule.... By compelling the School District here to consider 'contracting with [out-of-state] personnel to complete the evaluation, making use of videotaping and/or videoconferencing, and/or conducting a review of records,' the Appeals Panel departed from settled law. [emphasis added]

Relying on the cases discussed above (*Great Valley* and *Patricia P.*) the school district in *Jefferson County School Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227, 60 IDELR 91 (10<sup>th</sup> Cir. 2012) argued that the evaluation timeline did not apply in their case because the parent failed to produce the student for the evaluation when the parent placed her child in an out-of-state private facility in Idaho. The 10<sup>th</sup> Circuit Court of Appeals distinguished *Great Valley* and *Patricia P.* from the facts in *Jefferson County* because the school district told the parent that once the student was placed in Idaho, the district did not "presently have an obligation to evaluate, convene IEP team meetings for, or otherwise serve [the student] under the IDEA." The school district also unilaterally withdrew the student from enrollment upon learning of her hospitalization. In addition, the district failed to provide a PWN to give notice of intent to (or refusal to) evaluate; it sent a letter instead, stating it stood ready, willing, and able to serve the student under the IDEA should she return to Colorado.

The Appeal Committee finds that the facts in this complaint are most analogous to those of *Great Valley, Patricia P.*, and *Five Town*, and are distinguishable from *Jefferson County*. The facts stated in the Complaint Report, based on documentation reviewed by the investigator, establish that on August 4, 2017 the parents revoked consent in writing for the continued provision of all special education and related services for the student and the parents unilaterally withdrew the student from enrollment in the school district. That same month the parents then enrolled the student in a virtual school sponsored by a different Kansas public school district (Complaint Report, p. 4). In February 2019, the parents unilaterally placed the student in a private residential facility in Utah. In March 2019, the parents requested the school district to develop an IEP for the student. The school district then informed the parents that it would have to first conduct an initial evaluation to determine eligibility and provided the parents with a prior written notice (PWN) for evaluation and request for consent form dated April 25, 2019. The parents provided their signed written consent, dated May 10, 2019, for the district to conduct an initial evaluation (Complaint Report, p. 5-7). The student has remained in Utah since February 2019, except for a few brief home visits in February, March, and July of 2020 (Complaint Report, p. 9). Despite repeated attempts by the school district to inquire when the student would be made available for evaluation (Complaint Report, p. 5-10, 26-30), there is no evidence before the Appeal Committee to show that the parents produced the student for the evaluation at any time between the date of consent (May 10, 2019) and the conclusion of the 60 school-day timeline (October 28, 2019) (see district calendars for 2018-19 and 2019-20 school years at [hyperlink redacted] and [hyperlink redacted]).

Both in the complaint and on appeal, the parents argue that they made the student available “to be evaluated in-person in [the district] when he has been home on home visits” (Notice of Appeal, p. 1). The student was in [the district] after the expiration of the 60 school-day timeline from February 12 to 24, 2020, from March 10 to 19, 2020, and July 5 to 14, 2020 (Complaint Report, p. 9, 31). For the February visit, the parents waited until 4:30 p.m. on February 13 to inform the district that the student was home. That left the district with only 4 school days to evaluate the student in the general education setting (see district calendar for 2019-20 school year hyperlinked above). For the March visit, there were only 4 school days between March 10 and 19 because school was not in session for the district due to COVID-19 from March 16 through April 3, 2020 (the school district’s spring break was in the middle of that span from March 23 through March 27) (see district’s continuous learning plan at [hyperlink redacted]). There were no school days in July, since the last day of school for the district was May 21, 2020 (see district calendar for 2019-20 school year hyperlinked above). The Appeal Committee finds that, in light of the fact that state law gives the school district 60

school days to complete the initial evaluation process, the total accumulated school days when the district was aware that the student was physically present in [the district] (8 school days) is not the full timeline to which the district is entitled. The Appeal Committee also finds no evidence in either the Complaint Report or the Notice of Appeal that the parents produced the student at school during those 8 school days.

The parents further argue that they made the student “available for observation and evaluation via video conference” (Notice of Appeal, p. 1, 3). The Complaint Report states “the parents told the district that they would make the student available for the district to evaluate the student by allowing district staff to observe or interview the student in his private school classroom via Skype or would allow district staff to travel to Utah to observe the student on site. In the opinion of the district, the residential treatment center – where the average class size is 8 students and the student to adult ratio is 3:1 – was not a ‘general education’ setting” (Complaint Report, p. 33). However, the parents believe that the school district does not need to evaluate the student in the general education setting because it is not required by law, is unreasonable, and would be impossible because “the School District’s public schools have been closed due to the COVID-19 pandemic” (Notice of Appeal, p. 2, 3).

The Appeal Committee notes that Seven Stars, where the student was placed until August 1, 2019, describes itself as a residential program for “teens with autism and other neurodevelopmental disorders” and each student has “an individual academic plan” which is “self-paced and packet based” (see <https://discoversevenstars.com/>). The Appeal Committee also notes that New Focus, where the student has been placed since the filing of this complaint, describes itself as “a private special education school [w]ith a curriculum built specifically for teenage boys with autism and/or developmental delays” (see <https://newfocusacademy.com/b/private-special-education-schools/>). It does not appear that students at Seven Stars or New Focus participate in a general education setting with nondisabled peers; thus, evaluating the student via video conference while he is at these facilities would not enable the school district to collect data in a general education setting.

The IDEA requires that the school district when conducting the evaluation “must gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum” 34 C.F.R. 300.304(b)(1)(ii). Further, K.A.R. 91-40-8(b)(2) requires the school district to ensure that “the results of the evaluation are used by the child’s IEP team to develop the child’s

IEP.” In addition, the evaluation must be conducted before the initial provision of special education and related services to the child (34 C.F.R. 300.301(a); K.A.R. 91-40-8(b)(3)). Finally, on May 10, 2019, the parents gave their written informed consent, recorded on the PWN dated April 25, 2019, for the school district to conduct an initial evaluation to include “response to general education interventions.” That PWN also informed the parents that “[t]he evaluation will include general education interventions to run concurrently with the special education evaluation in order to collect data in the general education environment to determine the appropriate instructional approach and special education needs, while ensuring access to the least restrictive environment.” While the parents are correct when they state in the Notice of Appeal (p. 2) that educational placement in the least restrictive environment (LRE) is determined after the development of the IEP and must be based on the IEP, they have overlooked the fact that the IEP must be based on the evaluation results and the evaluation results must include data related to enabling the child to participate in general education.

The parents cite no legal authority for their claim that it is unreasonable for the school district to evaluate the student in the general education setting. They argue that the student is “unable to attend a general education classroom” and that “it would be detrimental to [the student’s] mental health and the progress he has made in treatment to require [the student] to be present in a general education classroom” (Notice of Appeal, p. 1, 2). While the Appeal Committee does not call in to question the parents’ concerns for their son, the case law (cited in the Complaint Report and above) is clear that there is no mental health exception to the rule that school districts have the right to conduct their own evaluation and that parents must make the child available for the evaluation. See *Andress v. Cleveland Independent School Dist.*, 64 F.3d 176 (5<sup>th</sup> Cir. 1995), *cert. denied* 519 U.S. 812 (Oct. 7, 1996); *Great Valley School Dist. v. Douglas and Barbara M.*, 807 A.2d 315, 37 IDELR 214 (Pa. Commw. 2002), *appeal denied*, 815 A.2d 1043, 572 Pa. 744 (Pa. 2003); *In re: Student with a Disability*, 110 LRP 9348 (January 21, 2010), *affirmed* *W.G. v. New York City Dept. of Educ.*, 801 F. Supp. 2d 142 (S.D.N.Y. 2011).

As to the parents’ impossibility argument, the parents state on appeal that “the School District’s public schools have been closed due to the COVID-19 pandemic, making it impossible, regardless of [the student’s] unique circumstances, for [the student] to attend a general education classroom for 30 consecutive school days.... All schools were closed when this demand was made, have been closed and, by order of the Governor of Kansas, shall remain closed until at least September 9, 2020” (Notice of Appeal, p. 2, 3). However, while school *buildings* were closed for the school district from March 16, 2020 to the end of the 2019-20 school year, classes resumed for all

students enrolled in the school district in a remote continuous learning environment on April 6, 2020 through the last day of the 2019-20 school year on May 21, 2020 (see district's continuous learning plan hyperlinked above). The 2020-21 school year started for the school district on August 25, 2020 and both on-site and remote classes are in session at the writing of this decision (see district calendar for 2020-21 school year at [hyperlink redacted]; and see district's COVID-19 Return to School Plan at [hyperlink redacted]). There is no evidence before the Appeal Committee that the parents made the student available to participate in the general education setting while the school district conducted classes remotely during this period.

For the reasons stated above, the Appeal Committee finds, based on the facts, the case law cited in the Complaint Report, and the case law discussed above, that the investigator correctly concluded that the 60 school-day initial evaluation timeline does not apply because the parents failed to produce the student for the evaluation, thereby negating the school district's obligation to complete the initial evaluation within the 60-school-day timeline. Thus, the Appeal Committee sustains the findings and conclusions of the complaint investigator on allegation two.

Free Appropriate Public Education (FAPE) and Individualized Education Program (IEP): As stated above, the outcome of allegation two (evaluation) is dispositive of allegation one (failure to provide a FAPE) and allegation three (failure to develop an IEP). Under the facts of this case, where the parents have previously revoked consent in writing for the continued provision of all special education and related services, and where a school district has subsequently been prevented from conducting an initial evaluation due to the parents' failure to produce the student, the school district has no responsibility to provide FAPE to the child or to develop an IEP for the child until such time as the child is evaluated and found eligible for special education and related services.

As stated in the Complaint Report (p. 13-15), both state and federal law provide that:

If, at any time subsequent to the initial provision of special education and related services, the *parent* of a child *revokes consent* in writing for the continued provision of special education and related services, *the public agency may not continue to provide special education and related services* to the child, but must provide PWN before ceasing the provision of special education and related services; may not use the procedures in subpart E of this part (including the mediation procedures or the due process procedures) in order to obtain agreement or a ruling that the services may

be provided to the child; *will not be considered to be in violation of the requirement to make FAPE available to the child* because of the failure to provide the child with further special education and related services; and *is not required to convene an IEP Team meeting or develop an IEP* for the child for further provision of special education and related services. K.A.R. 91-40-27(i); 34 C.F.R. 300.300(b)(4).

Here the parents revoked consent in writing for the continued provision of all special education and related services to the student on August 4, 2017. At that time, the school district provided the parents with a PWN informing the parents that all special education services, related services and supplementary aids and services specified in the IEP would cease (Complaint Report, p. 4). Once this took place, by law, the school district was required to stop providing special education and related services to the student unless and until the student was evaluated and again found eligible for special education, and unless and until the parents provided consent for the initial provision of special education and related services. By law, the school district must not be considered to be in violation of the requirement to make FAPE available to the student, and the school district is not required to develop an IEP for the student.

For the reasons stated above, the Appeal Committee finds, based on the facts, and the state and federal regulations and OSEP guidance cited in the Complaint Report, that the investigator correctly concluded that the parents' voluntary revocation of consent in writing for the continued provision of all special education and related services and the parents' failure to produce the student for an initial evaluation removed the district's responsibility for the development of an IEP and the provision of a FAPE. The Appeal Committee sustains the findings and conclusions of the complaint investigator on allegations one and three.

### CONCLUSION

The Appeal Committee concludes that the Complaint Report is sustained on all three allegations.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 15th day of September, 2020.

APPEAL COMMITTEE:

Brian Dempsey

Laura Jurgensen

Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON July 20, 2020

DATE OF REPORT: AUGUST 19, 2020

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Public Schools). In the remainder of this report, USD #\_\_ may also be referred to as the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on July 20, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which ended on August 19, 2020.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on August 4 and August 7, 2020 as part of the investigation process. \_\_\_\_\_, Mediation / Due Process Supervisor for USD #\_\_ was interviewed by telephone on August 5, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #\_\_:

- Individualized Education Program (IEP) dated October 2, 2018
- IEP dated September 26, 2019

- Behavior Intervention Plan (BIP) dated September 26, 2019
- IEP dated September 27, 2019
- BIP dated September 27, 2019
- IEP and BIP dated September 27, 2019 with handwritten parent notes
- Notice of Meeting dated October 25, 2019 for an IEP team meeting to be held on October 28, 2019
- IEP Amendment dated October 28, 2019
- Prior Written Notice (PWN) for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 28, 2019
- Notes of parent / school contacts between September 10, 2019 and February 3, 2020 written by the mother
- Student Diagnostic-Behavior Report spanning September 9 through November 29, 2019
- Disciplinary Action Form dated September 10, 2019
- Emergency Safety Intervention (ESI) Parent Notification and Documentation dated September 10, 2019
- Disciplinary Action Form dated September 13, 2019
- Disciplinary Action Form dated September 17, 2019
- Disciplinary Action Form dated September 18, 2019
- ESI Parent Notification and Documentation dated September 18, 2019
- Disciplinary Action Form dated September 20, 2019
- Disciplinary Action Form dated September 26, 2019
- Disciplinary Action Form dated October 3, 2019
- Disciplinary Action Form dated October 7, 2019
- Disciplinary Action Form dated October 15, 2019
- ESI Parent Notification and Documentation dated October 15, 2019
- Internal Review of ESI Incident dated October 21, 2019
- Disciplinary Action Form dated October 23, 2019
- ESI Parent Notification and Documentation dated October 24, 2019
- Disciplinary Action Form dated October 30, 2019
- Disciplinary Action Form dated October 31, 2019
- Manifestation Determination and Review dated November 12, 2019

- USD #\_\_ Board of Education Policy \_\_\_\_ for Emergency Safety Interventions
- Agenda titled *Positive Behavior Support Training for Safety Services* offered on July 8, 2020, July 14, 2020, and August 3, 2020
- PowerPoint for the *Positive Behavior Support Training for Safety Services* presentation
- USD #\_\_ written procedure titled *Amending a Current IEP: Non-IEP Meeting and Non-Annual IEP Meeting* dated August 2020
- Written response to allegations dated August 4, 2020 written by \_\_ \_\_\_\_, Mediation / Due Process Supervisor for USD #\_\_

### **Background Information**

This investigation involves a male student who was enrolled in the eighth grade at USD #\_\_ during the 2019-20 school year. The student has attended schools in USD #\_\_ since pre-kindergarten and was attending \_\_\_\_\_ Middle School at the time of the allegation being investigated.

The student was initially identified as a student with a disability in the second grade during the 2013-14 school year while attending \_\_\_\_\_ Elementary School. At that time, an Individualized Accommodation Plan (IAP) was developed per Section 504 of the Rehabilitation Act. In third grade, the student was evaluated and found eligible for special education and related services due to the exceptionality category of emotional disturbance. The student has received special education services since that time. He attended \_\_\_\_\_ Elementary School for fourth and fifth grades and he attended \_\_\_\_\_ Middle School for sixth through eighth grades. At the end of the eighth grade, the student was transferred to \_\_\_\_\_ High School. The most recent reevaluation was conducted during the 2019-20 school year and the student continued to meet the eligibility requirements to be identified under the exceptionality category of emotionally disturbance.

### **Issues**

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

**ISSUE ONE:** The USD # \_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not following the Behavior Intervention Plan (BIP) between the dates of September 10 and October 31, 2019.

### Positions of the Parties

The parents alleged USD # \_\_\_ did not follow the student's BIP, which resulted in an escalation of negative behaviors in the school setting. The parents indicated the student had 10 disciplinary incidents between September 10 and October 31, 2019 and that four of those disciplinary incidents escalated to the point that school staff needed to perform emergency safety interventions (ESI) to keep the student and others safe. The parents believe the ten disciplinary situations could have been avoided if USD # \_\_\_ had followed the student's BIP.

The parents reported that the failure to implement the student's IEP and BIP ultimately resulted in disciplinary actions that triggered a Manifestation Determination Review meeting on November 12, 2019 where it was determined that the student's inappropriate behavior was a manifestation of the student's disability. The parents requested and the district agreed to change the alternative school setting from \_\_\_\_\_ Middle School to \_\_\_\_\_ High School. A Functional Behavioral Assessment (FBA) was conducted and the student's IEP and BIP were reviewed and revised on February 6, 2020. Another reevaluation was conducted on April 7, 2020, which resulted in the review and revision of the student's IEP and BIP.

The parents also reported that during the disciplinary incidents resulting from the district's alleged failure to implement the student's BIP, school safety staff did not follow the district's policies regarding ESI. The parents were also concerned with "how rough security hold & restrain children." These allegations, while serious, do not fall under federal or state special education statutes or regulations and, as such, cannot be investigated through the child complaint process described in the IDEA (34 C.F.R. 300.153(b)(1); K.A.R. 91-40-51(a)); however, the parents have the right to file a

complaint with USD #\_\_'s local board of education who does have jurisdiction to investigate such allegations. (K.A.R. 91-42-3(a)(2)(A)).

USD #\_\_ acknowledged the student's IEP including the BIP was not implemented between September 10 and October 31, 2019. \_\_\_\_, Mediation / Due Process Supervisor for USD #\_\_, stated:

It is the district's position that the student's IEP and BIP were not consistently implemented as written during the period specified in the child complaint. Although the Behavior Report does indicate days when the student experienced progress, the behaviors monitored do not align with his IEP goals or the targeted behaviors identified in the BIP. Further, the disciplinary incident reports and descriptions of behaviors necessitating ESI in the letters to the parent do not consistently include documentation to support that strategies from the IEP or BIP were implemented as written. No other data or associated documents exist to support the implementation of the IEP and BIP as written.

USD #\_\_ believes they have taken steps to correct this noncompliance. A reevaluation of the student was conducted including a functional behavioral assessment (FBA), the student's IEP and BIP were reviewed and revised, and the location where special education services were provided to the student was changed from \_\_\_\_ Middle School to \_\_\_\_ High School.

In addition, USD #\_\_ has taken proactive steps to address the noncompliance by providing training on Non-Violent Crisis Intervention (NCI) during July and August 2020 to staff at the alternative middle school and to all district security staff. Ms. \_\_\_\_ [Mediation/Due Process Supervisor] reported that USD #\_\_ is also developing a district-wide protocol "to ensure that school security staff are knowledgeable of students' needs and relevant IEP/BIP details as they are responsible for consistent implementation of such plans in collaboration with other school staff."

### Findings of the Investigation

Documentation shows that an IEP dated October 2, 2018 was in effect during the beginning of the 2019-20 school year. This IEP included a BIP, which required that the

student “be given frequent feedback from adults to reinforce appropriate verbalizations with adult attention. He will be afforded the opportunity, when appropriate, to act as a leader or helper in the class so that he may receive appropriate peer attention.” In addition, the BIP required that the student be “redirected by the teacher or para when he uses inappropriate verbalizations.” This IEP included three accommodations for a separate setting for academic tasks, extended time to complete assignments, and frequent breaks.

Documentation shows there were five disciplinary incidents that occurred while the October 2, 2018 IEP was in effect. On September 10, 2019, when the student used inappropriate language, school staff initially attempted to remove the student from the situation rather than redirecting the student back to the task or activity. This caused an escalation in the student’s inappropriate language and behavior, which resulted in multiple school staff becoming involved in the situation and the student being given multiple directions by the multiple staff members, and ultimately ended with school safety staff being called to assist in resolving the situation. On September 17 and September 20, 2019, the student was using inappropriate language but there is no documentation to show that staff redirected the student prior to the student becoming physically aggressive. The incidents on September 13 and September 18, 2019 do not document inappropriate language as the antecedent to physical aggression resulting in assault and arrest.

Documentation provided by both the district and parent included an IEP dated September 26, 2019, and an IEP dated September 27, 2019. The LEA could not provide a Notice of Meeting (NOM) showing the actual date the IEP team meeting was held at the end of September 2019 and the parents only remember meeting multiple times with the school staff during that timeframe.

These two IEPs did not include the same accommodations or BIP and it is unclear which one, or if either, of the IEPs accurately reflected the decisions made by the IEP team at the annual IEP team meeting held in September 2019.

There were four disciplinary incidents during the period between September 26 and October 28, 2019 that the IEP developed at the end of September would have been

effect. The incidents on September 26, October 7, and October 15, 2019 do not document inappropriate language as the antecedent to the student's disruptive behavior and physical aggression. The incident on October 3, 2019 does indicate the student initially used inappropriate language but, rather than redirecting the student, safety staff told the student to stop, which escalated the inappropriate language and ended in physical aggression and a broken window.

Documentation also includes an IEP amendment dated October 28, 2019, which amends the September 27, 2019 IEP. USD #\_\_ provided the parent with a NOM for the IEP team meeting held on October 28, 2019.

There was one disciplinary incident during the period between October 28 and October 31, 2019 that the IEP amended at the October 28, 2019 IEP team meeting would have been effect. The incident on October 30, 2019 documents the student using inappropriate language and staff redirecting him several times and offering the student a break. The student refused the break and continued to escalate his verbally aggressive behavior until safety staff were contacted to resolve the situation.

The IEP dated September 26, 2019 showed an implementation date of October 2, 2019. This IEP included three accommodations for a separate setting for academic tasks, extended time to complete assignments, and frequent breaks. In addition, this IEP included the following accommodations related to the student's behavior with the implementation date of October 28, 2019 for each:

- Provide positive engagements.
- Allowed to go to a safe location within the building.
- One direction at one time from one person.
- Give additional processing time when given a direction even when denying the request or in a crisis.
- Allowed to take breaks outside. Adult to monitor for safety but not to engage.
- When given a direction, provide why there is a request.
- Allowed to take a break even when he asks for it inappropriately.

This IEP also included a BIP with an implementation date of October 28, 2019. The BIP included all of the accommodations listed in the IEP as noted previously as supports and strategies. In addition, the following supports and strategies were included:

- When in crisis, give one direction at one time from one person.
- Reduced number of staff that approach him when in crisis.
- Staff can encourage him that he has school and home goals.
- When in crisis, observe from a safe distance.

The IEP dated September 27, 2019 showed an implementation date of September 27, 2019 for special education services. This IEP included the same three accommodations as the October 2, 2018 IEP with an updated implementation date of October 2, 2019. The BIP included in this IEP was the exact same BIP including the same implementation and review dates during the 2018-19 school year from the October 2, 2018 IEP. This BIP required that the student “be given frequent feedback from adults to reinforce appropriate verbalizations with adult attention. He will be afforded the opportunity, when appropriate, to act as a leader or helper in the class so that he may receive appropriate peer attention.” In addition, the BIP required that the student be “redirected by the teacher or para when he uses inappropriate verbalizations.”

The parent’s copy of the September 27, 2019 IEP includes handwritten notes on the BIP reflecting discussions in regards to updating the BIP. The notes state “Will be allowed to take breaks outside; When behaviors occur will receive directions from 1 person only; Not to crowd around him.”

The October 24, 2019 entry on the parent / school contact notes kept by the mother states, “Also obtained IEP and part of behavior plan info was not added! Requested a meeting.” Documentation shows USD #\_\_ provided the parent with a Notice of Meeting dated October 25, 2019 scheduling an IEP team meeting for October 28, 2019.

The IEP amendment dated October 28, 2019 was made to the IEP dated September 27, 2019. This amendment adds all of the accommodations related to behavior included in the September 26, 2019 IEP. It also all of the strategies and supports

contained in the BIP from the September 26, 2019 IEP except “When in crisis, observe from a safe distance”.

The parent was provided with Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent (PWN) on October 28, 2019. The action proposed was described as:

Mom requested an IEP meeting to add additional accommodations as well as additional supports for the Behavior Plan on the IEP. These actions were accepted. Description Additional accommodations of: 1. One direction at one time from one person. 2. Given additional processing time when given a direction even when denying the request. 3. Allowed to take breaks outside. Adult to monitor for safety but not to engage. 4. Allowed to go to a safe location within the building. 5. Allowed to take a break even when he asks for it inappropriately. 6. When given a direction, provide why there is a request. 7. Provide positive engagements. Additional strategies/supports on behavior plan: 1. When in crisis, give one direction at one time from one person. 2. Give additional processing time when given a direction even when denying the request or in crisis. 3. Staff can encourage him that he has school and home goals. 4. Reduced number of staff that approach him when in crisis. 5. When in crisis, observe from a safe distance.

The parents reported they requested but never received a copy of the IEP reflecting the changes made through the amendment process.

Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] reported that the conflicting information contained in the three IEPs was a result of the student’s IEP manager, \_\_\_\_\_, completing the IEP paperwork incorrectly in the computerized IEP system used by USD #\_\_\_\_. Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] stated and documentation shows that the written procedure for amending an IEP in the computerized IEP system was updated in August 2020 and now includes step-by-step directions for IEP managers to follow.

Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] indicated that the IEP dated September 27, 2019 together with the IEP amendment dated October 28, 2019

reflected the IEP team's decisions regarding the student's educational program. She believes the IEP dated September 26, 2019, which includes all of the updated accommodations and the majority of the amendments made to the BIP described in the PWN resulting from the October 28, 2019 IEP team meeting, was the IEP that reflects the decisions made at that IEP team meeting. Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] theorizes that when the IEP case manager incorrectly entered the information from the October 28, 2019 IEP team meeting into the computerized IEP system, the IEP dated September 26, 2019 was created.

Interviews and documentation indicated that the school security staff were involved in five of the ten disciplinary incidents between September 10 and October 31, 2019. Following a change in school building assignment, there were five disciplinary incidents and the school security staff were not involved. Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] stated:

In March of 2020, district leadership and legal counsel determined that professional development emphasizing the use of positive behavioral supports and de-escalation techniques would be mandatory for all school security staff prior to the 2020-21 school year. This targeted professional development was developed as a supplementary enhancement to the annual Non-Violent Crisis Intervention (NCI) trainings that are mandatory for all school security staff.

Documentation shows this enhanced professional development training was provided to school security staff on July 8, July 14, and August 3, 2020. The school security staff involved in the disciplinary incidents and use of ESI with the student during the period of September 11 – October 31, 2019 attended the professional development on July 8, 2020.

Documentation also shows the staff at \_\_\_\_\_ Middle School participated in training on the topic of *Trauma in Schools and How to Respond* on August 7, 2020. This training was provided by the Educational Services and Staff Development Association of Central Kansas (ESSACK).

In addition, these staff participated in NCI de-escalation training with “additional application of skills learned” on August 11, 2020. \_\_\_\_\_, USD #\_\_’s Director of Behavior and Executive Coordinator for Alternative Schools, Special Day Schools and PBIS Programs, facilitated this training.

### **Applicable Regulations and Conclusions**

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

In this case, USD #\_\_ acknowledged the student’s IEP and BIP were not implemented correctly between September 10 and October 31, 2019. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student’s IEP and BIP correctly between September 10 and October 31, 2019.

Federal regulations at 34 C.F.R. 300.320 define the term IEP to be a written statement describing the individualized special education program developed, reviewed, and revised not less than annually by the IEP team in an IEP team meeting. Federal regulations at 34 C.F.R. 300.322(f) require school districts to give the parent a copy of this IEP. Federal regulations at 34 C.F.R. 300.324(a)(6) require that when changes are made to the IEP after the annual IEP Team meeting for a school year by amending the IEP rather than redrafting the entire IEP, the school district must provide the parent a revised copy of the IEP with the amendments incorporated upon the parent’s request.

In this case, USD #\_\_ provided the parent with two versions of the written statement describing the IEP that was reviewed and revised at an IEP team meeting held at the end of September 2019. The IEP dated September 26, 2019 appears to include the majority of the amendments made to the BIP and accommodations agreed upon at the October 28, 2019 IEP Team meeting while the IEP dated September 27, 2019 appears to be an updated copy of the previous IEP dated October 2, 2018.

While no IEP team meeting notes were kept from the annual IEP Team meeting held at the end of September 2019, the handwritten notes on the parent’s draft copy of the September 27, 2019 IEP clearly indicate some discussion was held regarding updating

the BIP. The notes of parent / school contacts also show that the final copy of the September 27, 2019 IEP provided to the parent did not include any of the changes that the parent believed were supposed to be added to the BIP based on the IEP team discussions. This resulted in the parents requesting another IEP Team meeting, which was subsequently held on October 28, 2019.

The documentation and interviews show that the IEP amendment dated October 28, 2019 was made to the IEP dated September 27, 2019. The parents were provided with PWN of the changes made to the accommodations and BIP that were discussed and agreed upon at that meeting. However, the parent requested but did not receive a copy of an IEP that accurately describe the decisions made by the IEP team on October 28, 2019.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to create a written statement accurately describing the individualized special education program developed by the IEP team at IEP team meetings held at the end of September and again on October 28, 2019. In addition, a violation of special education statutes and regulations is substantiated for failing to provide the parent with accurate copies of both the annual and amended IEPs.

### **Corrective Action**

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

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

In this case, USD #\_\_ acknowledges they failed to implement the student's IEP and BIP between September 10 and October 31, 2019.

B. Federal regulations at 34 C.F.R. 300.320 require the district to create a written statement describing the individualized special education program developed by the IEP team. Federal regulations at 34 C.F.R. 300.322(f) that require the district to provide parents with a copy of the IEP. Federal regulations at 34 C.F.R. 300.324(a)(6) require that when changes are made to the IEP after the annual IEP Team meeting for a school year by amending the IEP rather than redrafting the entire IEP, the school district must provide the parent a revised copy of the IEP with the amendments incorporated upon the parent's request.

In this case, USD #\_\_\_ provided the parent with two versions of the written statement describing the IEP that was developed, reviewed and revised at an IEP team meeting held at the end of September 2019 and neither accurately reflect the decisions made by the IEP team at the September 2019 IEP team meeting. In addition, USD #\_\_\_ did not provide the parents with the requested copy of the amended IEP that accurately describe the decisions made by the IEP team on October 28, 2019.

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

1. Within 15 calendar days of the date of this report, USD #\_\_\_ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) that require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.
  - b. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.320 that require school districts to create a written statement describing the individualized special education program developed by the IEP team, federal regulations at 34 C.F.R. 300.322(f) that require the district to provide parents with a copy of an IEP that was developed by the IEP team at the

annual IEP team meeting, and federal regulations at 34 C.F.R. 300.324(a)(6) that require that when changes are made to the IEP after the annual IEP Team meeting for a school year by amending the IEP rather than redrafting the entire IEP, the school district must provide the parent a revised copy of the IEP with the amendments incorporated upon the parent's request..

2. No later than 30 calendar days following the first day of the 2020-21 school year, USD #\_\_ will reconvene the IEP team, including the parents, to review and revise the student's IEP and ensure that it accurately describes the special education program developed by the IEP team. USD #\_\_ will provide the parent and KSDE Special Education and Title Services (SETS) with a copy of this IEP within 10 business days following the IEP team meeting.
3. USD #\_\_ shall designate a person in a special education administrative position within the district to review and approve any annual IEPs created by Ms. \_\_\_\_\_ [the student's IEP case manager] prior providing any copies of those annual IEPs to parents. This review, at a minimum, will confirm that the annual IEP accurately reflects the special education program developed by the IEP teams at all annual IEP team meetings. No later than 30 calendar days following the first day of the 2020-21 school year, USD #\_\_ shall provide SETS with the name and title of the person assigned to supervise Ms. \_\_\_\_\_ [the student's IEP case manager] in the aforementioned capacity. No later than 10 calendar days following the last day of the 2020-21 school year, the person assigned to supervise Ms. \_\_\_\_\_ [the student's IEP case manager] shall provide SETS with a signed statement certifying that all aforementioned annual IEPs were reviewed and approved prior to providing copies to parents.
4. USD #\_\_ has already reviewed and revised the district-wide procedures for amending the IEP in the district's computerized IEP system. No later than 30 calendar days following the first day of the 2020-21 school year, USD #\_\_ will share this new procedure with all IEP managers within the district and provide SETS with documentation of when and with whom the procedure was shared.
5. USD #\_\_ is in the process of developing a district-wide procedure "to ensure that school security staff are knowledgeable of students' needs and relevant

IEP/BIP details as they are responsible for consistent implementation of such plans in collaboration with other school staff.” No later than 30 calendar days following the first day of the 2020-21 school year, USD #\_\_ will provide a copy of this new procedure to SETS for review and approval. No later than 10 school days after SETS approves this new procedure, USD #\_\_ will share the approved procedure with all school security staff, special education teachers, and all building level and special education administrators. No later than 10 school days after SETS approves this new procedure, USD #\_\_ will provide SETS with documentation of when and with whom the procedure was shared.

6. Further, USD # \_\_ shall, within 10 calendar days of the date of this report, submit to Special Education and Title Services one of the following:
  - a) a statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612.

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. The notice of appeal must be delivered within 10 calendar days from the date of this report.

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

# *Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON OCTOBER 6, 2020

DATE OF REPORT: NOVEMBER 6, 2020

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

**Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone on October 12, 2020 with \_\_\_\_\_, Director of Special Education for USD #\_\_. The investigator spoke by telephone with the student's mother on October 12, 2020 and communicated via email on October 14, 15, and 30, 2020. On November 6, 2020, the investigator spoke by telephone with Rebekah Varvel, Assistant Director of Special Education for the district.

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

- IEP for the student dated March 5, 2020
- Form entitled \_\_\_\_\_ Restart – Families FAQ revised on August 5, 2020
- Letter dated August 22, 2020 from the principal to families with students enrolled in the school
- Form entitled \_\_\_\_\_ Restart Next Week (September 9-11)
- Form entitled \_\_\_\_\_ Restart Week of September 14-18

- Email dated September 8, 2020 from the case manager to the parent with attached letter to parents from the principal
- Email dated October 1, 2020 from the student's case manager to the parent
- Email dated October 1, 2020 from the parent to the student's case manager
- Email dated October 5, 2020 from the student's case manager to the parent
- Prior Written Notice dated October 5, 2020
- Email dated October 6, 2020 from the parent to the general education teacher
- Email exchange dated October 5-6, 2020 between the case manager and the parent
- Service Notes developed by the student's special education teacher covering the period of September 30 through October 15, 2020
- Attendance Logs for Specialized Instruction for behavior covering the period of September 9 through October 15, 2020
- Attendance Logs for Specialized Instruction in reading covering the period of September 9 through October 15, 2020
- Prior Written Notice for Change in Services/Placement dated October 21, 2020
- 2020 KSDE Summer Leadership Conference form entitled Questions, Answers and Comments
- Screen shot showing the student's schedule for remote learning days attached to his daily planner
- Samples of visual supports provided by the district
- Schedules for three district paraeducators
- Visual schedule for October 5, 2020
- Blank example of a daily behavior sheet for the student
- Completed daily behavior sheets for October 13, 15, 16, 19, 26, 27, and 29, 2020
- Attendance record for the student reflecting absences during the period of September 14 through October 8, 2020
- Online Academic Calendar for USD #\_\_ for the 2020-21 school year

- Online Board Policies for the district
- Online Parent/Student Handbook for the student's school
- Grade card for the student for the 2019-20 School year
- Fourth Quarter Elementary Continuous Learning Report Card for the student for the 2019-20 school year
- Grade card for the student for the first quarter of the 2020-21 school year
- AimsWeb testing report covering the period of February 24 through October 26, 2020
- Progress Reports covering the period of March 2019 through October 2020

### Background Information

This investigation involves a 10-year-old student who is enrolled in fifth grade. He has been given multiple diagnoses including Post Traumatic Stress Syndrome (PTSD), Attention Deficit Hyperactivity Disorder (ADHD), Anxiety, and Depression. He takes several medications including \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

According to his March 5, 2020 IEP, the student's math, written language, and communication skills are adequate, but he is reading at a second-grade level. The IEP also notes that the student "is distracted by other students (and visual stimuli), has difficulty sitting still, rushes through tasks, makes careless mistakes, and has difficulty following directions."

The COVID-19 Pandemic has led the district to explore a number of options to allow students to access and participate in the general education curriculum. On August 5, 2020, the parents of all students in the district were sent information regarding the district's overall plan for the delivery of instruction to students in response to restrictions resulting from the Pandemic. Parents were asked to select, by no later than August 13, 2020, one of three instructional models – In-Person, Rigorous Remote, or K-8 Virtual School – for the instruction of their child. Families that chose to begin the year with the In-Person option for their child were allowed to move to the Rigorous Remote model later in the

semester if they subsequently determined that change was in the best interest of the student. Because the curriculum delivered under the Virtual School model differed from the curriculum used in the other models, parents were cautioned that a subsequent change to In-Person learning at the start of the second semester would be challenging.

The principal of the student's school sent a letter to families on August 22, 2020 stating that the school day would run from "7:50 – 3:00" and provided additional information regarding drop-off and entrance procedures. According to the letter, fifth grade students would:

- Spend the majority of their day in their classroom.
- Breakfast (for those who eat at school) and lunch will be eaten in the classroom.
- Attend only one exploratory class a day (this will rotate quarterly).
- Have 20 minutes of recess.
- Masks must be worn at all times – except when eating/drinking, PE and recess.
- Hand washing/sanitizing will occur every hour.
- Desktops/surface areas will be cleaned during transitions.
- Students can bring plastic water bottles from home.
- Students desks in classroom will all face in one direction.
- Students will be spaced 6 feet apart whenever possible.
- Custodial/maintenance will increase cleaning throughout the building, with extra attention to touch-points and high contact areas.
- Eating areas will be sanitized between lunch shifts.
- Playground equipment will be sanitized by maintenance crews before and after school.

In-Person classes began on August 24, 2020. For the first two weeks (August 24 through September 4, 2020), all district students were divided into two groups based upon the first letter of their last names. On Mondays and Wednesdays, students whose last names began with letters A-K attended in-person classes. Students whose last names began with letters L-Z attended in-person classes on Tuesdays and Thursdays. No in-person classes were held on Fridays during

this period. No Zoom classes were provided during those times students were not attending in-person classes.

Students who attended in-person classes for the first two weeks of the school year were given the option of moving to the Rigorous Remote model after September 4, 2020. Instruction under the Rigorous Remote model was to begin on September 9, 2020.

A document provided by the district entitled “\_\_\_\_\_ Restart – Families FAQ (last revised August 5, 2020) contained the following question/answer:

Q. What about special needs students and IEP service requirements?

A. Our district will continue to offer the same levels of support for our learners who need extra time, specific interventions, or special education services. Regardless of which learning model your family chooses, there will be opportunities for personalized instruction and assistance as needed.

Students who receive special education services and plan to attend On Site/In-Person learning, will continue to receive their special education services as outlined in the student’s IEP. Students who receive special education services whose parent/guardian chooses Rigorous Remote learning will have the option to reconvene IEP teams to make further determinations if necessary.

The student’s family opted to have the student participate in on-site, in-person learning for the first two weeks of the school year.

Beginning the week of September 7, 2020, the district moved to a “hybrid” approach to general education instruction. All students would attend in-person classes one day during that week based upon the alphabet schedule previously described. All students would participate in two days of remote learning sessions. Information regarding this change was provided to parents via email, auto-dialers, and social media.

According to an informational form entitled “\_\_\_\_\_ Restart Next Week (September 9-11)”, in-person students would alternate between “learning at home [short-term hybrid] and learning at school...” Students attended in-person classes on September 9 and 10, 2020. Students with last names A-K (Group A) attended in-person on Wednesday (September 9, 2020) and those with last names L-Z (Group B) attended in-person on Thursday (September 10, 2020). Remote learning was scheduled for the A-K group on Thursday and Friday and for the L-Z group on Wednesday and Friday.

According to the schedule for the week of September 14-18, 2020, Group A (A-K) attended in-person classes on Monday and Thursday and remote learning classes on Tuesday, Wednesday, and Friday. Group B (L-Z) had in-person classes on Tuesday and Friday and remote learning classes on Monday, Wednesday, and Thursday.

The student’s mother is a special education teacher in another school district and has been unavailable to supervise the student and his sister during their remote sessions. According to the parent, the student generally gets up before she leaves for work, but often returns to bed after she leaves home.

Students in the district continued on the hybrid schedule until October 26, 2020. At that point, those students who had been operating under the hybrid schedule were transitioned to full time in-person instruction.

### Issues

In her complaint, the parent alleges that the district did not develop strategies to address service delivery to the student under COVID-19 restrictions and failed to provide the student with the special education services specified in his IEP on days when general education instruction was provided to the student via Zoom. The parent further alleges the district has, during Zoom-based remote learning sessions, failed to provide the student with accommodations and/modifications that are specified in his IEP.

### Service Delivery

**Applicable Statutes and Regulations for Service Delivery:**

Federal regulations, at 34 C.F.R. 300.101(a), require that a student who has been determined eligible for, and in need of, special education services, and whose parents have provided written consent for the provision of those services, be provided with a FAPE (Free Appropriate Public Education). 34 C.F.R. 300.17(d) states that FAPE means, in part, special education and related services provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324.

In *Andrew F. v. Douglas County School District*, the Supreme Court addressed the concept of "FAPE" noting that the progress that a student should expect to make under his or her IEP should be "more than "de minimis" or "minimal." According to the ruling, the educational program reflected in a student's IEP should be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

The Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act require school districts to provide special education and related services to students with exceptionalities. Special education requirements are set forth in federal and state statutes, which were written and enacted by the United States Congress and the Kansas Legislature. Neither the Kansas State Department of Education (KSDE) nor individual school districts have the authority to alter or waive these statutory requirements in response to the COVID-19 Pandemic.

**Parent's Position:**

The parent asserts that the district has failed in its obligation to provide the student with a FAPE. Specifically, the parent alleges that the student was not consistently provided with special education services on those days when the student was receiving his education via the district's remote option. It is the position of the parent that the district failed to notify her that the student was not routinely logging in to receive those special education services. The parent also contends that the student did not receive the paraeducator support called for in his March 5, 2020 IEP during his Zoom classes.

**District's Position:**

It is the position of the district that remote learning sessions with special educators were scheduled for the student during the period of September 9 through October 7, 2020, and it was not the responsibility of the district to ensure that the student logged in for those sessions.

The district stipulates that there has been insufficient communication with the parent regarding the student's lack of participation in the remote learning environment and has worked to remedy that situation.

With regard to paraeducator support, it is the position of the district that while no support was provided to the student during the first two weeks of the school year, paraeducators have subsequently been available to provide the student 60 minutes of support in the general education setting on a daily basis.

#### **Investigative Findings for Service Delivery:**

The student's March 5, 2020 IEP states that the student was to receive

- 30 minutes, 5 days every week of direct special education services in the regular education classroom for reading in order to afford the student instructional support so that he could "make growth and access the general education curriculum and needed accommodations;"
- 45 minutes, 5 days every week of direct special education services outside the regular education classroom in the area of reading because the student "needs specialized reading instruction to make progress with his reading deficits and make progress with the general education curriculum;"
- 30 minutes, 5 days every week of direct services in the regular education classroom in the area of behavior because the student required "behavioral support...in order to access accommodations such as breaks, and academic support such as in reading;" and
- 20 minutes, 5 days every week of special education services outside the regular education classroom in the area of behavior because the student "benefits from triaging in the morning and

afternoon and benefits from direct social skills instruction to practice using appropriate social skills.”

Prior to the filing of this complaint on October 7, 2020, the district had not proposed any changes to the student’s March 5, 2020 IEP.

The district stipulates that no special education services were provided to the student during the first two weeks of the school year.

According to the student’s case manager, she stapled a copy of the student’s anticipated remote learning schedule to the student’s planner on September 1, 2020. That chart was entitled “Class Zoom times for remote days.” The chart included a listing of services – not all of which the student would actually receive – as well as blocks for “Specials” and “General Education.” Columns reflected the days of the week. Times when the student was to “Zoom” for general education (8:00 AM to 2:45 PM on Monday, Wednesday, and Friday) were reflected in the schedule. Times for “Reading Support” and “Social Skills” were also shown on Monday, Wednesday, and Friday. Reading support via Zoom was scheduled from 9:45 to 10:30 AM on designated days, and social skills support was scheduled on those same days from 9:00 to 9:30 AM.

On September 8, 2020, the student’s case manager sent an email to the parent noting that the “team will continue to offer sped services for your child. Please note that any day your child is not in person...they need to zoom in during these times.” The email outlined remote learning expectations and guidelines. According to the email, the student was to receive reading support with the case manager from 9:45 to 10:25 and social skills group support with another special education service provider from 9:00 to 9:30. Passwords, URLs, and meeting ID numbers were provided. According to the email, Paraprofessional support would be available from 7:50 to 8:20 AM and from 2:30 to 3:00 PM daily. Paraprofessional support would be available on Wednesdays from 8:00 AM until noon and from 12:30 to 3:00 PM. Links for paraeducators were including in the email. According to the case manager, “paras will be available [on Friday, September 11, 2020] from 8:00 am – 3:00 pm using their links. Starting on Wednesday 9/16/20 and every Wednesday after that, paras will be available

from 8:00 am – 3:00 pm. Paras will be unavailable on Wednesdays from 12:00 pm – 12:30 pm for lunch.”

Attached to the case manager’s September 8, 2020 email was a letter to parents and guardians from the building principal. In her letter, the principal provided some “do’s and don’ts” including:

- Asking parents to make sure that their children check their email daily;
- that they ensure that their children know when they are supposed to be meeting with a special education teacher or general education teacher;
- that they make sure that their child is “present, both physically and mentally in their online classes;” and
- that they ask for help if needed.

The principal stated that students would “always receive the same services at the same time” on remote learning days.

On October 1, 2020, the student’s case manager made her initial direct contact with the parent via an email sent to the parent in response to a voicemail from the parent to another special education teacher. The case manager informed the parent that she would be the case manager for the student and his sister and would be providing reading services to the student. According to the email, another special educator would be providing behavior services to the student.

The parent responded to the case manager via email on October 1, 2020 with questions regarding the student’s educational program. The parent asked:

- how many times the student had participated in reading and social skills through Zoom;
- the number of times the student had been pulled for services on his in-person school days; and
- whether the student saw the other special education teacher for social skills and reading.

The parent contacted the district and requested that the student be provided compensatory services to make up for the district’s failure to provide special

education services on several remote learning days. On October 5, 2020, the district provided the parent with prior written notice refusing the parent's request to provide compensatory services to make up for the times that special education services were not provided due to the student's failure to log on to Zoom meetings. The district's refusal was based upon the fact that the services were available "at the agreed upon time."

An attendance log provided by the student's special education teacher reflects the student's participation in direct special education sessions designed to address the student's behavior needs. The log covers the period of September 9 through October 14, 2020. During that period, the log shows that the student participated in every session conducted on the student's in-person school days. The student was absent for every session conducted on the student's remote learning days during the first two weeks covered by the log. The student missed two sessions held on remote learning days during the week of September 21, 2020. He missed one session held on a remote learning day during the week of September 28, 2020. Two more remote learning day sessions were missed during the week of October 5, 2020. In total, the student missed 10 of 16 behavior related sessions (63%) held on remote learning days during the period covered by the log.

Case notes provided by the district reflect direct behavior related services provided to the student by the special education teacher beginning on September 30, 2020. Between that date and October 15, 2020, the student participated in 8 of 12 scheduled sessions. Of the 8 sessions that were scheduled on remote learning days during that period, the student participated in 5, although he did not enter the Zoom meeting on time in all of those sessions. When the sessions scheduled on in-person learning days are included in the count, the student participated in a total of 8 of 12 sessions (67%).

It should be noted that the reporting of the student's attendance for behavior related sessions as seen on the log and the case notes is not completely consistent. In three instances, case notes suggest that the student was present for at least some portion of a session that the log counted as a student absence.

In both records, however, the pattern of student absences on remote learning days is consistent.

An attendance log provided by the student's case manager reflects the student's participation in special education reading sessions. These logs cover the period of September 9 through October 14, 2020. During that time, the student participated in every session scheduled on the student's in-person days. However, he missed every remote session day for the first three weeks covered by the log, participated in one remote session during the week of September 28, 2020, and participated in both remote sessions reported between October 12 and 14, 2020. In total, the student missed 12 of 17 sessions (71%) conducted when the student was operating under the remote learning model.

According to the district's Board Policies, under section JBD,

"When a student is absent from school, an attempt shall be made to contact the parent or guardian to determine the reason for the absence. The principal has been designated to determine the acceptability and validity of excuses presented by the parent(s) or the student. Procedures for notifying the parents on the day of a student's absence shall be published in the student handbook...An absence of two or more hours in any school day shall be considered an absence for a significant part of the school day."

District board policies address truancy under section JBE as

...any three consecutive unexcused absences, any five unexcused absences in a semester, or seven unexcused absences in a school year, whichever comes first...Students who are absent without a valid excuse for a significant part of any school day shall be considered truant.

Prior to reporting to either the Department for Children and Families (if the student is under 13) or the county or district attorney (if the student is 13 or more years of age but less than 18 years of age), a letter shall be sent to the student's parent(s) or guardian

notifying them that the student's failure to attend school without a valid excuse shall result in the student being reported truant.

On page 7, the Parent/Student Handbook for the student's school includes the following information regarding attendance:

For students to be successful in school, consistent daily attendance is vitally important. Whenever a student is absent from class, a valuable part of the student's education is missed. Attendance in school is the legal responsibility of the student and the student's parents/guardians. The school's responsibility is to provide instruction and to inform parents/ guardians of absences from class.

Students who arrive at school more than 30 minutes after the start of the school day will be considered absent for the morning, and those who arrive at school 30 minutes after the start of the afternoon session will be considered absent for the afternoon. Attendance is taken in the morning and in the afternoon at the elementary level, and every class period at the middle school level. For the purposes of this policy, an absence means that the student is absent from school either for a half-day or a full-day.

An attendance letter will be sent to the parents of students with 3 days of unexcused absences in a row, 5 days of unexcused absences in a semester, or 7 days of unexcused absences in a year (absences for reasons other than absences substantiated by a doctor's statement or caused by emergency family situations or other extenuating circumstances known to the principal). Additionally, a report will be made to the County Attorney Office.

On September 30, 2020, the parent sent an email to the members of the district's school board expressing her frustration regarding the system set up by the district to provide educational services to students under limitations imposed by COVID-19. The parent wrote that she had not heard from either of

the student's special education teachers, but had learned from the student's sister that the student was not participating in all Zoom classes and was not being pulled for services during in-person school days. The parent wrote that, because of her work, she was not able to be present to monitor what her children were doing during the day and noted that the student was not "able to monitor himself and complete his work."

In an email dated October 5, 2020, the student's Case Manager notified the parent that the student did not participate in that day's Zoom reading session scheduled for 9:45 to 10:30 a.m. The Case Manager stated that the student had attended his social skills class that day.

According to the district, the auto-dialer system used to notify parents when a student's unexcused absence is entered into the system was not working at the beginning of the 2020-21 school year. Though the district was aware that the student had an unexcused absence on September 24, 2020, no call was made to the parent. The building secretary placed a call to the parent on September 28, 2020 and left a voicemail stating that the student had not been in attendance. An auto-dialer message was sent to the parent for the first time on October 8, 2020 notifying her of the student's absence that day. By that date, the student had, according to service provider and building records, been absent for all or part of more than 10 days.

A meeting was held on October 15, 2020. In attendance, according to the district, were the student's case manager, the special education teacher, the student's general education teacher, principal, and a special education coordinator. The parent reports that the school psychologist was also present. At the meeting, the district offered to provide compensatory services to address an acknowledged failure to provide special education services to the student during the first two weeks of the school year.

On October 21, 2020, the district provided the parent with prior written notice of the district's proposal to provide the following compensatory services to make up for special education services the district did not provide between August 24 and September 4, 2020:

- 180 minutes of specialized instruction for reading
- 80 minutes of specialized instruction for behavior
- 120 minutes of instructional support in reading
- 120 minutes of instructional support for behavior

The parent declined to accept the district's proposal because it did not include compensatory services that were missed when the student did not log into Zoom for remote learning sessions.

### **Summary and Conclusions for Service Delivery:**

The student was present for all of his in-person sessions between the start of the school year on August 24, 2020 and the time of the filing of this complaint on October 7, 2020. However, records provided by the district confirm that the student was not present for the majority of his remote classes during that same period.

The district stipulates that the student received no special education services during the first two weeks of the school year and has offered compensatory services for those missed services. The district acknowledges that the student did not participate in direct instruction opportunities available via Zoom on days when the student was working from home under the remote learning model and recognizes that communication with the parent regarding the student's absences was insufficient. However, the district believes that while it is responsible for providing compensatory services for the first two weeks of the school year, it is not responsible for the provision of compensatory services to address any lack of service that resulted from the student's failure to participate in sessions that were scheduled and available.

The district does not dispute that communication with the parent regarding the student's absences/truancy was inadequate. The number of unexcused absences accumulated by the student exceeded district standards for the reporting of truancy, yet the district provided evidence to show that the parent was only given notice of 3 of the student's many absences.

At no time between the start of the school year and the time of the filing of this complaint on October 7, 2020 did the district convene the student's IEP team to discuss the impact of the student's absences or to develop strategies to improve the student's attendance.

The question, then, is what responsibility, if any, did the district have to ensure that the student received the special education services called for in his March 5, 2020 IEP on the days when his general education curriculum and special education services were being delivered remotely, and what obligation did the district have to specifically address the student's lack of participation in a specific and targeted way?

Case law and administrative decisions provide some guidance on this issue. For example:

- For a student who is already eligible under the IDEA and whose truancy adversely affects learning, the duty to address the absences in the IEP may exist regardless of whether they stem from a disability. The IDEA regulations at 34 CFR 300.324 (a)(2)(i) require a district, in the case of a child whose behavior impedes the child's learning or that of others, to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See Huron Sch. Dist.*, 68 IDELR 178 (SEA SD 2016).
- A behavioral intervention plan that included goals and strategies relating to attendance and strategies to address a student's truancy was proper under the IDEA. *See Garris v. District of Columbia*, 68 IDELR 194 (D.D.C. 2016).
- In order to properly address the student's absenteeism in the IEP, districts may need to reevaluate the student. *West Lyon Cmty. Sch. Dist.*, 48 IDELR 232 (SEA IA 2007) (concluding that the student's frequent absences should have prompted the district to conduct a psychological evaluation and revise the student's IEP).

- A district's failure to determine the cause of an IDEA-eligible student's truancy amounted to a deprivation of FAPE (*See Urban Pathways Charter Sch.*, 112 LRP 27526 (SEA PA 05/01/12)).
- In *Pocono Mountain School District*, 12 ECLPR 14 (SEA PA 2014), a district that addressed a kindergartner's absenteeism "early and often" established that it did not deny the child FAPE. A Pennsylvania hearing officer noted that the district responded to the student's sporadic attendance in numerous ways, including by assigning an individual to monitor the student for seizure activity, developing a seizure action plan, and placing the student in a small-group setting.
- In *Downingtown Area School District*, 113 LRP 34703 (SEA PA 08/11/13), the parents alleged that the district denied the student FAPE because it referred them to a truancy judge without addressing the truancy through interventions. In rejecting the parents' claim, the impartial hearing officer noted that the district took a variety of steps to secure the student's attendance long before it filed truancy charges, including by developing multiple attendance plans, providing small-group therapy, and having the parents call the assistant principal when the student was refusing to leave home. Only after its varied efforts failed and the parents' cooperation waned did the district file a truancy petition.
- If a student is consistently absent and his truancy is affecting his ability to receive the services in his IEP, the district should take steps to address the issue. Failing to do so may amount to an IEP implementation failure. *Joaquin v. Friendship Pub. Charter Sch.*, 66 IDELR 64 (D.D.C. 2015) (concluding that although a teenager's sporadic attendance impeded a charter school's ability to implement his IEP, the school was responsible for the student's failure to receive postsecondary transition services).
- A district's efforts to reschedule services and classes for a student who was repeatedly absent and uncooperative with staff satisfied its duty to offer the student FAPE (*See Forest Grove Sch. Dist. #15*, 65 IDELR 278 (SEA OR 2015)).

- A homeless student's repeated absences did not excuse the district's failure to provide him the services set forth in his IEP (*See Hill v. District of Columbia*, 68 IDELR 133 (D.D.C. 2016)).

Additionally, the Office of Special Education Programs (OSEP) within the United States Department of Education, writes and enforces the federal regulations that implement the IDEA. When asked to respond to a letter questioning the necessity to schedule make-up sessions when services were missed due to a child's absence from school, cancellation for a class or school activity, or the absence of the service provider (*See Letter to Clarke*, March 8, 2007), OSEP opined that districts "are required to ensure that all children with disabilities have available to them FAPE [free appropriate public education], consistent with the child's individualized education program [IEP] [see 34 CFR §300.101]. [OSEP encourages] public agencies to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure continued provision of FAPE in order for the child to continue to progress and meet the annual goals of his or her IEP. Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis."

The district's failure to alert the parent to the student's repeated absences during his remote learning sessions and to take any action to address those absences (including the scheduling of an IEP team meeting) resulted in the student missing not only the opportunity to receive special education and related services, but also his opportunity to participate in the general education curriculum.

During the first three quarters of his fourth-grade year (the 2019-20 school year), the student earned grades of "2" – "Progressing Towards Standard" – in all areas of reading. He was meeting standards in some academic areas and failed to meet standards only with regard to "Works Independently." First quarter grades for the 2020-21 school year indicate that while the student is meeting standards or progressing towards the standard in most areas, some areas

related to “Reading Literature” and “Reading Foundation Skills” were “not met.” Specifically, the student failed to meet the standard with regard to the following:

- Reads grade-level text with purpose to support comprehension
- Accurately identifies themes
- Accurately summarizes

Reports of the student’s progress toward attainment of IEP goals were provided by the district for the period of March 2019 through October 2020. In December 2018, the district set an oral reading fluency goal for the student to correctly read 66 words per minute on curriculum-based measure by January 2020, beginning with a baseline level of 47 correct words per minute on first grade level probes. In October 2019, the student’s curriculum-based monitoring level was advanced from first to second grade. By December 2019, the student was correctly reading up to 61 words per minute on second grade level probes. At the December 18, 2019 annual IEP Team meeting, the team revised the student’s goal to advance the student to 80 correct words read per minute on oral reading probes.

A triennial reevaluation of the student was conducted in March 2020, and a new IEP was developed. For reasons that are unclear to the investigator, the new baseline level for the student with regard to oral reading fluency was 49 words correct on a second-grade level curriculum-based measure. A goal was established of 77 words read correctly per minute by March 2021.

The student’s progress was monitored on October 22, 2020. At that time, the student was reading second grade level curriculum-based material aloud 61 words per minute, the same oral reading level reported on a progress report in December 2019.

AimsWeb testing shows that improvements are needed in order for the student to achieve his reading goal by the end of February 2021. According to the report, the student started with a baseline score on February 24, 2020, of 49, improving to a score of 67 by March 2, 2020. When retested on September 28,

2020, the student's score had dropped to 57. He progressed to a score of 58 by October 5, 2020, to 63 by October 12, 2020 and remained at 63 when tested on October 26, 2020. As stated on an October 20, 2020 report of the student's performance on AimsWeb testing,

[The student's] current rate of improvement [Trend ROI] is 0.09 points per week on Oral Reading Fluency. To reach the goal score of 77 by 02/22/21, [the student] will need to improve at an average rate of 0.54 points per week.

There is evidence to suggest that the district's failure to provide any special education services during the first two weeks of the 2020-21 school year and the failure to address the student's repeated absence from remote learning sessions resulted in a loss of FAPE for the student with regard to the development of his reading skills. Records provided by the district show a drop in the student's reading grades. Additionally, IEP progress reports show that the student's oral reading skills improved during the 2019-20 school year, but he is currently performing at the same oral reading level he had previously demonstrated in December of 2019. Under these circumstances, a violation of special education statutes and regulations is substantiated on this aspect of this issue.

### Accommodations/Modifications

#### **Applicable Statutes and Regulations for Accommodations/Modifications:**

Federal regulations, at 34 C.F.R. 300.323(c)(2), require the school district to ensure that special education and related services are made available to the student in accordance with the student's IEP.

#### **Parent's Position:**

According to the parent, the district provided the student with the accommodations/modifications specified in his March 5, 2020 IEP while he attended in-person classes, but did not make a number of those accommodations available to the student during remote learning sessions. Specifically, the parent asserts that the district failed to provide the student with:

- the opportunity for grade-level text to be read to him,
- a visual schedule,
- AM/PM triage,
- a daily behavior sheet,
- visual supports for writing tasks,
- modified writing paper, and
- structured practice for the teaching of replacement behaviors.

#### **District's Position:**

The district contends that all accommodations/modifications identified by the parent have been provided to the student.

#### **Investigative Findings for Grade Level Text Read Aloud:**

Under the section of the student's March 5, 2020 IEP entitled "Accommodations/Modifications/Supplementary Aids and Services," is the following statement:

Grade level text and test questions and answers may be read orally to [the student] in a quiet, small group setting or alternate location.

This accommodation is to be provided "when [the student is] expected to read grade level text in order to reduce frustrations and distractions...across all school settings throughout the duration of the test or assignment [in the] Gen Ed Classroom."

According to the district, the classroom teacher reads all instructional materials aloud to the class as a whole. Paraeducators are also available to read materials to students. Further, the Chromebook applications used in classroom instruction (Ed Puzzle, Epic, Read Works, and Text to Speech) read all text to students. All students have been taught how to access these applications and to use them for educational tasks.

#### **Summary and Conclusions for Grade Level Text Read Aloud:**

The district has developed a number of strategies to facilitate the reading aloud of grade level materials to the student. A violation of special education statutes and regulations is not substantiated on this aspect of this issue.

### Investigative Findings for Visual Schedule:

The "FBA/BIP" section of the student's March 5, 2020 IEP includes a section entitled "Antecedent Strategies [to minimize the circumstances in which behavior tends to occur]." The third item in that section is "Visual schedules on his desk." The "Reinforcement" portion of the FBA/BIP section also includes the following statement:

"[The student] will be provided with a visual schedule for *his*[emphasis added] day."

The district provided the investigator with a sample of the daily schedule developed by the student's classroom teacher. The schedule is not individualized for this student and does not reflect when the student would participate in his special education services.

Additionally, the district provided a screen shot of a visual schedule which was developed by the student and the student's case manager and was then stapled to the student's daily planner. That document reflects the student's schedule for remote days. It notes that the student is to participate in general education via Zoom from 8:00 AM to 2:45 PM on Monday, Wednesday, and Thursday with no further break-down of the school day. According to the schedule, the student was to receive social skills support via Zoom from 9:00 to 9:30 AM on Monday, Wednesday, and Thursday and reading support via Zoom from 9:45 to 10:30 AM on the same three days.

According to the parent, the district, in a meeting on October 15, 2020 agreed to provide the parent with an individual schedule for the student. In an email to the investigator on October 30, 2020, the parent reported that she has not yet received an individual schedule for the student although the whole-class schedule posted on the board in the classroom now reflects the times when individual students leave the room for special education services.

### Summary and Conclusions for Visual Schedule:

The district provided no evidence to show that the student was provided an individualized schedule to reflect his activities for an in-person school day. The

schedule developed by the special education teacher and the student showed those times when the student was to participate in special education services, but it did not reflect in any detail what general education activities the student was to engage in other than a broad statement that the student would be in general education from 8:00 AM to 2:45 PM. Conversely, the daily schedule developed by the classroom teacher did not reflect the student's participation in special education services.

Because the district failed to develop a visual schedule designed to specifically address *the student's* daily activities for both in-person and remote learning sessions, a violation of special education statutes and regulations is substantiated on this issue.

#### **Investigative Findings for AM/PM Triage:**

The Antecedent Strategies portion of the FBA/BIP section of the student's March 5, 2020 IEP includes, under item 4, "Morning triage and afternoon triage." The "Reinforcement" portion of the FBA/BIP section also includes, at item six, the following statement:

"Triage at the beginning and end of the day to process and also triage after incidents as necessary. He may draw a visual if necessary."

The district contends that the student receives his morning triage from a paraeducator from 7:50 to 8:15 AM and receives his afternoon triage from his classroom teacher from 2:45 to 3:00 PM. In support of this assertion, the district provided the investigator with a copy of the daily schedule for three paraeducators and a sample daily visual schedule for October 5, 2020. As noted above, the district also provided the investigator with a daily schedule for the student for remote learning days. None of these documents reflect specific times for triage with this student.

The district also provided a student service time report purporting to show dates and time that the student received triage support. However, for the majority of the dates shown on the report, the district had considered the

student absent as did case notes and service records from special education service providers.

### Summary and Conclusions for AM/PM Triage:

While evidence was provided to show that staff members were *available* to provide morning and afternoon triage with the student, the evidence offered to document that these triage sessions actually took place was not consistent with other data provided by the district. Under these circumstances, a violation of special education statutes and regulations is substantiated on this issue.

### **Investigative Findings for Daily Behavior Sheet:**

The second item of the “Reinforcement” portion of the FBA/BIP section of the student’s March 5, 2020 IEP states:

[The student] will be provided with a daily behavior chart. This will be used as a visual reminder of expectations and consequences. Daily data collection related to goal: Following instructions the first time given.

The district initially provided a copy of a blank daily behavior sheet for the student and subsequently provided seven daily behavior sheets for dates beginning October 13, 2020. According to the district, copies of the student’s behavior sheets were not being retained by the district until this complaint was filed on October 7, 2020.

The district has provided daily behavior sheets for October 13, 15, 16, 19, 26, 27, and 29, 2020. The district provided the investigator with a Progress Monitoring Graph covering dates between September 8 and October 29, 2020 reflecting 100% compliance on all but one of 22 data days, 9 of which fell within the period between the start of the school year and October 7, 2020. All but two of these data days were in-person session days. Data is recorded for September 11, 2020, a remote learning day when both special education service providers indicated the student was absent. Data was also recorded for September 8,

2020, a date when, according to other information provided by the district, the student was not in school.

In an email to the investigator dated October 30, 2020, the parent stated that while she is now receiving some behavior data sheets, the district is not sending these sheets home on a daily basis.

### Summary and Conclusions for Daily Behavior Sheet:

No evidence was provided by the district to show that behavior sheets were being completed on a daily basis for the student prior to the date of the filing of this complaint. Further, evidence provided by the district indicates that behavior data has been collected on the student's in-person school days, but there is no evidence to show that behavior data was collected on the student's remote learning days since the student was generally absent on those days.

Documents provided by the district show that behavior sheets were completed between October 7 and October 29, 2020, but not daily. Because the district has failed to consistently provide the student with a daily behavior chart, to be used as a visual reminder of expectations and consequences, to support the student in reaching the goal of the student following instructions the first time given since the beginning of the 2020-21 school year, a violation of special education statutes and regulations is substantiated on this aspect of this issue.

### **Investigative Findings for Visual Supports for Writing Tasks and Modified Writing Paper:**

The "Accommodations/Modifications/Supplementary Aids and Services" section of the student's March 5, 2020 IEP includes the following statement:

"Visual supports for writing tasks [writing checklist, reminders to check his written work, graphic organizers, bold lines to write on, etc]."

According to the student's IEP, this accommodation is to be made available to the student in all settings throughout the school day during writing tasks.

The district presented the investigator with examples of visual supports provided to the student, but none were specifically related to writing tasks.

By report of the district, modified writing paper has not been provided to the student since the beginning of the 2020-21 school year because no writing assignments have required the student to produce a hand-written document. All students are currently completing their writing assignments on their Chromebooks. During in-person sessions, a paraeducator scribes what the student wants to say on paper and the student then types what was written into his Chromebook. During remote sessions, the student has access to Speech-to-Text software on his Chromebook that will turn his dictated words into a typed document.

### **Summary and Conclusions for Visual Supports for Writing Tasks and Modified Writing Paper:**

The district's practice of having all students complete writing tasks on their Chromebooks since the start of the school year has obviated the need for modified writing paper to be provided to the student because the student has not been assigned any hand-writing tasks. While the district furnished evidence to show that the student has been provided with visual supports, no evidence was offered to show that any visual supports specifically designed to address writing tasks have been made available to the student. Under these circumstances, a violation of special education statutes and regulations is substantiated on this aspect of this issue.

### **Investigative Findings for Structured Practice for the Teaching of Replacement Behaviors:**

The "Reinforcement" portion of the FBA/BIP section of the student's March 5, 2020, IEP contains the following statement:

"Provide direct instruction to teach replacement behavior and structured practice opportunities when student is not escalating."

The replacement behavior specified in the FBA/BIP is as follows:

“By March 2021, when given a verbal direction by an adult during class time (or other academic or social setting, e.g. cafeteria, library), [the student] will follow a verbal direction by looking at the person and complying with the direction with no more than one prompt on 4 of 5 direction-following opportunities.”

The district provided a copy of service notes covering the time between September 30 and October 15, 2020 which were completed by the special education teacher who works with the student to address behavior needs. During that period, the student was seen for a total of nine sessions (September 30 and October 1, 2, 5, 6, 7, 8, 9, and 13, 2020). One other student was present in each of these sessions. Nothing in the notes reflects that time was spent practicing the specific skill addressed in the student’s IEP. Comments included the following:

- Talked about tomorrow’s online assignment (Big/Little Problems); we discussed what was going on at home...
- [The student] joined at 9:40 and did not turn his camera on. He said he understood the online assignment and left quickly [music loud in background].
- Worked through WK #1 – problem solving together. Worked on taking turns in conversation and not interrupting.
- Reviewed weekend, talked about coping skills question, background.
- Worked on classifying problems [glitch, little, medium, big, gigantic, emergency] and examples of solutions. Both [students present] were able to classify problems correctly...Took a short walk to the bridge to wake [the student] up and we talked a bit about cleaning up the creek of all the trash...
- Reviewed the assignment for today on Google Classroom [problem-solving, idioms, and conversation cues].
- Played coping skills bingo. Talked about the strategies as we played.
- Talked about urban legends and how they are created and propagated because [the student] mentioned [Bloody Mary]. We were practicing the skill of taking turns in conversation because each kiddo wanted to add their own information.

- [The student] logged on at 9:20 but didn't turn on his camera or microphone, so I was unable to determine his level of engagement. I mentioned the online assignment and the meeting ended.

### Summary and Conclusions for Structured Practice for the Teaching of Replacement Behaviors:

A document provided by the district shows that the student participated in six group sessions with a special education teacher between September 30 and October 7, 2020 – the date this complaint was filed. However, no evidence was provided by the district to show that, during these sessions, the student was provided with structured opportunities to practice the replacement behavior of following a verbal direction given by an adult by looking at the person and complying with the direction with no more than one prompt which is specified in his March 5, 2020 IEP. No other evidence was provided by the district to show that the student was provided with any other structured practice of this skill. Under these circumstances, a violation of special education statutes and regulations is substantiated on this aspect of this issue.

### **Additional Issues Identified During the Course of This Investigation**

In the course of this investigation, additional issues were identified by the investigator. The first of these issues relates specifically to this student:

The student's progress toward attainment of his IEP goals was not reported to the parent in accordance with the student's IEP during the fourth quarter of the 2019-20 school year.

Two systemic issues were identified in the course of this investigation:

- Progress reports toward the attainment of IEP goals were not provided to the parents of all students with IEPs during the fourth quarter of the 2019-20 school year.
- Special education services were not provided to all students with IEPs during the first two weeks of the 2020-21 school year.

## Progress Reporting for This Student

### **Applicable Statutes and Regulations for Progress Reporting for This Student:**

The regulations implementing the IDEA require that each IEP includes a description of when IEP goal progress reports will be provided to the parents (34 C.F.R. § 300.320(a)(3)(ii)).

A document produced by the Kansas State Department of Education entitled "Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic" dated June 29, 2020 provides guidance on a number of special education legal questions. Question A-27 is, "How should a school handle the provision of IEP goal progress reports to parents during a school closure due to COVID-19?"

The answer to that question is as follows:

If a child's IEP says that the progress report will be provided concurrent with the issuance of report cards or in the same manner and frequency as general education progress reports, then the IEP progress report would only need to be issued if report cards or general education progress reports are also issued. If the IEP says that the progress report will be provided in a different manner and frequency than general education progress reports or report cards, schools should make every effort to issue the IEP progress report in the manner required by the IEP.

### **Investigative Findings for Progress Reporting for This Student:**

According to the student's March 5, 2020 IEP, the "Progress Frequency" – the intervals at which progress would be monitored – for the annual goal related to following verbal directions as well as for the annual goal related to oral reading fluency was described as "Quarterly." Daily point sheets were to be used to measure the student's progress regarding following oral directions. Curriculum-based measures were to be used to measure the student's oral reading fluency progress.

Progress reports provided by the district show that, during the 2018-19 and 2019-20 school years, progress was reported quarterly in March, May, October, and December of 2019.

The student's IEP was revised on March 5, 2020. His progress toward attainment of the goals contained in his previous IEP was reported on March 12, 2020.

The sections of the Progress Report for the student dated May 5, 2020, provided the following statement with regard to the student's progress on his behavior goal:

[The student] completed his virtual social skill activities during virtual learning. Data could not be collected in the school setting for this skill due to virtual learning.

Please Note:

Due to the COVID-19 outbreak and local health department guidelines, school buildings were closed during his reporting period. However, [the district] implemented continuous learning options for all students.

Please Note: The collection of progress monitoring data was not possible for this skill during this time due to the national pandemic (COVID-19). When school returns to in-person sessions, the team will collect 4-6 weeks of data, review student progress and make adjustments as necessary

With regard to the student's progress toward attainment of his reading goal, the May 22, 2020 Progress Report stated

[The student] completed his virtual reading assignments during virtual learning. Enjoy your summer, [student].

Please Note:

Due to the COVID-19 outbreak and local health department guidelines, school buildings were closed during his reporting period. However, [the district] implemented continuous learning options for all students.

Please Note: The collection of progress monitoring data was not possible for this skill during this time due to the national pandemic (COVID-19). When school returns to in-person sessions, the team will collect 4-6 weeks of data, review student progress and make adjustments as necessary.

The district did not revise the student's IEP prior to the fourth quarter monitoring period in May of the student's 2019-20 school year.

When the district moved to a Continuous Learning Plan as a result of the COVID-19 Pandemic, the reporting of student progress in the general education curriculum was modified and reported in a different manner than had been used previously by the district. Fourth quarter progress regarding the student's progress in the general education curriculum was reported to the parents.

**Summary and Conclusions for Progress Reporting for This Student:**

The student's IEP was reviewed and revised on May 5, 2020. According to the IEP, the student's progress toward attainment of IEP goals would be reported quarterly. No change was made to the student's May 2020 IEP prior to the end of the 2019-20 school year. While the district provided the parents with a report of the student's progress in the general education curriculum during the fourth quarter, no data was collected or reported regarding the student's progress toward attainment of his IEP goals during that same period. Because the district failed to provide the parents with a report of the student's progress on IEP goals during the fourth quarter of the 2019-20 school year, a violation of special education statutes and regulations is identified on this issue.

**Progress Reporting for All Students with IEPs**

### **Applicable Statutes and Regulations for Progress Monitoring for All Students with IEPs:**

As noted above, the regulations implementing the IDEA require that each IEP includes a description of when IEP goal progress reports will be provided to the parents (34 C.F.R. § 300.320(a)(3)(ii)). No change to this requirement has been made during the COVID-19 Pandemic.

### **Investigative Findings for Progress Monitoring for All Students with IEPs:**

In a telephone call with the investigator on November 6, 2020, the Assistant Director of Special Education for the district confirmed that the IEP goal progress reports of at least some other students with IEPs in the district also indicated that progress monitoring could not be completed for the fourth quarter of the 2019-20 school year.

### **Summary and Conclusions for Progress Monitoring for All Students with IEPs:**

The district confirms that a general statement regarding student progress on IEP goals for the fourth quarter of the 2019-20 school year was included in the IEPs of a number of students in the district indicating that progress monitoring data could not be collected. Because the district failed to properly monitor and report the progress of a number of district special education students, a violation of special education statutes and regulations is identified on this issue.

## **Special Education Service Delivery for All Students with IEPs**

### **Applicable Statutes and Regulations for Special Education Service Delivery for All Students with IEPs:**

Federal regulations, at 34 C.F.R. 300.101(a), require that a student who has been determined eligible for, and in need of, special education services, and whose parents have provided written consent for the provision of those services, be provided with a FAPE (Free Appropriate Public Education). 34 C.F.R. 300.17(d) states that FAPE means, in part, special education and related services provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. Finally, 34 C.F.R. 300.323(c)(2) requires school districts to ensure that special education and

related services are made available to the student in accordance with the student's IEP.

### **Investigative Findings for Special Education Service Delivery for All Students with IEPs:**

In a telephone call with the investigator on November 6, 2020, the Assistant Director of Special Education for the district confirmed that special education services for some students with IEPs in the district were not provided for the first two weeks of the 2020-21 school year. According to the Assistant Director, these delays in service implementation occurred as the district finalized plans for implementation under a hybrid instructional model. By report of the Assistant Director, services to some students were implemented earlier than for others.

### **Summary and Conclusions for Special Education Service Delivery for All Students:**

The district systemically delayed the delivery of special education services to some students with IEPs at the beginning of the 2020-21 school year. A violation of special education statutes and regulations is identified on this issue.

### **Additional Comments**

In the course of this investigation, the investigator noted numerous inconsistencies in the information provided by the district. Evidence was provided to show that services had been provided on dates when other evidence indicated that the student was absent and would not have been available to receive those services. The investigator strongly suggests that the district takes a close look at this issue and works with staff to ensure that data collection and reporting is uniform and dependable.

### **Corrective Action**

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. The district failed to provide FAPE (See C.F.R.

300.101(a)) to the student (See 34 C.F.R. 300.17) by failing to provide special education and related services in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. Specifically, the district failed to provide the student with the level of special education services called for in his March 5, 2020 IEP and failed to address the student's absences on remote learning days. As a result of these failures, the student was not able to make progress appropriate in light of his circumstances.

Additionally, the district failed to implement the student's IEP as written by failing to provide the student with accommodations/modifications that were specified in his IEP including the provision of an individualized daily schedule, AM/PM triage, a daily behavior sheet, visual supports for writing tasks, and structured practice for the teaching of replacement behaviors (See 34 C.F.R.300.323(c)(2)). Further, the district failed to report the student's progress toward the attainment of his IEP goals (See K.S.A. 72-3429(c)(3); 34 C.F.R. 300.320(a)(3)).

Finally, the district did not report the IEP goal progress of all of its students with IEPs during the fourth quarter of the 2019-20 school year (See K.S.A. 72-3429(c)(3); 34 C.F.R. 300.320(a)(3)) and did not provide special education services to all students with IEPs enrolled in the district for the first two weeks of the 2020-21 school year.

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

- 1) Submit to Special Education and Title Services (SETS), within 10 days of the date of this report, a written statement of assurance stating that it will comply
  - a. with 34 C.F.R. 300.17(d) and 34 C.F.R. 300.101(a) by providing special education and related services in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324;
  - b. with 34 C.F.R. 300.323(c)(2) by ensuring that special education and related services are made available to each student in accordance with each student's IEP; and

- c. with K.S.A. 72-3429(c)(3); 34 C.F.R. 300.320(a)(3)) by providing reports of student progress toward the attainment of IEP goals in the manner and frequency required by each student's IEP.
- 2) Submit to SETS, within 10 days of the date of this report, a written statement of assurance stating that it will provide to this student the following accommodations/modifications:
  - a. Daily visual schedule specific to the student
  - b. AM/PM triage,
  - c. a daily behavior sheet,
  - d. visual supports for writing tasks, and
  - e. structured practice for the teaching of replacement behaviors.
- 3) Submit to SETS, within 10 days of the date of this report, a written plan to ensure that specific, structured practice of replacement behaviors will be provided for this student.
- 4) Submit to SETS, by no later than January 8, 2021, documentation to show that for each day school is in session until Winter Break of the 2020–21 school year:
  - a. a visual schedule for the student's day was developed for the student and modified as circumstances warranted;
  - b. triage at the beginning and end of the day to process and also triage after incidents as necessary and to allow the student draw a visual, if necessary, was provided to the student;
  - c. the student was provided with a daily behavior chart, to be used as a visual reminder of expectations and consequences, to support the student in reaching the goal of the student following instructions the first time given;

- d. the student was provided with visual supports for writing tasks [writing checklist, reminders to check his written work, graphic organizers, bold lines to write on, etc.]; and
- e. structured practice regarding replacement behaviors was provided to the student by being given a verbal direction by an adult during class time (or other academic or social setting, e.g. cafeteria, library), giving the student the opportunity to follow the verbal direction by looking at the person, and complying with the direction with no more than one prompt.

Documentation provided to SETS must include:

- a) copies of the student's daily schedule(s);
  - b) a daily log showing who provided AM/PM triage, when, and how;
  - c) copies of daily behavior charts;
  - d) copies of the visual writing supports provided to the student; and
  - e) daily logs showing who provided structured practice of replacement behaviors, the nature of that practice, and when it was provided.
- 5) Within 10 days of the date of this report, submit to SETS a plan to provide no fewer than 30 hours of compensatory services consisting of one-on-one direct special education service to the student in the areas of reading and behavior to be delivered outside of the regular school day by a certified special education teacher in order to make up for the direct services missed during the first two weeks of the school year and during remote learning days when the student was not logged on to Zoom sessions with special educators.
- 6) Within 15 days of the date of this report, present the compensatory services described above under Item 5) to the parent of this student. The district shall provide prior written notice of the compensatory services to the parent who shall have the option of accepting all, part of, or none of the offered compensatory services. Within 20 days of the date of this report, the district shall then inform SETS of the parent's decision

regarding compensatory services. If the parent chooses to accept all or part of the compensatory services, the district shall inform the parent and SETS in writing when the compensatory services have been completed.

- 7) Within 10 days of the date of this report, develop a written plan for training to address all of the items listed below and submit the plan to SETS for approval before any training is conducted. The plan must address:
  - a) how the attendance of students with disabilities will be monitored,
  - b) how parents will be notified of any lack of participation,
  - c) specific guidelines as to when an IEP team meeting should be convened to discuss a student's absences,
  - d) how staff will be trained on the plan and which staff will be trained, and
  - e) which district administrators and or staff will be responsible for each element of the plan.
  
- 8) Within 15 school days of receiving approval from SETS regarding the plan referenced under Item 7 above, the district must train staff on the procedures addressed in the plan. The staff who must participate in the training will be identified in the plan approved by SETS. This training may be conducted face-to-face or virtually. Once the training is completed, the district must submit to SETS documentation including the date of the training, name and position of the person or persons who conducted the training, a summary of the contents of the training, and an attendance record with signatures and positions of all staff who attended the training.
  
- 9) Within 30 days of the date of this report, complete an internal audit to identify each student whose IEP goal progress reports were not provided during the fourth quarter of the 2019-20 school year, and submit the results of that audit to SETS. Documentation must include the name of each student identified.

- 10) Within 30 days of the date of this report, submit to SETS for approval a written plan to address the monitoring and reporting of student progress toward the attainment of IEP goals when circumstances such as those occasioned by the COVID-19 Pandemic require the school district to deliver instruction and services using alternative operational models (such as remote and hybrid learning environments). The plan must also include a description of which staff will be trained and how staff will be trained to implement the plan.
  
- 11) Within 5 school days of receiving approval from SETS regarding the plan referenced under Item 10 above, the district must train staff on the procedures addressed in the plan. The staff who must participate in the training will be identified in the plan approved by SETS. This training may be conducted face-to-face or virtually. Once the training is completed, the district must submit to SETS documentation including the date of the training, name and position of the person or persons who conducted the training, a summary of the contents of the training, and an attendance record with signatures and positions of all staff who attended the training.
  
- 12) Within 30 days of the date of this report, complete an internal audit to identify all students who were not provided with the services required by their IEPs during the first two weeks of the 2020-21 school year, and submit the results of that audit to SETS. Documentation must include the name of each identified student and the type and amount of services that were missed for each student during that period.
  
- 13) Within 45 days of the date of this report, submit to SETS for approval a written plan for the delivery of compensatory services to all identified students described above under Item 12. The district must begin to implement this plan within 5 days of receiving approval from SETS. The plan must address:

- a. how compensatory services will be calculated for each child,
- b. how parents will be notified of the offer of compensatory services for their child,
- c. how parents will be informed of their right to accept some, all, or none of the compensatory services offered,
- d. how the response of each parent to the district's offer will be documented, and
- e. how the completion of all compensatory services will be documented, and
- f. how the district will notify SETS and parents when the compensatory services have been completed for each child.

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

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

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). Due to COVID-19 restrictions, the written notice of appeal may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. Such notice of appeal must be delivered within 10 calendar days from the date of this report.

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



Diana Durkin  
Complaint Investigator

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

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

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

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

- (A) The issuance of an accreditation deficiency advisement;
- (B) the withholding of state or federal funds otherwise available to the agency;
- (C) the award of monetary reimbursement to the complainant; or

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_  
\_\_\_\_\_ Public Schools: 21FC\_\_-001

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced on October 7, 2020, with \_\_\_\_\_ filing a complaint on behalf of her son, \_\_\_\_\_. A complaint investigator undertook the investigation of the complaint on behalf of the Special Education and Title Services team (SETS) at the Kansas State Department of Education (KSDE). Following the investigation, the complaint investigator issued a Complaint Report addressing the allegations on November 6, 2020. That Complaint Report concluded that there were substantiated violations of special education statutes and regulations.

Thereafter, the school district, through their attorney, filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the Complaint Report, the notice of appeal and attached exhibits submitted by the district's attorney, and the response to the district's appeal submitted by the parent. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

### PRELIMINARY MATTER

Scope of Inquiry: The Appeal Committee limits its inquiry to the issues investigated in the Complaint Report and presented in the appeal. The Appeal Committee will not decide any new issues. The appeal process is a review of the Complaint Report issued on November 6, 2020. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

Kansas Administrative Regulation (K.A.R.) 91-40-51(f)(1) gives either party to a formal complaint the right to "appeal any of the **findings or conclusions** of a compliance report..." [emphasis added]. This regulation does not give any party the right to appeal the investigative process or corrective actions. The district argues on appeal that the

investigative process was unfair because it had late notice and little opportunity to respond to the three additional issues that the investigator identified during the course of the investigation (Notice of Appeal, p. 14, 15, 17, 18). Regarding the additional issues (found on pages 29-34 of the Complaint Report), the district states, "The District acknowledges the Appeals Committee does not typically review *procedural* issues; however, the lack of timely notice and meaningful opportunity to respond has resulted in findings and conclusions that would otherwise not be supported by sufficient evidence. The District believes that its presented evidence would have resulted in *different* findings and conclusions." (Notice of Appeal, p. 15). Pursuant to K.A.R. 91-40-51(f)(1), the Appeal Committee will not consider or address any arguments about the investigative process. However, this appeal process is a built-in mechanism that the district can and has used when it believes the findings and conclusions of the Complaint Report are not supported by sufficient facts. As such, the Appeal Committee will consider the district's additional information and evidence submitted on appeal in order to determine whether the findings and conclusions for the three additional identified issues should be sustained. The district also objects to specific requirements of the corrective actions (Notice of Appeal, p. 19). The Appeal Committee may remove, alter, or add corrective actions if appropriate in light of the Appeal Committee's decision in the appeal regarding the findings and conclusions of the investigator, but it will not address any direct appeal of corrective actions.

### DISCUSSION OF ISSUES ON APPEAL

The Complaint Report contained the following issues, and the district appeals the findings and conclusions of each of these issues:

1. Delivery of special education services to the student.
2. Implementation of accommodations/modifications for the student during remote learning sessions.
3. Additional issues identified during the course of the investigation:
  - a. The student's progress toward attainment of his IEP goals was not reported to the parent in accordance with the student's IEP during the fourth quarter of the 2019-20 school year.
  - b. Progress reports toward attainment of IEP goals were not provided to the parents of all students with IEPs during the fourth quarter of the 2019-20 school year.
  - c. Special education services were not provided to all students with IEPs during the first two weeks of the 2020-21 school year.

The Complaint Report issued on November 6, 2020 substantiated a violation of special education statutes and regulations for all of the issues stated above. The Appeal Committee will discuss each of these issues below.

ISSUE 1.: Delivery of Special Education Services to the Student:

The Complaint Report concludes “There is evidence to suggest that the district’s failure to provide any special education services during the first two weeks of the 2020-21 school year and the failure to address the student’s repeated absence from remote learning sessions resulted in a loss of FAPE for the student.... Under these circumstances, a violation of special education statutes and regulations is substantiated.” (Complaint Report, p. 20).

*First Two Weeks.* The Complaint report stated in the Background Information section that:

In-Person classes began on August 24, 2020. For the first two weeks (August 24 through September 4, 2020), all district students were divided into two groups based upon the first letter of their last names.... Students who attended in-person classes for the first two weeks of the school year were given the option of moving to the Rigorous Remote model after September 4, 2020. Instruction under the Rigorous Remote model was to begin on September 9, 2020.... The student’s family opted to have the student participate in on-site, in-person learning for the first two weeks of the school year. (Complaint Report, p. 5).

The investigator then concluded that “The student was present for all of his in-person sessions between the start of the school year on August 24, 2020 and the time of the filing of this complaint on October 7, 2020... The district stipulates that the student received no special education services during the first two weeks of the school year and has offered compensatory services for those missed services.” (Complaint Report, p. 15).

On appeal, the district argues that the investigator was mistaken when concluding that the district failed to provide any special education services to the student during the first two weeks of the school year – starting on August 24, 2020. The district argues that the school year started for the district on September 9 instead of August 24:

As reflected in the school district’s academic calendar, the first full day of school for the general education population was September 9, 2020. The District offered three learning models for students: In-Person, Rigorous Remote, and K-8 Virtual. Regardless of the model selected, academic

instruction did not begin until September 9, 2020. For those students who selected In-Person, four days were set aside beginning on August 24 to check-out technology devices to students, to upload and practice various applications that would be utilized, and to adjust and practice safety protocols. This period is referred to as On-Site Student Phase-In on the District's calendar. No academic instruction was provided on these days.... Moreover, it is notable that Phase-In consisted of only four (4) days and not two (2) weeks as referenced in the Report (Notice of Appeal, p. 1, 4).

The district further describes the "Phase-In" period as a "time to help students adjust to the new educational setting prior to the start of the academic year" (Notice of Appeal, p. 3).

Based on March 12 guidance issued by the Office of Special Education Programs (OSEP)<sup>1</sup> and corresponding guidance issued by KSDE<sup>2</sup>, which state that a school district is not required to provide special education services to students with IEPs during times when the district does not provide any educational services to the general student population, the district argues that it was not required to provide special education services to this student during their "Phase-In" period because "[n]o academic instruction was delivered to the general student population during that time [Phase-In]." (Notice of Appeal, p. 3-4).

The Appeal Committee finds the district's arguments unconvincing on this matter. Though the school district calendar (Notice of Appeal, Exhibit A) states that August 24-27, 31 and September 1-3 are "On-Site Student Phase-In" and September 9 is "First Full Day of School," other documentation is contradictory. In SPEDPro (a web application where districts are required to report special education data used for state and federal reporting to KSDE), the district reported that August 24-27 and August 31-September 3 were school days. The SPEDPro calendar is used to determine the number of days of special education service for the given service provided. Total days of service is used for OSEP Least Restrictive Environment calculation, Full Time Equivalent staff calculation, December 1 count of students with disabilities, etc. Additionally, all of this student's service lines reported in SPEDPro begin on August 24. Upon checking a few other students from different buildings in the district, all service lines for the students the Appeal Committee checked begin on August 24. The Appeal Committee finds that

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<sup>1</sup> See Question A-1 within "Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak" located at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

<sup>2</sup> See Question A-1 within "Guidance on Compliance with IDEA and the Kansas Special Education for Exceptional Children Act for Reopening Schools During the COVID-19 Pandemic" located at <https://www.ksde.org/Portals/0/ECSETS/Announcements/COVID-SpEd-FAQ.pdf>.

this information indicates the district's school year actually began on August 24, there were 8 school days from August 24 to September 3, and that this student and other students with IEPs that start at the beginning of the school year should have received special education services starting on August 24. Further, the district's own document titled "\_\_\_\_\_ USD \_\_\_ \_\_\_\_\_ Restart"<sup>3</sup>, updated August 14, 2020, states the following description on page 12 next to "Beginning of the Year 'Phase-In'": "Using the first weeks of school prior to/during to Fall Diagnostic Benchmark Testing, classes will focus on the following: ... A focus on prerequisite skills based on standards/competencies". This information contradicts the district's statement on appeal that no academic instruction was provided during the Phase-In period.

The district's appeal makes much of Question and Answer A-1 in both the March 12 OSEP guidance and the KSDE guidance, which states that a school district is not required to provide special education services to students with IEPs if the school district is not providing any educational services to the general student population. However, this guidance is not applicable to the situation at hand because the Appeal Committee finds, for the reasons stated above, that the district did provide educational services to the general student population starting on August 24, 2020. Because the district considered these days "school days," counting the hours in these days toward the required school term, the district was required to provide educational services. The more relevant and applicable guidance here is Question and Answer A-14 in the KSDE document "School Year 2020-21 Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act for Reopening Schools during the COVID-19 Pandemic."<sup>4</sup> The guidance states:

**Question A-14.** Can a school district decide not to provide any special education and related services to all students with IEPs during the first week of the 2020-21 school year so that students can spend more time learning about social/emotional competencies, general expectations, and procedures?

**Answer A-14.** Each child's IEP must be individualized and created by that child's IEP team to meet the child's unique needs. If an individual child's IEP team decides that it is appropriate to begin services on the second or third week of school, then the IEP team has the authority to make that decision and put it in the IEP.

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<sup>3</sup> See "\_\_\_\_\_ USD \_\_\_ \_\_\_\_\_ Restart" located at [URL redacted]

<sup>4</sup> See Question A-1 within "Guidance on Compliance with IDEA and the Kansas Special Education for Exceptional Children Act for Reopening Schools During the COVID-19 Pandemic" located at <https://www.ksde.org/Portals/0/ECSETS/Announcements/COVID-SpEd-FAQ.pdf>.

There is no evidence before the Appeal Committee that this student's IEP Team made an individualized decision to begin special education services for that particular student on the third week of school.

For the reasons stated above, the Appeal Committee sustains the findings and conclusions in the Complaint Report that the district's school year started on August 24, 2020 and that the student was not provided with any special education services during the first two weeks of school as required by his IEP.

*Failure to Address the Student's Repeated Absence from Remote Learning Sessions:* Based on attendance logs provided by the district covering the period of September 9 through October 14, 2020, the Complaint Report found that the student was absent for 10 of 16 (63%) behavior related sessions during remote learning days and 12 of 17 (71%) special education reading sessions during remote learning days (Complaint Report, p. 11-12). The Complaint Report then concluded that:

At no time between the start of the school year and the time of the filing of this complaint on October 7, 2020 did the district convene the student's IEP team to discuss the impact of the student's absences or to develop strategies to improve the student's attendance. The question, then, is what responsibility, if any, did the district have to ensure that the student received the special education services called for in his March 5, 2020 IEP on the days when his general education curriculum and special education services were being delivered remotely, and what obligation did the district have to specifically address the student's lack of participation in a specific targeted way?

The Complaint Report then went on to summarize case law and administrative rulings from various jurisdictions for guidance on how to answer this question (Complaint Report, p. 16-18). Based on those legal sources and OSEP's Letter to Clarke (March 8, 2007), the investigator then looked at progress monitoring data to determine the impact of the absence on the student's performance and progress and ultimately concluded:

The district's failure to alert the parent to the student's repeated absences during his remote learning sessions and to take any action to address those absences (including the scheduling of an IEP team meeting) resulted in the student missing not only the opportunity to receive special education and related services, but also his opportunity to

participate in the general education curriculum. (Complaint Report, p. 18-20).

This conclusion, coupled with the conclusion that the district failed to provide any special education services for the first two weeks of the school year, led the investigator to substantiate a loss of FAPE for the student (Complaint Report, p. 20).

On appeal, the district notes that “the Report relies entirely on non-binding decisions from other jurisdictions outside of the 10<sup>th</sup> Circuit.” The district then argues that the 10<sup>th</sup> Circuit case *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116 (10<sup>th</sup> Cir. 2008) “squarely addresses the ‘absence’ issue, and as such, this [Appeal] Committee need look no further to determine the appropriateness of the Report’s legal conclusion.” The district claims that the 10<sup>th</sup> Circuit Court in *Garcia* found that the student “was not receiving the district’s offered special education services because she had ‘affirmatively avoid[ed] attending school,’” and that “the Court found that the district had met its obligations under the IDEA.” (Notice of Appeal, p. 7).

The Appeal Committee finds that the 10<sup>th</sup> Circuit *Garcia* case is not controlling in the instant matter. Contrary to the school district’s argument, the Court in *Garcia* did not rule on the issue of a student with a disability exhibiting repeated absences. In *Garcia*, the parents of the student (the Garcias) argued that the 10<sup>th</sup> Circuit Court should overturn the lower district court’s decision because “[the student’s] behavior cannot be used to defeat the school district’s liability under IDEA” and that “there is at least the possibility that had the school district reassessed the student’s needs and implemented a new IEP ... the school might have been successful in helping [the student] to overcome her behavioral tendencies and to increase her commitment to school....” In response to that argument, the 10 Circuit Court stated:

Having acknowledged that the Garcias’ appeal on liability poses novel questions of law, **we ultimately think the wisest course is to decline to answer them definitively in this case.... [W]e leave for another day the questions of liability posed here.** Instead, assuming (though without deciding) the school district’s liability, we turn to the question of remedy.... **[W]e cannot say that the [District] court abused its discretion. Of course, this is not to say that, were we making a decision in the first instance, we would necessarily choose the same path the district court took here; neither do we necessarily believe that the district court’s path was the only one available to effect [sic] the statutory purposes of the IDEA. Rather, we simply hold that the district court’s decision fell well within the broad parameters of the discretion Congress chose to invest in it.... Our decision today should, therefore, not be taken as excusing the school district’s**

actions, or as condemning [the student] for being a poor student. Rather, our affirmance of the district court's disposition is simply a product of the discretion that Congress reposed in that court. [emphasis added]

In *Garcia*, the 10th Circuit declined to answer the very question posed to this Appeal Committee, what is a district's obligation in the face of student absences that are posing an educational impact to the student? Therefore, the Appeal Committee does not find *Garcia* to be relevant to this Appeal.

The district also argues on appeal that the decisions from other jurisdictions cited in the Complaint Report are distinguishable from the circumstances of this complaint, and that there are other decisions not cited within the Complaint Report that set different standards regarding the issue of student absence (Notice of Appeal, p. 8-9).

The Appeal Committee reviewed various and multiple cases and administrative rulings from several jurisdictions and cannot find a consistent standard among them. The only consistency is that this issue requires a case-by-case analysis. Because there is no binding precedence in the 10th Circuit on this issue, and because rulings in other jurisdictions are inconsistent, the Appeal Committee looks to OSEP's Letter to Clarke (48 IDELR 77; March 8, 2007) for a standard. A parent of a child with a disability has a legal duty to make sure their child attends school to receive the services specified in their IEP, or to provide for those services privately (K.S.A. 72-3421(a)). However, that parental obligation is not the only consideration when absence involves a child with a disability. There may be reasons connected with the disability that contribute to absence. For that reason, when a child with a disability is missing school on a regular basis, the child's IEP team has a duty to assess the educational detriment the child is experiencing, any relationship between the absence and the disability, and whether additional supports are needed to successfully address the absence. There is no formula for this process. It is a case-by-case individualized determination. The best single statement of this process is in OSEP's Letter to Clarke. OSEP was asked how schools should handle absences, either absences of school staff members or absences of students. OSEP answered with the following:

[Y]ou requested written guidance on the need to use substitutes and to schedule **make-up sessions** when speech-language pathology sessions are missed **due to a child's absence from school**, cancellation for a class or school activity, or absence of the speech language pathologist. IDEA and the regulations do not address these issues. States and local educational agencies (LEAs) are required to ensure that all children with disabilities have available to them FAPE, consistent with the child's individualized

education program (IEP) (see 34 CFR 300.101). We encourage public agencies to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. **Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis.** [emphasis added]

The Appeal Committee emphasizes the word “consider” because it is at the heart of this OSEP guidance. To “consider” means the IEP team or school district must at least ask why the student is absent and whether additional supports are needed to improve attendance. It is not enough for a district to take the position that absence is purely a parental responsibility.

The district argues on appeal (Notice of Appeal, p. 10) that the Complaint Report is incorrect when it concludes that the district failed to alert the parent to the student’s repeated absences and to take any action to address those absences (including the scheduling of an IEP team meeting) (Complaint Report, p. 18). The district points out that, as indicated in the Complaint Report, it notified the parent of the student’s absences three separate times and argues that “[t]hese notices, coupled with a sibling’s reports to the Parent that the Student was not attending his sessions, were more than sufficient to put Parent on notice that Student was not attending his remote learning sessions.” (Notice of Appeal, p. 10).

The Appeal Committee finds this argument unconvincing. As stated in the Complaint Report (p. 16), “At no time between the start of the school year and the time of the filing of this complaint on October 7, 2020 did the district convene the student’s IEP team to discuss the impact of the student’s absences or to develop strategies to improve the student’s attendance.” When faced with a pattern of repeated absences for a student with a disability who has an IEP, a school district must do more than simply put the parent on notice that the student is not attending. Letter to Clarke states that school districts should “consider the impact of a provider's absence or a child's absence on the child's progress and performance”. There was no evidence before the investigator, and there is no evidence before this Appeal Committee, to suggest that the school district fulfilled this responsibility to at least ask why the student was repeatedly absent. While the Appeal Committee cannot establish a specific number of absences that would trigger this responsibility in every case, the Appeal Committee finds that in this case the pattern, frequency, and duration of the

student's absences (63% of behavior related remote sessions and 71% of special education reading remote sessions between September 9 and October 14) were enough to trigger the district's responsibility to consider the impact of the student's absences on his progress and performance.

Further, the Appeal Committee finds that the investigator correctly applied the standard set forth in Letter to Clarke when determining the impact of the absences on the student's progress. Therefore, the Appeal Committee sustains the following conclusion of the Complaint Report:

There is evidence to suggest that the district's failure to provide any special education services during the first two weeks of the 2020-21 school year and the failure to address the student's repeated absence from remote learning sessions resulted in a loss of FAPE for the student with regard to the development of his reading skills. Records provided by the district show a drop in the student's reading skills. Additionally, IEP progress reports show that the student's oral reading skills improved during the 2019-20 school year, but he is currently performing at the same oral reading level he had previously demonstrated in December 2019. Under these circumstances, a violation of special education statutes and regulations is substantiated. (Complaint Report, p. 20).

In summary, the Appeal Committee concludes that the district failed to provide any special education services to the student during the first two weeks of school and failed to consider the impact of the student's remote learning absence on his progress and performance. These failures resulted in a denial of FAPE to the student, evidenced by the progress monitoring data described in the Complaint Report on pages 19 through 20.

#### ISSUE 3.c.: Delivery of Special Education Services to Other Students During First Two Weeks:

The findings and conclusions discussed in the issue above are incorporated herein by reference.

The Complaint Report concluded, based on a phone call with a district administrator on November 6, that "The district systemically delayed the delivery of special education services to some students with IEPs at the beginning of the 2020-21 school year." (Complaint Report, p. 33-34).

The district appealed this conclusion and incorporated its argument (discussed above) with respect to whether the individual student should have received special education services, stating: “Had the District been afforded a meaningful opportunity to respond [to this additional issue identified by the investigator], it would have clarified that academic instruction did not commence for all students until September 9, 2020.” (Notice of Appeal, p. 18).

As discussed above, the Appeal Committee has considered the evidence that was available to the investigator and the information and evidence submitted by the district on appeal regarding this issue. Based on the evidence in SPEDPro and the “\_\_\_\_\_ USD \_\_\_ \_\_\_\_\_ Restart” document, which contradict the district’s claim that the school year started on September 9 instead of August 24, the Appeal Committee sustains the findings and conclusions of the Complaint Report on this issue.

#### ISSUE 2.: Implementation of Accommodations/Modifications for the Student During Remote Learning Sessions:

The parent alleged that “the district did not make a number of accommodations/modifications available to the student during remote learning sessions.” (Complaint Report, p. 21). The Complaint Report concluded that the school district failed to provide the student with the following accommodations/modifications required by his IEP during remote learning sessions: visual schedule, AM/PM triage, daily behavior sheet, visual supports for writing tasks, and structured practice for teaching replacement behaviors. However, the district appeals the findings and conclusions regarding only the am/pm triage, daily behavior sheet, and structured practice for teaching replacement behaviors. Thus, the Appeal Committee will not address the visual schedule or visual supports for writing tasks, and the findings and conclusions in the Complaint Report for those two accommodations/modifications stand.

***AM/PM Triage:*** The Complaint Report found that the student’s IEP required “Triage at the beginning and end of the day to process and also triage after incidents as necessary. He may draw a visual if necessary.” (Complaint Report, p. 23).

The investigator concluded that evidence the district provided was contradictory. During the investigation, the district provided a copy of the daily schedule for three paraeducators and a sample daily visual schedule for October 5, 2020, as well as a daily schedule for the student on remote learning days. The investigator found that none of these documents indicated times for AM/PM triage with the student. In addition, the district provided a student service time report, which the investigator

stated “purport[ed] to show dates and time that the student received triage support.” However, the investigator found that for the “majority of the dates shown on the [student service time] report” the student was absent according to other district records. The investigator concluded that the district provided documentation to show that staff “were available to provide morning and afternoon triage,” but the other evidence offered “to document that these triage sessions actually took place was not consistent with other data [attendance records] provided by the district.” (Complaint Report, p. 24). In essence, the investigator came to the findings and conclusions for this accommodation based on the veracity and credibility of the evidence, as is within her authority as a fact-finder to do so. The Appeal Committee finds the investigator is in the best position to determine credibility of the evidence and will not disturb determinations of credibility as long as those determinations are reasonable and consistent with findings of fact, as they are here.

The district argues on appeal that:

[I]t appears the investigator mistakenly thought that certain data provided by the District was intended to reflect times when the student was online receiving services. The investigator then expressed concern that the data appeared to be inconsistent with data showing the student to be absent. The District’s data was not submitted to show the student’s online activity. Rather, the data was provided to show when staff were online making the services available to the Student, even if the Student did not attend.

If the documentation submitted by the district to the investigator was only a record of when staff were available, such documentation is not responsive to the allegation that the accommodation was not provided. The district argues “From a practical perspective, a student’s behavior intervention plan and any strategies contained therein typically do not get implemented on days when a student is not in attendance.” That is beside the point; the district did not provide any evidence to the investigator or the Appeal Committee to show that it in fact provided the AM/PM triage to the student on the remote learning days when the student was in attendance.

The district’s documentation is either inconsistent as the investigator concluded (showing they provided triage even though other records show the student was absent), or it is non-responsive to the allegation (“not submitted to show the student’s online activity” as the district states). Therefore, having no additional evidence to show that the district in fact provided AM/PM triage to the student on remote learning days when he was in attendance, the Appeal Committee must sustain the investigator’s findings and conclusions for AM/PM triage.

*Daily Behavior Sheet:*

The Complaint Report found that the student's IEP required "[The student] will be provided with a daily behavior chart. This will be used as a visual reminder of expectations and consequences. Daily data collection related to goal: Following instructions the first time given." (Complaint Report, p. 24).

Similar to the documentation provided for AM/PM triage, the investigator concluded that evidence provided by the district regarding the daily behavior sheet and data collection was contradictory. The investigator found that the district recorded behavior data for the student in a "Progress Monitoring Graph" on two dates when, according to district attendance records, the student was actually absent (Complaint Report, p. 25).

Further, the investigator found that the district initially provided a copy of a blank daily behavior sheet and subsequently provided daily behavior sheets with data for October 13, 15, 16, 19, 26, 27 and 29, 2020. The district did not provide any daily behavior sheets that contained data for the student for any date prior to October 7, the date the complaint was filed (Complaint Report, p. 24-15). Based on these findings, the investigator concluded:

No evidences was provided by the district to show that behavior sheets were being completed on a daily basis for the student prior to the date of the filing of this complaint. Further, evidence provided by the district indicates that behavior data has been collected on the student's in-person school days, but there is no evidence to show that behavior data was collected on the student's remote learning days since the student was generally absent on those days. Documents provided by the district show that behavior sheets were completed between October 7 and October 29, 2020, but not daily.

On appeal, the district does not address the investigator's finding that the district recorded behavior data for the student on two dates when, according to district attendance records, the student was actually absent; nor do they address the finding that no daily behavior sheets were provided to the investigator for the dates prior to October 7. The district's sole argument on appeal with regard to the daily behavior sheet is: "A behavior intervention plan typically does not get implanted on days when a student is not in attendance. Likewise, no behavior data is available to be recorded on a daily behavior sheet when the student is absent." Again, like the AM/PM triage argument, this statement is beside the point and not responsive to the allegation. The district provided evidence to the investigator that it implemented the daily behavior

sheet on October 13, 15, 16, 19, 26, 27, and 29, 2020 – seven days. The district did not provide evidence to show it implemented the daily behavior sheet on any of the other days the student was in attendance for the period of August 24, 2020 (the start of the school year) to October 7, 2020 (the date the complaint was filed). Based on both the contradictory data and the missing daily behavior sheets, the Appeal Committee concludes that there is sufficient evidence to support the investigator’s findings and conclusions regarding the daily behavior sheet.

***Structured Practice for Teaching Replacement Behaviors:***

The Complaint Report found that the student’s IEP required the following:

Provide direct instruction to teach replacement behavior and structured practice opportunities when student is not escalating... By March 2021, when given a verbal direction by an adult during class time (or other academic or social setting, e.g. cafeteria, library), [the student] will follow a verbal direction by looking at the person and complying with the direction with no more than one prompt on 4 of 5 direction-following opportunities. (Complaint Report, p. 27).

During the investigation the district provided service notes covering September 30 through October 15, 2020. The services notes reflected activities that took place during behavior sessions with a special education teacher. After summarizing the service notes, the investigator concluded that “nothing in the notes reflects that time was spent practicing the specific skill addressed in the student’s IEP” and that “no evidence was provided by the district to show that, during these sessions, the student was provided with structured opportunities to practice the replacement behavior... as specified in his March 5, 2020 IEP.” (Complaint Report, p. 27-28).

On appeal, the district provided a lesson plan (Exhibit B) that was not provided to the investigator during the investigation. The district argues that “The social skills curriculum provides direct instruction in the underlying skills necessary for the student to meet his goal.... Opportunity to practice these skills, including his replacement behavior, are imbedded in the lessons.” (Notice of Appeal, p. 13). When examining the lesson plan (Exhibit B) the Appeal Committee finds no evidence to support the district’s claim that “opportunity to practice his replacement behavior” is imbedded in the lessons. The lesson plan makes no mention of having the student follow a verbal direction given by an adult by looking at the person and complying with the direction with no more than one prompt.

The district further argues on appeal that “[the student] is afforded the opportunity to practice his specific replacement behavior in various settings throughout the day as reflected by his daily behavior sheet.” (Notice of Appeal, p. 13). However, as stated above in the Daily Behavior Sheet section of this Appeal Decision, the district did not provide evidence that it implemented a daily behavior sheet prior to October 7, 2020.

The Appeal Committee finds the district’s arguments and additional evidence unconvincing and concludes that there is sufficient evidence to support the investigator’s findings and conclusions regarding the structured practice for teaching replacement behaviors.

ISSUE 3.a.: IEP Goal Progress Reports for the Student:

During the course of the investigation, the investigator found that the 2019-20 fourth quarter IEP goal progress reports for the student did not contain any data regarding the student’s progress toward attainment of his IEP goals (Complaint Report, p. 30-32).

The investigator concluded:

According to the IEP, the student’s progress toward attainment of IEP goals would be reported quarterly... While the district provided the parents with a report of the student’s progress in the general education curriculum during the fourth quarter, no data was collected or reported regarding the student’s progress toward attainment of his IEP goals during that same period. Because the district failed to provide the parents with a report of the student’s progress on IEP goals during the fourth quarter of the 2019-20 school year, a violation of special education statutes and regulations identified on this issue. (Complaint Report, p. 32)

On appeal, the district argues that:

The district met its obligation to provide a progress report to the parent. The report indicated what goal activities the student had completed and accurately informed the parent that, due to the constraints imposed by the COVID-19 pandemic, formal data was unable to be collected. The report was made in compliance with the direction provided by KSDE and TASN to issue an individualized progress report to extent possible.” (Notice of Appeal, p. 17).

The Appeal Committee notes that the district seems to misunderstand the guidance issued by KSDE on this topic. As stated in the Complaint Report (p. 29), the KSDE guidance document titled “Compliance with the Individuals with Disabilities Education

Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic” provides in A-27:

**Question A-27.** How should a school handle the provision of IEP goal progress reports to parents during a school closure due to COVID-19?

**Answer A-27.** If a child’s IEP says that the progress report will be provided concurrent with the issuance of report cards or in the same manner and frequency as general education progress reports, then the IEP progress report would only need to be issued if report cards or general education progress reports are also issued. If the IEP says that the progress report will be provided in a different manner and frequency than general education progress reports or report cards, schools should make every effort to issue the IEP progress report in the manner required by the IEP.

This guidance does not permit a school district to provide parents with IEP goal progress reports that contain no actual information about the progress the child is making toward meeting the annual goals. The guidance is clear that IEP progress reports issued must be “in the manner required by the IEP,” which must follow federal requirements regarding the content of a progress report. Federal regulation 34 C.F.R. 300.320(a)(3)(ii) requires that the IEP must include “a description of when periodic reports on the progress the child is making toward meeting the annual goals will be provided.” The district stated the following in the student’s progress report regarding his behavior goal: “[The student] completed his virtual social skills activities during virtual learning. Data could not be collected in the school setting for this skill due to virtual learning.” (Complaint Report, p. 30). For the student’s progress report regarding his reading goal, the district made a statement similar to the behavior progress report: “[The student] completed his virtual reading assignments during virtual learning. Enjoy your summer, [student].” (Complaint Report, p. 31). The Appeal Committee finds that nothing in these statements reported the progress the child was making toward meeting the goals as 34 C.F.R. 300.320(a)(3)(ii) requires. The rest of both progress report documents is identical standard COVID-19 language not related to the student’s progress.

For the reasons explained above, the Appeal Committee finds there is sufficient evidence to sustain the investigator’s findings and conclusions on this issue.

ISSUE 3.b.: IEP Goal Progress Reports for Other Students:

The findings and conclusions discussed in the issue above are incorporated herein by reference.

During the course of the investigation, the investigator found, based on a November 6 phone call with a district administrator, that the IEP goal progress reports for at least some other students with IEPs in the district were provided in a similar format to that of the student at the center of this complaint. The investigator concluded that "Because the district failed to properly monitor and report the progress of a number of district special education students, a violation of special education statutes and regulations is identified on this issue."

On appeal, the district relies on the same argument for this issue as their argument for the issue above regarding the progress reports for the individual student (Notice of Appeal, p. 17). The district also states "The Report does not identify a single student for which a progress report was not issued. In fact, the corrective action attendant with this issue directs the District to audit itself and report each student whose IEP goal progress reports were not provided during the fourth quarter. The answer to this report would be 'none' as all IEP students were issued a progress report with the information as instructed." Again, the district seems to misunderstand the KSDE guidance on IEP goal progress reports as explained in the issue above. KSDE's guidance provides that IEP progress reports issued must be "in the manner required by the IEP," which must follow federal requirements regarding the content of a progress report. KSDE's guidance also does not permit districts to issue progress reports that contain no actual information about the progress the child is making toward meeting the annual goals.

For the reasons explained above, the Appeal Committee finds there is sufficient evidence to sustain the investigator's findings and conclusions on this issue. In addition, the Appeal Committee directs the district to fulfill the audit ordered in Corrective Action 9 (the corrective action attendant with this issue) by identifying students whose parents were provided with IEP goal progress reports that did not contain the information required by 34 C.F.R. 300.320(a)(3)(ii) about the progress the child is making toward meeting the annual goals.

## CONCLUSION

The Appeal Committee concludes that the Complaint Report is sustained on all issues. Pursuant to K.A.R. 91-40-51(f)(2), the district is directed to initiate the corrective action ordered by the Complaint Report immediately. In accordance with this regulation, if after five days, no required corrective action has been initiated, the district shall be notified of the action that will be taken to assure compliance as determined by KSDE.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 7th day of December, 2020.

APPEAL COMMITTEE:

Brian Dempsey  
Laura Jurgensen  
Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON OCTOBER 9, 2020

DATE OF REPORT: NOVEMBER 7, 2020

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Unified School District). In the remainder of this report, USD #\_\_ may also be referred to as the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on October 9, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which ended on November 8, 2020.

### **Investigation of Complaint**

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on October 16 and October 31, 2020 as part of the investigation process. In addition, \_\_\_\_\_, a friend of the family, was interviewed with parent consent on October 30, 2020. On November 2, 2020, the parent requested and provided written consent for the investigator to interview Jana Walpole from the Family Service and Guidance Center; however, Ms. Walpole did not respond to requests to arrange an interview prior to the completion of the investigation.

USD #\_\_ made the following staff available for an interview on October 29, 2020:

1. \_\_\_\_ \_\_\_\_, Special Education Director
2. \_\_\_\_ \_\_\_\_, Special Education Teacher
3. \_\_\_\_ \_\_\_\_, School Social Worker
4. \_\_\_\_ \_\_\_\_, School Psychologist
5. \_\_\_\_ \_\_\_\_, Assistant Principal
6. \_\_\_\_ \_\_\_\_, Special Education Department Chair
7. \_\_\_\_ \_\_\_\_, Principal
8. \_\_\_\_ \_\_\_\_, Behavior Interventionist

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #\_\_:

- Individualized Education Program (IEP) including the behavior intervention plan (BIP) dated March 29, 2019
- Formal Complaint Request Form and attached statement written by the parent dated October 9, 2020
- District Response to the Allegation written by Dr. \_\_\_\_ [Special Education Director]
- Discipline Report for October 9, 2019
- Executive Summary of events between October 9, 2019 and February 11, 2020 written by Mr. \_\_\_\_ [Principal]
- Witness statement prepared for the October 17, 2019 Manifestation Determination Review written by Ms. \_\_\_\_ [Special Education Teacher]
- Witness statement prepared for the October 17, 2019 Manifestation Determination Review written by Mr. \_\_\_\_ [Principal]
- Witness statement prepared for the October 17, 2019 Manifestation Determination Review written by Ms. \_\_\_\_ [Special Education Department Chair]
- Manifestation Determination Review dated October 17, 2019
- Meeting Report for the IEP team meeting held on October 28, 2019
- USD #\_\_ School Board Policy GAAF: Emergency Safety Interventions
- USD #\_\_ Emergency Safety Interventions - Parent Information
- Document titled *About the* \_\_\_\_ \_\_\_\_ *USD* \_\_ *Police Department* including credentials and training record for \_\_\_\_ \_\_\_\_, School Resource Officer (SRO)

## Background Information

This investigation involves a male student who was enrolled in the eighth grade at \_\_\_\_\_ Middle School in USD #\_\_ during the 2019-20 school year. The student has attended schools in USD #\_\_ since the 2017-18 school year when he was in sixth grade. He previously attended school in USD #501 (Topeka Public Schools) where he was initially determined eligible for special education and related services in the second grade due to an exceptionality of autism. The student has continuously received special education services since that time. The student is currently enrolled as a ninth-grade student at \_\_\_\_\_ High School in USD #\_\_ for the 2020-21 school year.

## Issues

The Individuals with Disabilities Education Act (IDEA) allows allegations of noncompliance to be investigated for up to one year from the date the complainant files a written complaint with the state's department of education. In this case, the alleged noncompliance occurred on October 9, 2019, and the parent filed the child complaint with the KSDE on October 9, 2020.

Based upon the written complaint and interviews with the parent, one IDEA issue was investigated. It should be noted that the parent also shared multiple concerns related to the student's detention and subsequent arrest; however, those issues were not found to fall under the jurisdiction of the IDEA.

**ISSUE ONE:** The USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individual Education Program (IEP) as written, specifically by not implementing the Behavior Intervention Plan (BIP) on October 9, 2019.

## Positions of the Parties

### Parent Position

The parent alleged USD #\_\_ did not follow the student's BIP, which resulted in an escalation of negative behaviors in the school setting on October 9, 2019. This escalation resulted in the student being physically restrained in the special education classroom by \_\_\_\_, Principal; \_\_\_\_, Assistant Principal; and \_\_\_\_, SRO. Ultimately, the student was detained, arrested, and transported by the police on that date.

The parent believes school staff intentionally escalated that student's behavior over a period of approximately two hours on October 9, 2019. The parent indicated the BIP states that the student's negative behavior is a result of his severe anxiety of new and social situations. The parent reported the student was already anxious on that date because he was late to school due to an appointment. The mother noted the student "had a rough morning" and commented that she would typically have kept the student home because of the anxiety caused by the disruption in the student's schedule but, because USD #\_\_ was threatening to report her for truancy due to absences, she brought the student to school.

The mother also indicated the BIP states that the student "should be given time and space to cool off" when he gets upset. The parent reported the student went to his special education classroom upon his arrival at school on October 9, 2019 but did not want to work because he was feeling anxious. According to the parent, the student even told his teacher that "I need time," but \_\_\_\_, Special Education Teacher, "just kept pushing for the work to be completed."

The parent reported the BIP states that the student is extremely aware of how his peers view him and exhibits behaviors that allow him to escape from uncomfortable social situations. When the lunch bell rang, the special education teacher told the student he could not go to lunch; however, the student left the classroom and proceeded to the lunchroom anyway. Once in the lunchroom, the student proceeded to get his lunch and then sit with his friends at the lunch table. At that time, the principal removed the student's peers from his lunch table. The parent reported the removal of his friends from the lunch table caused the student to feel embarrassed in front of his peers, which further escalated the student's anxiety and agitation.

The parent stated that the BIP allows the student to leave a situation to “cool down” in a designated place such as walking outside of the building or going to the special education classroom. The BIP indicates the student de-escalates quicker if he goes outside and that staff should prompt him to “take a break” when he is becoming agitated. In this situation, the student exited the cafeteria and returned to the special education classroom where his inappropriate behavior continued to escalate. The parent noted the weather was nice on October 9, 2019, but the student was not allowed or prompted to go outside to de-escalate.

The parent reported the BIP states that a maximum of three familiar staff should be involved with the student when the student is agitated. However, there were two special education staff, two administrators, the school resource officer, and a police officer involved in the situation that occurred on October 9, 2019.

The parent indicated the BIP also states the student does not react well to aggressive body posture or stances and that he responds better to relaxed approaches. In addition, the BIP states the student has never purposely hurt another person but that “his amygdala is just simply in flight mode and wants the established safe and calm environment.” On October 9, 2019, the parent believes the student’s aggressive behavior was triggered and further escalated by the two administrators and the school resource officer when they “cornered the student” in the special education classroom. This caused the student to attempt to escape the threatening situation and inadvertently bump into the three grown men as he was trying to leave the special education classroom. At this point, the parent reported that the student was restrained, assaulted, handcuffed, and arrested.

The parent reported the BIP requires school staff to inform her when the student escalates. The parent indicated she first learned of the situation that occurred on October 9, 2019 when she was contacted by Juvenile Intake. At that time, she was informed that her son had been arrested and was at Juvenile Intake to be processed. The parent reported the school staff have contacted her by telephone in the past when he escalates. She would talk with staff and

they would decide if she needed to be present. The parent reported that there was a time that the school staff had her come to school and encourage the student to clean up a mess. She was not contacted by school staff on this day to help de-escalate the situation. The parent believes that this whole situation could have been avoided if school staff had contacted her during the two hours that the student's behavior was escalating so that she could have helped to de-escalate his anxiety and the resulting inappropriate behavior.

### School District Position

USD #\_\_\_ stated that the student's BIP was followed by school staff on October 9, 2019. Nevertheless, despite the implementation of the BIP, the student's behaviors escalated to the point that he was becoming a danger to others. Following the MANDT system protocol, school staff determined it was unsafe to use emergency safety interventions (ESI) due to the size discrepancy between the student and the female staff. At that time, it became necessary to involve law enforcement.

USD #\_\_\_ indicated the student arrived at school late on October 9, 2019, and was "already in an agitated state due to a canceled appointment and his phone being confiscated by mom". The student became more agitated when he was asked to complete a modified assignment involving writing one sentence with one-to-one assistance from a special education staff. The student was allowed time to calm down and to take a break in a safe location. The student's noncompliance quickly escalated to verbal aggression and then physical aggression towards objects and finally physical aggression towards staff.

School staff stated:

Throughout the on-going incident (which lasted approximately 60 minutes), Mrs. \_\_\_\_\_ [Special Education Teacher] followed the student's behavior plan, as well as used strategies that had been successful in the past. Until the last several minutes, the student's behavior wasn't atypical for him; however, the student's behavior deteriorated and escalated at a rapid pace, resulting in the student throwing chairs with intent at staff members. Subsequently,

administration and the police officer arrived at the classroom in response to the commotion.

As another chair was hurled at staff, administration and the officer decided the situation was getting too violent and they needed to intervene. When the principal and officer entered the classroom, a chair was thrown and hit the principal's left hand. They asked him to calm down and re-directed him. As he refused to comply, the student bumped the officer several times in the chest and pushed him. This led the principal and officer to believe their safety, as well as the student's was at risk (the student is very large in stature.) Both agreed the student should be taken into custody. At that point in which the decision was made, jurisdiction of the situation was with law enforcement. Ultimately, the student was handcuffed and arrested. The officer called for assistance from a second officer to transport the student to Juvenile Intake.

Following school district procedure, the principal called the parent immediately following the student leaving campus with law enforcement. Because the parent did not answer the phone, the principal left a message to inform her of the situation. The parent called back a short time later to speak to the principal and was reportedly very upset about how the situation was handled.

### Findings of Fact

The IEP developed on March 29, 2019, was in effect on October 9, 2019, the date of the incident resulting in the alleged noncompliance. This IEP included a BIP consisting of eleven paragraphs.

BIP paragraph number one noted the student's negative behavior results from his severe anxiety of new and social situations. It also states that the student is extremely conscious of how others view him and that the student has learned behaviors that he could use to escape uncomfortable situations. This paragraph provides background information about the function of the student's inappropriate behavior but there are no actions required to be implemented in this paragraph.

BIP paragraph number two requires that appropriate social interactions are “frontloaded” before the student “is faced with them.” An example of this is included, which describes the student being removed from the classroom for a specific inappropriate behavior and then reviewing the expectations prior to the student re-entering the classroom.

BIP paragraph number three states that the expectation is that the student remain in the class and engaged in the classroom activity or assignment. It notes that the student will usually remove himself from the classroom when he is escalating. This paragraph requires school staff to “intervene on the student’s behalf” and prompt the student to “take a break” if the student appears to be noticeably agitated/escalated.

BIP paragraph number four requires specific locations be identified for the student to take a break. The BIP states, “The special education classroom should be one option, but not the only one just in case it is not available.” This paragraph also specifically identifies other options that should be available including a designated area outside, the counseling office, library, conference room, etc. In addition, this paragraph states that the student de-escalates more quickly if he is allowed to pace/walk outside in the designated area and that the student does not run away so there is no reason to stand in front of the student when he is headed outside.

BIP paragraph number five notes that the student does not react well to aggressive body postures or stances. This paragraph requires the district to minimize the number of staff members involved during times of heightened escalation to no more than three and to ensure those persons are staff members with whom the student is familiar.

BIP paragraph number six requires staff to accompany the student throughout the school building when he is transitioning to a location designated for taking a break. Staff are required to not engage in conversation with him or block his way, even if he does not take a direct route to the “cool-down spot.” Staff should prompt staff/students who might be in the hallway to move aside. It is noted that the student “moves fast but has never purposely plowed people

over; his amygdala is just simply in flight mode and wants the established safe and calm environment.”

BIP paragraph number seven requires that the student be given “time and space to cool off” when he goes to the special education classroom or other safe space. It is noted that the student will indicate he is de-escalated by initiating conversation, lifting his head off the desk, or beginning to work.

BIP paragraph number eight requires staff to engage in conversation to process through the student’s feelings once he is calm. The purpose of this conversation is “to validate the student’s feelings so that he knows we care and are addressing his concerns.”

BIP paragraph number nine requires that the student must always be in the presence of an adult even during passing periods and lunchtime. This staff person does not need to stand next to him, but the student needs to be aware that an adult is present who can provide help at any time.

BIP paragraph number ten requires that the student not be sent home for any destructive behavior. It notes that sending the student home is actually rewarding the student’s inappropriate behavior, which was used to escape an anxiety-provoking situation. Instead, staff must wait until the student is de-escalated and then “make the student pick up everything he destroyed, put all furniture back where it belongs, and tape papers back together. After processing and cleaning everything up, present the student with the same anxiety-provoking situation with social/emotional supports so that the student learns it doesn’t go away.”

BIP paragraph number eleven requires school staff to keep daily behavior data and to communicate with the mother regarding the “specific circumstance and how long the escalation occurred.”

Based upon interviews and a review of the witness statements written by Ms. \_\_\_\_\_ (special education teacher), Ms. \_\_\_\_\_ (special education department chair), and Mr. \_\_\_\_\_ (principal), all of which were created independently and

contemporaneous to the discipline situation, the sequence of events that occurred on October 9, 2019, appears to be as follows:

- The student arrived at school late and in an agitated state due to a change in a scheduled appointment and the confiscation of his cell phone by the parent. Ms. \_\_\_\_\_ [Special Education Teacher] met the student as he entered the building and previewed the day's class schedule. Ms. \_\_\_\_\_ [Special Education Teacher] then accompanied the student in the hallway to his classroom.
- Once in the classroom, Ms. \_\_\_\_\_ [Special Education Teacher] worked one-to-one with the student to complete a modified history worksheet. The student completed several multiple-choice questions but became agitated when asked to write a sentence to answer a question. The student "shut down" and refused to complete the assignment. Ms. \_\_\_\_\_ [Special Education Teacher] encouraged the student to complete the assignment but the student requested to be "left alone" and then left the classroom heading towards the Students Overcoming Adversity to Reach Success (SOARS) classroom. Ms. \_\_\_\_\_ [Special Education Teacher] followed the student to the SOARS classroom.
- Once in the SOARS classroom, the student sat in a gaming chair and faced the wall. He continued to be agitated, yelling obscenities and stating that he wanted to be left alone. Ms. \_\_\_\_\_ [Special Education Teacher] radioed Ms. \_\_\_\_\_ [Special Education Department Chair] to come to the SOARS classroom as a witness for documentation purposes. The two staff did not engage with the student but instead sat at a table away from the student and "cross-talked" about events happening in the building hoping to distract the student and reduce his anxiety about the schoolwork that appeared to be the trigger for the escalation in behavior. Because the lunch period was next in the student's schedule, Ms. \_\_\_\_\_ [Special Education Teacher] asked the student what he would like for her to bring him for lunch as he continued to be agitated and not calm enough to hold a conversation to process his feelings about the situation.

- The student responded by “growling” his response and then left the SOARS classroom and walked to the cafeteria. Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] followed the student through the hallways until he reached the cafeteria. Once in the cafeteria, the student got his lunch and sat at the lunch table with several of his peers. Because the student had left the SOARS classroom prior to calming down, Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] determined that the peers eating at the lunch table with the student should be moved to a different table in order to allow the student space to calm down. Ms. \_\_\_\_\_ [Special Education Teacher], Ms. \_\_\_\_\_ [Special Education Department Chair], Mr. \_\_\_\_\_ [Principal], and Mr. \_\_\_\_\_ [Assistant Principal] guided the peers to an alternate location to eat lunch. The student continued to be agitated and he left the cafeteria after approximately 5 minutes and returned to SOARS classroom with Ms. \_\_\_\_\_ [Special Education Teacher] following the student in the hallway.
- Initially, the student moved to the back of the SOARS classroom and both he and Ms. \_\_\_\_\_ [Special Education Teacher] did not speak or interact. The student then knocked a table over onto its side and threw several chairs at the table. Ms. \_\_\_\_\_ [Special Education Teacher] radioed Ms. \_\_\_\_\_ [Special Education Department Chair] to come back to the SOARS classroom as a witness for documentation purposes and both school staff stood in the doorway to the classroom to allow the student space and to keep staff safe. The student continued to throw chairs and slam them into the table, which resulted in very loud noises coming from the classroom. The student then picked up a chair and threw it directly at Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] who were standing in the doorway. The chair landed short and then bounced off another chair and table. The student moved closer to the doorway, picked up another chair, and threw it directly at the staff again. This time the chair hit Ms. \_\_\_\_\_’s [Special Education Department Chair] right ankle as she was moving from the doorway.

- Due to loud crashing noises coming from the SOARS classroom, Mr. \_\_\_\_\_ [Principal], Mr. \_\_\_\_\_ [Assistant Principal], and Officer \_\_\_\_\_ [School Resource Officer] came from the cafeteria to the SOARS classroom to check on the situation. As they arrived, they observed a chair being thrown out of the classroom door and school staff attempting to keep from being hit. The administrators and SRO joined Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] to briefly review the situation and determine if ESI was needed when the student threw another chair at the four staff standing in the doorway. Mr. \_\_\_\_\_ [Principal] and Officer \_\_\_\_\_ [School Resource Officer] made the determination that the safety of Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] was in question and had them leave the area.
- As Mr. \_\_\_\_\_ [Principal] and Officer \_\_\_\_\_ [School Resource Officer] started to enter the classroom, the student threw another chair, which struck Mr. \_\_\_\_\_ [Principal] on the left hand. Officer \_\_\_\_\_ [School Resource Officer] requested the student to stop his behavior and the student responded by bumping Officer \_\_\_\_\_ [School Resource Officer] in the chest several times and pushing him. At this point, Mr. \_\_\_\_\_ [Principal] and Officer \_\_\_\_\_ [School Resource Officer] made the determination that the student was a danger to others and Officer \_\_\_\_\_ [School Resource Officer] took jurisdiction of the situation.
- Officer \_\_\_\_\_ [School Resource Officer] attempted to take the student into custody but the student resisted by yelling, hitting, kicking, and attempting to bite the school staff. Mr. \_\_\_\_\_ [Principal] attempted to assist Officer \_\_\_\_\_ [School Resource Officer] in an effort to handcuff the student. Mr. \_\_\_\_\_ [Assistant Principal] entered the classroom to move tables, chairs, and desks away from the student. Ultimately, Officer \_\_\_\_\_ [School Resource Officer] and Mr. \_\_\_\_\_ [Principal] physically restrained the student on the floor and the student was able to be handcuffed. Officer \_\_\_\_\_ [School Resource Officer] then called for a \_\_\_\_\_ County Sheriff's Office deputy to transport the student. Mr. \_\_\_\_\_ [Principal] phoned the parent and left a message regarding the incident

and the parent returned his phone call that same day to discuss the situation.

USD #\_\_ School Board Policy GAAF Emergency Safety Interventions defines a “school resource officer” as a law enforcement officer or police officer employed by a local law enforcement agency who is assigned to a district through an agreement between the local law enforcement agency and the district. Officer \_\_\_\_\_ [School Resource Officer] serves as the school resource officer at USD #\_\_. This policy states:

Campus police officers and school resource officers shall be exempt from the requirements of this policy when engaged in an activity that has a legitimate law enforcement purpose.

This policy requires that when a school resource officer has used seclusion, physical restraint, or mechanical restraint on a student, the school shall notify the parent the same day using the parent’s preferred method of contact. It is noted that mechanical restraint includes, but is not limited to, the use of handcuffs.

### Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.324(a)(2)(i) require school districts to consider the use of positive behavioral interventions and support, and other strategies, to address the behavior of any child whose behavior impedes that child’s learning or the learning of others in the development of the IEP. In addition, federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP.

In this case, the March 29, 2019 IEP, which included a BIP, was in effect on October 9, 2019. The BIP required the following actions in order to support

appropriate behavior at school and to de-escalate the student's inappropriate behavior when he became agitated on that date:

1. Appropriate social interactions are "frontloaded" before the student is faced with them. An example of this is included in the BIP describing a situation where the student is removed from the classroom for a specific inappropriate behavior and then staff review the expectations prior to the student's re-entry back into the classroom.

In this situation, the student was displaying inappropriate behavior but was never able to de-escalate to the point where school staff could review expectations prior to the student re-entering his scheduled classroom setting.

2. School staff are to "intervene on the student's behalf" and prompt the student to "take a break" if the student appears to be noticeably agitated/escalated.

In this situation, when the student first became agitated in the classroom due to the writing involved in the modified assignment, he self-initiated taking a break in the SOARS classroom. From that point forward, the student continued to be "taking a break" as an intervention for de-escalating his behavior.

3. Identify specific locations for the student to take a break. Examples of these locations include the special education classroom, the counselor's office, library, conference room, etc. It is noted that the student de-escalates quicker outside. If the student chooses to go outside to walk/pace, staff should not stand in front of the student as he is exiting the building.

In this situation, the student chose to take a break in the SOARS classroom. There is no requirement for school staff to direct the student to go outside even though it is noted that he seems to de-escalate more quickly in that setting.

4. Minimize the number of staff members involved during times of heightened escalation to no more than three and to ensure those persons are staff members with whom the student is familiar.

In this situation, USD #\_\_ did limit the number of staff involved with the student at any one time. Ms. \_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_ [Special Education Department Chair] were with the student in the SOARS classroom both times he went to this location due to being escalated. The student was familiar with Ms. \_\_\_\_ as she is his special education teacher as well as Ms. \_\_\_\_ as she is the special education department chair at \_\_\_\_ Middle School. Once the loud crashing noises started, Mr. \_\_\_\_ [Principal] and Officer \_\_\_\_ [School Resource Officer] went to the SOARS classroom and briefly reviewed the situation with Ms. \_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_ [Special Education Department Chair] outside the doorway of the SOARS classroom. Based upon that discussion, Ms. \_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_ [Special Education Department Chair] left the area and Mr. \_\_\_\_ [Principal] and Officer \_\_\_\_ [School Resource Officer] remained. Both of these individuals were familiar with the student as the building principal and the school resource officer. As the student's behavior escalated, Mr. \_\_\_\_ [Assistant Principal] came into the SOARS classroom to assist in resolving the situation. Mr. \_\_\_\_ was also known to the student as he is the assistant principal of the building.

5. Accompany the student through the school building when he is transitioning to a location designated for taking a break. Staff are not to engage in conversation with him or block his way even if he does not take a direct route to the "cool-down spot." Staff should prompt staff/students who might be in the hallway to move aside.

In this situation, the student was agitated upon his entry into the building. Ms. \_\_\_\_ [Special Education Teacher] followed the student to his first class. She then followed the student when he left his first class to go to the SOARS classroom and again when he left the cafeteria to return to the SOARS classroom. Ms. \_\_\_\_ [Special Education Teacher] did not engage in conversation with the student at these times nor did she block his way when he was transitioning to the SOARS classroom.

6. Give the student "time and space to cool off" when he goes to the special education classroom or other safe space.

The first time the student went to the SOARS classroom, Ms. \_\_\_\_\_ [Special Education Teacher] and Ms. \_\_\_\_\_ [Special Education Department Chair] did not directly engage with the student. Instead, these two staff “cross-talked” about events happening in the building hoping to distract the student and reduce his anxiety about the schoolwork that appeared to be the trigger for the escalation in behavior. The second time the student went to the SOARS classroom, Ms. \_\_\_\_\_ [Special Education Teacher] did not interact with the student and did not intervene when the student began throwing furniture. Instead, she moved to the doorway to observe along with Ms. \_\_\_\_\_ [Special Education Department Chair] who had just arrived at the SOARS classroom doorway. It was not until the student’s behavior had escalated to the level of being a threat to others that the principal and SRO intervened to keep everyone safe.

7. Engage the student in conversation to process through his feelings once he is calm in order to “to validate the student’s feelings so that he knows we care and are addressing his concerns.”

In this situation, there were no facts to show that the student ever de-escalated to the point that he was able to engage in this type of conversation with school staff.

8. The student must always be in the presence of an adult even during passing periods and lunchtime.

October 9, 2019, the student was in the presence of Ms. \_\_\_\_\_ [Special Education Teacher] upon his entry into the building as well as in the classroom, hallways, SOARS classroom, and cafeteria. When Ms. \_\_\_\_\_ [Special Education Teacher] exited the SOARS classroom, Mr \_\_\_\_\_ [Principal] and Officer \_\_\_\_\_ [School Resource Officer] were with the student.

9. The student should not be sent home for any destructive behavior. Staff must wait until the student is de-escalated and then “make the student pick up everything he destroyed, put all furniture back where it belongs, and tape papers back together. After processing and cleaning everything up, present the student with the same

anxiety-provoking situation with social/emotional supports so that the student learns it doesn't go away."

In this situation, the student was not sent home for destructive behavior. Instead, the student's behavior became a threat to others when he escalated to intentional physical aggression towards others. At that point, Officer \_\_\_\_\_ [School Resource Officer] took jurisdiction of the situation and proceeded to detain and arrest the student. USD #\_\_ School Board Policy GAAF Emergency Safety Interventions specifically allows for this action by the school resource officer. Mr. \_\_\_\_ [Principal] contacted the parent by telephone on October 9, 2019, the same day of the incident, as required by this same policy.

10. School staff must communicate with the mother regarding the "specific circumstance and how long the escalation occurred" based on daily data.

In this situation, Mr. \_\_\_\_ [Principal] contacted the parent by telephone on October 9, 2019, the same day of the incident, as required by USD #\_\_ School Board Policy GAAF Emergency Safety Interventions.

Based on the foregoing, a violation of special education statutes and regulations for failing to implement the student's IEP including the BIP on October 9, 2019 is not substantiated.

### **Right to Appeal**

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). Due to COVID-19 restrictions, the written notice of appeal may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. Such notice of appeal must be delivered within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

# *Nancy Thomas*

Nancy Thomas, Complaint Investigator

(f) Appeals.

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

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

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

(A) the issuance of an accreditation deficiency advisement;

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON OCTOBER 19, 2020

DATE OF REPORT: NOVEMBER 18, 2020

This report is in response to a complaint filed with our office by \_\_\_\_ and \_\_\_\_  
\_\_\_\_, on behalf of their daughter, \_\_\_\_\_. For the remainder of this report, \_\_\_\_  
will be referred to as "the student." Mr. and Mrs. \_\_\_\_ will be referred to as "the  
parents." Mr. \_\_\_\_ will be referred to as "the student's father." Mrs. \_\_\_\_ will be  
referred to as "the student's mother."

**Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone on October 22 and 26  
and November 10 and 12, 2020 with \_\_\_\_ \_\_\_\_, Director of Special Education  
for the \_\_\_\_ Cooperative of \_\_\_\_ Kansas. The investigator spoke  
briefly by telephone with the student's father on October 22, 2020 and spoke by  
telephone with the student's mother on that same date.

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

- Prior Written Notice for Evaluation or Reevaluation and Request for  
Consent dated September 25, 2018
- Multidisciplinary Team Report Initial or Reevaluation dated January 8,  
2019
- Prior Written Notice for Identification, Initial Services, Educational  
Placement, Change in Services, Change of Placement, and Request for  
Consent dated January 8, 2019

- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated January 29, 2019
- IEP for this student dated January 29, 2019
- IEP for this student dated October 1, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated October 1, 2019
- Notes from a Speech-Language Screening dated October 2, 2019
- IEP for this student dated November 14, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated November 14, 2019
- Resolution Meeting summary dated December 17, 2019
- Email dated January 27, 2020 from the student's mother to the special education teacher
- Continuous Learning Plan dated March 26, 2020
- Prior Written Notice for Identification, Initial Services, Educational Placement, Changes in Services, Change of Placement dated March 27, 2020
- Amended IEP for the student dated August 27, 2020
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement dated August 27, 2020
- Due Process – Resolution Session – Tracking Form dated December 17, 2019
- Notes regarding a December 17, 2019 Resolution Meeting
- Email dated December 18, 2019 from the director of special education to the parents
- Email dated December 18, 2019 from the student's mother to the director of special education
- Guardianship document dated July 2, 2020
- Report of TEACCH Transition Assessment Profile – Second Edition (TTAP) Evaluation dated September 8, 2020

- Email exchange dated September 14, 2020 between the student's mother and the director of special education
- Multidisciplinary Team Report dated September 29, 2020
- IEP for the student dated September 29, 2020
- Prior Written Notice for Identification, Initial Services, Educational Placement, Changes in Services, Change of Placement, and Request for Consent dated September 29, 2020
- Specialized Direct Instruction Communication forms covering the period of January 6 through March 13 and September 9 through November 6, 2020
- History of IEP Meetings beginning September 16, 2018 through October 19, 2020
- IEP Progress Reports for the student for school years 2019-20 and 2020-21
- Class schedule for the student for the 2020-21 school year
- Course grades for the student for school years 2019-20 and 2020-21

### Background Information

This investigation involves an 18-year-old student who is enrolled in the twelfth grade in her local high school.

The student was adopted at age \_\_ by these parents. On \_\_\_\_, 20\_\_ legal guardianship for the student was assigned to the student's mother.

According to the student's September 2020 IEP, the student was given the following diagnoses in 20\_\_: Autism Spectrum Disorder, Major Depressive Disorder (recurrent and severe), Generalized Anxiety Disorder, and Mild Intellectual Disability. Her social communication requires support, and she demonstrates restricted, repetitive behaviors which also require support.

### Issues

In their complaint, the parents identified five issues as follows:

- 1) Transition services were not started at the proper time.
- 2) Job shadowing
- 3) Resource room time being used on homework
- 4) [The student] taking general education classes
- 5) Speech and transportation

After speaking with the student's mother on October 22, 2020, the investigator expanded some of these issue statements in the interest of clarity and added an additional issue to address the parents' expressed concern throughout their complaint regarding the district's alleged failure to consider the input of the parents when developing the student's IEPs. The student's mother gave her permission for the issue restatement outlined in the remainder of this report. The restated issues were shared with the district, and the district was able to provide a response to all issues.

**Issue One: Transition services were not initiated for the student at age 14.**

**Parents' Position**

The parents assert that transition services for the student were not initiated as they should have been when the student turned age 14. It is the contention of the parent that transition services for the student were only included in the student's IEP after the parent questioned the district about those services after the student turned 17 (on \_\_\_, 20\_\_).

**Applicable Statutes and Regulations**

In a letter to the parties dated October 19, 2020, Tiffany Hester, Dispute Resolution Coordinator for Special Education and Title Services (SETS) at KSDE stated the following:

The Department's Special Education and Title Services team has authority to investigate only complaints alleging a violation of state

and federal special education statutes and regulations that occurred not more than one year from the date the complaint is received (K.A.R. 91-40-51(a), (b)(1); 34 C.F.R. 300.153(b)(1), (c)). The investigator, in her judgment, may determine that one or more allegations are beyond the jurisdiction of a state complaint. Any allegation in the complaint that does not relate to special education laws, or that occurred prior to October 19, 2019 will not be investigated.

### Summary and Conclusions

This complaint was filed on October 19, 2020, and state and federal regulations only give the Kansas State Department of Education (KSDE) jurisdiction to investigation allegations that occurred not more than one year from the date the complaint is received by KSDE (K.A.R. 91-40-51(a), (b)(1); 34 C.F.R. 300.153(b)(1), (c)). Because the parents are alleging violations of special education statutes and regulations which occurred prior to October 19, 2019, this issue was not investigated.

**Issue Two: Job shadowing opportunities provided for the student have been inappropriate.**

### Parents' Position

The parents contend that the job shadowing opportunities provided for the student have been a waste of the student's time because they do not relate to any job the student might realistically hold in the future. The parents believe that the student should not shadow the building art teacher because the student will not be a teacher or work with children. Similarly, the parents believe that rather than working with an activities director in a nursing home, the student should be learning how the commercial kitchen in the nursing home works or that she should be in the laundry at the nursing home learning about that setting.

The parents assert that the shadowing opportunities have lasted for too long (nine weeks), and that the district failed to consider their request to reassess the appropriateness of the opportunities described above. According to the parents, the district would not consider their input regarding the reassignment of the student to job shadowing opportunities the parents felt were more appropriate.

### **District's Position**

The district contends that the student's job shadowing activities were selected based upon the student's expressed interests and strengths. The district further asserts that these activities align with the student's IEP goals and recent transition assessment recommendations.

### **Applicable Statutes and Regulations**

Kansas statutes, at K.S.A. 72-3429(c)(8), establish requirements related to transition services for students age 14 or older. This statute requires that the IEP must include appropriate measurable postsecondary goals based on age-appropriate transition assessments related to training, education, employment and where appropriate, independent living skills. The IEP must also include the transition services needed to assist the student in reaching these postsecondary goals. Transition services are a coordinated set of activities that is focused on improving the academic and functional achievement of the child with a disability to help the child move from school to postschool activities. These activities must be based on the individual student's needs, preferences and interests, and must include instruction, related services, community experiences, the development of employment and other postschool adult living objectives, and – if appropriate – daily living skills and a functional vocational evaluation (K.A.R. 91-40-1(uuu)). The IEP team builds this set of activities from transition assessments given to the student. This information is then included in the present level of performance, within the IEP, that describes where the student is currently performing relative to the student's postsecondary goals. The IEP team considers the individual child's needs, taking into account the

child's strengths, preferences, and interests. With that as the starting point, the team determines what skills, services, or supports are needed to assist the student in transitioning from where the student is now to the student's desired postsecondary goals.

Neither state nor federal statutes and regulations specifically address "job shadowing," but in the development of transition services for students, IEP teams must include community experiences (K.A.R. 91-40-1(uuu)(3)). Examples of such community experiences may include community-based work experiences and/or job exploration.

### Investigative Findings

On October 29, 2019, in preparation for the student's November 14, 2019 IEP team meeting, the student completed an O\*NET Interest Profiler which showed the student had a strong interest in fields where artistic and social skills were needed. This assessment indicated that the student preferred to work in fields that allowed her to help and be of service to other people, to give advice, and to be creative. When establishing a vision for a "good life," the student indicated that she wanted to graduate from high school, find a job, and live on her own, but the student recognized that she needed support to make decisions about many aspects of life beyond school.

According to the student's October 1, 2019 IEP, the student planned to work at a local store and receive on-the-job training. To help the student achieve that goal, the student's IEP included "job preparation skills" – special education services provided through the resource room. Goals were written to address the student's needs in the areas of money skills, task planning, and completion of a job application.

When the IEP team revised the student's IEP on November 14, 2019, the team determined that job shadowing experiences in the school and community should be added to the student's plan. When selecting job shadowing activities for the student, special education staff focused on the interests the student had

shown during her October 2019 O\*NET Interest Profiler assessment described above.

Although the student had initially wanted to shadow in the art room on a daily basis, she and the special education teacher agreed that shadowing one day a week would be best. The district contends that the shadowing experience was not designed to teach the student how to be an art teacher. Rather, the experience was intended to provide the student with an opportunity to use her strengths (her interest and proficiency in art and her ability to work with children) to build competency in deficit skill areas. Specifically, the placement gave the student an opportunity to improve her ability to communicate with others in a work setting, to enhance her planning skills, to express her excitement and needs appropriately, and to build advocacy and decision-making skills.

According to the district, job shadowing at the nursing home was selected because it allowed the student to shadow an activities coordinator, interact with residents, and help to plan daily activities. Again, the job shadow experience was not designed to teach the student to be an activities director. Instead, the experience built on the student's interest in helping others. The experience created opportunities for the student to plan and create a schedule, to make job-related decisions, and to understand social norms and social cues.

The TTAP was administered to the student in September 2020 and provided the IEP team with additional information regarding the student's transition needs.

During the current school year, the student is working with the FACS (Family and Consumer Science) teacher helping to plan and prepare classroom activities. The FACS class teaches life skills along with the importance of basic nutrition, relationships, health, time management, and teamwork. This experience was chosen to help the student work on the following skill needs: time management, planning and scheduling, communication with professionals (teachers) and peers, relationship building, skill transfer, and understanding social norms.

## Summary and Conclusions

The IEP team selected job shadowing opportunities for the student that were based upon age-appropriate transition assessments that identified her needs, strengths, and interests. The experiences were not intended to teach the student how to become a teacher or an activities director, but rather how to function in a workplace setting. Each experience provided an opportunity for the student to enhance skills that were identified through assessment as deficient and were subsequently addressed in the student's IEP as a part of transition services. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Three: The time the student spends in the Resource Room is not being used appropriately.**

### Parents' Position

The parents contend that the district has used resource room time for the student to complete homework and other activities rather than devoting that time to the mastery of job skills and daily living skills. The parents assert that they had identified skills the student needed to work on, but they do not believe that those skills have been the focus of the student's work during her time spent in the resource room.

In their complaint, the parents state that the student "is not a truthful reporter, but when [the student's mother asks the student] what she did that day what she reports is not consistent with the skills we listed she needs to work on." In the complaint, the parents state that they "do not trust that they [school staff] are working on what they say they are."

### District's Position

The district asserts that the time the student spends in the resource room is used solely for the student to work towards her annual IEP goals. According to the district, a "Specialized Daily Instruction" spreadsheet was developed to

improve communication with the parents regarding how resource time was utilized. The special education teacher sends a spreadsheet home weekly to the parents. This spreadsheet communication is the result of a resolution agreement reached between the parents and the school after the parents requested due process in December, 2019.

### **Applicable Statues and Regulations**

Federal regulations require the school district to make special education and related services available to the student in accordance with the student's individualized education program (IEP) (See 34 C.F.R. 300.323(c)(2)).

### **Investigative Findings**

At an IEP team meeting on November 14, 2019, three annual goals were established for the student:

- 1) By the end of the IEP year, when given scenarios of real-world situations, [the student] will demonstrate problem-solving and decision-making skills to make decisions by identifying problems and generating 2 solutions appropriate to the situation in 4 out of 5 trials, as measured by data collection.
- 2) By the end of the IEP year, when given real life situation reading material at [the student's] instructional level, she will make inferences using vocabulary and reasoning skills on 8 out of 10 trials measured.
- 3) By the end of the IEP year, [the student] will use estimation skills to identify time needed to complete tasks in the areas of time, money, daily living tasks, scheduling, and personal care tasks on 4 out of 5 trials.

The IEP team also established the following services:

- 46 minutes of special education/resource/pull out services 5 days a week in the area of social/emotional
- 23 minutes of special education/resource/pull out services 5 days a week in the area of reading

- 23 minutes of special education/resource/pull out services 5 days a week in the area of math
- 46 minutes of special education/resource/pull out services 2 days a week in the area of job skill prep

Resource room services would be provided either by the special education teacher or by a paraeducator.

On December 9, 2019, the school district received the parents' request for a due process hearing. The district subsequently contacted the parents to offer to meet to attempt to resolve the parents' issues. The parties held a resolution meeting on December 17, 2019. The parties came to a resolution agreement. As stated in a summary of that meeting, the parties agreed that:

The IEP addressed the concerns that have been discussed, however, the parents are not feeling confident with the implementation of the plan. It was decided that better communication regarding content/instruction of the special education service times would be helpful in order to reassure the parents' confidence in the plan. At the start of 2<sup>nd</sup> semester, the [district's] high school special education teacher will send home weekly communication to the parent regarding special designed instruction that is being utilized during the service time. On January 2<sup>nd</sup>, the special education teacher, instructional coach, and special education director will meet to create a communication template that will be provided to the parents.

At the conclusion of the meeting, both parents and administration left feeling confident that continued communication and supports will be in place for successful implementation regarding the IEP. The administration encourages the parent to continue to reach out to administration with concerns so any issues can be resolved in a timely manner.

The director of special education signed off on the resolution agreement on December 18, 2019. In an email to the parents on December 18, 2019, the director of special education reported that she had scheduled a meeting with the special education teacher and the instructional coach to develop the communication tool. The director of special education attached a copy of the resolution agreement for the parent to sign. The student's mother responded via email to the director on December 18, 2019 stating, "I am so grateful that we have come to a consensus and am excited to put this plan in place and see amazing results." The student's mother signed off on the resolution agreement on December 18, 2019.

The district's proposal to provide weekly summaries regarding the student's specialized daily instruction was initiated the week of January 6, 2020. On January 27, 2020, the student's mother sent an email to the special education teacher thanking the teacher for "faithfully sending me these schedules every week." The weekly summaries were provided to the parent every week until March 13, 2020. Spring Break for the district was March 16 through March 20, 2020. On March 18, 2020, the governor of the state of Kansas issued an executive order closing all school buildings in the state for the remainder of the 2019-20 school year in an effort to slow the spread of the COVID-19 virus.

During the remainder of the 2019-20 school year, special education services were delivered to the student via Zoom. During that period, the special education teacher did not send home communication forms since the parents had the opportunity to directly observe the special education instruction that was being provided to the student and could see that instruction was focused on the student's goals. However, she continued to keep in touch with the parent via email.

The student's IEP was amended in an IEP Team meeting on August 27, 2020. A remote learning plan was added to the IEP. Annual goals were not changed, nor were the student's special education services. Students returned to school on September 1, 2020. Specialized Direct Instruction reports were again

provided to the parents by the special education teacher beginning September 7, 2020.

On September 29, 2020, the IEP team met to review and revise the student's IEP. The district proposed to make the following changes to the student's services:

- 45 minutes of special education/resource/pull out services 5 days a week in the area of social/emotional
- 45 minutes of special education/resource/pull out services 5 days a week in the area of math
- 45 minutes of special education/resource/pull out services 2 days a week in the area of job skill prep
- 45 minutes of special education/resource/pull out services 3 days a week in the area of job shadowing

The district also proposed the following three goals:

- 1) By the end of the IEP year, when given situations regarding social norms [the student] will be able to use problem solving skills to analyze the situation, identify the problem, and create an appropriate solution in 5 out of 5 opportunities when presented during her social skills instruction.
- 2) By the end of the IEP year, when given 10 items for real life purchase in a variety of settings, [the student] will be able to generalize dollar amounts associated with the item and its cost with 80% accuracy.
- 3) By the end of the IEP year, when planning a real-life scenario, [the student] will be able to plan and budget up to \$100 the appropriate cost associated with the activity she is participating in with 100% accuracy.

The district has continued to provide Specialized Direct Instruction reports on a weekly basis, adapting the documents to reflect the changes made to the student's IEP on September 29, 2020.

The district provided the investigator with copies of every Specialized Direct Instruction Communication form sent home to the parents. These sheets

contain columns related to the IEP goals identified in the student's November 14, 2019 and September 29, 2020 IEPs as well as the Job Skill Prep and Job Shadowing activities. The forms provide daily information regarding which IEP goal(s) were worked on and about the specific activity in which the student was instructed. The forms reflect a varied and individualized approach to the instruction of the student.

### **Summary and Conclusions**

It is the responsibility of the investigator to look for specific, tangible evidence that supports and/or refutes the positions of the parents and the district. With regard to this issue, the parents provided no evidence to support their contention that time in the resource setting is being used for something other than work on the student's IEP goals. The district, on the other hand, has provided detailed, daily documentation of the focus on student IEP goals, job preparation, and job shadowing. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Four:** The district has failed to consider the input of the parents in the development of the student's IEP.

### **Parents' Position**

The parents contend that the district is not responsive to their suggestions regarding placement and services for the student. The parents report that they have submitted an "example IEP" which included proposed goals but the district did not consider the parents' input. It is the position of the parent that the district has refused to agree with their request that the student spend less time in general education classes and more time in the resource room where service time should be focused entirely on the student's goals and objectives.

### **District's Position**

The district asserts that the parents have been actively involved in the IEP process, that the concerns and input of the parents have consistently been

considered, and changes have been made to the student's IEPs in response to the parents' input.

### **Applicable Statutes and Regulations**

The school district must make sure that the IEP Team includes the parents of the child with a disability (34 C.F.R. 300.321(a)(1)). The school district must also take steps to ensure that one or both of the parents are present at each IEP Team meeting or are given an opportunity to participate (34 C.F.R. 300.322(a)(1),(2)). In developing the child's IEP, the IEP team must consider the concerns of the parents for enhancing the education of their child (34 C.F.R. 300.324(a)(1)(ii)). The parent of a child with a disability must be given an opportunity to participate in meetings about the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education (FAPE) to the child (34 C.F.R. 300.501(b)(1)). Further, the school district must make sure that a parent of the child with a disability is a member of any group that makes decisions on the educational placement of the child (34 C.F.R. 300.501(c)(1)). However, if the members of the IEP Team (including the parents and the school staff) cannot agree on the appropriate placement or services for a child with a disability, the school district has the responsibility to make the final decision. The Office of Special Education Programs (OSEP), which is the office within the U.S. Department of Education that writes and implements the federal special education regulations, has stated:

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding the child's needs and appropriate goals, the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments, and the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in

developing, reviewing, and revising IEPs. The IEP team should work toward consensus, but the public agency [school district] has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon majority “vote” [emphasis added]. If the team cannot reach consensus, the public agency [school district] must provide the parents with prior written notice of the agency’s proposals or refusals, or both, regarding the child’s educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing (64 Federal Register, March 12, 1999, pp. 12473-74).

### Investigative Findings

In the fall of the 2019-20 school year, the parents requested that the IEP team meet before the student’s January 29, 2019 annual IEP review in order to address transition-related needs. An IEP meeting was held on October 1, 2019. Prior to the IEP team meeting, the student’s mother presented the team with an “example IEP” which she wanted the team to consider. While the team did not adopt the parent’s sample document in its entirety, elements of the sample document were included in the revisions to the student’s IEP. The team agreed with the parents that transition, job skills, and independent living skills were important elements of the student’s IEP. Goals were added to the student’s IEP to focus on daily living and job-related skills. The team also considered the parents’ request that more time in the resource room setting be added to the student’s IEP, but the IEP team decided that the level of services specified in the IEP in conjunction with accommodations and modifications would meet the student’s educational needs.

The parent was provided with prior written notice of the district’s proposal to provide the student with the following:

special education services for 46 minutes per day, for vocational skills and daily living skills. [The student] will receive special education services for 23 minutes per day for SDI [Specialized Direct Instruction] for math and 23 minutes per day of SDI for written language.

The student's parents gave written consent for the district's proposed plan on October 1, 2019.

During the October 1, 2019 IEP team meeting, the parents expressed concern that the student might need speech services. The team decided to ask the SLP (speech and language pathologist) to screen the student's skills. That screening was conducted on October 2, 2019. (See Issue Six for additional information.)

In a telephone call with the director of special education on October 22, 2019, the student's mother outlined a number of concerns. According to the director of special education, those concerns included:

- dissatisfaction with special education services;
- a request that the student spend less time in general education classes and perhaps full time in the resource room;
- a desire for more attention to meeting student needs in the areas of social/emotional, transition training, life skills, and job training skills;
- consideration of a "dream IEP" developed by the student's mother and presented to staff prior to the October 1, 2019 IEP meeting;
- similarities between sophomore and junior-year IEPs;
- use of resource room as a study hall; and
- a belief on the part of the parent that the school sees the student differently than the parents do, fails to recognize how low functioning the student is, and therefore does not plan to address some student needs – particularly those related to transition and social emotional development – until the student's senior year.

According to the director of special education, she considered each of the parent's concerns and notes that several of these concerns were specifically addressed in subsequent IEP team meetings.

The parents called for another IEP team meeting to request that the student be placed in the resource room full time. An IEP team meeting was convened on November 14, 2019. Both parents were present. The student did not attend the meeting, but the student's father reported that he had spoken with the student who had told her father that she would rather be in the resource room all day long. Under the section entitled "Parents Comments/Concerns" the student's November 14, 2019 IEP includes the following statement: "Parent asked [the student] and she expressed wanting to be in the resource room the entire day."

A prior written notice form dated November 14, 2019 shows that the IEP team discussed the parents' request. The student's classroom teachers provided input regarding the student's performance in their classes. (See Issue Five for additional information.) The district increased the amount of time the student would spend each day in the resource room but refused the parents' proposal to move the student to full time resource room placement because the student's needs would be met with the special education goals and services proposed in the revised IEP. According to a November 14, 2019 prior written notice form, "Taking away more access to general education is too restrictive and not appropriate for [the student's] needs."

On December 4, 2019, the special education teacher sent an email to the student's mother stating:

I have been working on some opportunities for [the student] during the added hour of resource time that was proposed at her IEP meeting. Just following up to see where you and [the student's father] are at with consenting for the proposed services. Please let me know if I can help clarify anything regarding the proposal.

The student's mother responded to the special education teacher on December 5, 2019 telling the special education teacher:

I don't think you need my signature to continue, but if I'm wrong, I must tell you we decided to go to due process. I mailed the

paperwork yesterday. I can still sign so she can get those services started if I need to. Just let me know and thank you for your efforts.

The special education teacher followed up with the student's mother to let her know that parental consent would be required before the district could increase the student's special education services. The student's mother gave written consent for the district's November 14, 2019 proposal on December 8, 2019.

As noted above under Issue Three, the parents filed a request for a due process hearing with the school district on December 9, 2019. At a meeting on December 17, 2019, the parties reached a resolution that required the district to send home weekly reports regarding the student's specialized daily instruction. These weekly summaries were provided to the parent from the week of January 6, 2020 until March 13, 2020 when the governor issued an executive order closing school buildings for the remainder of the 2019-20 school year. The weekly reports were reinstated once students returned to in-person learning on September 1, 2020 and continue to the present.

An August 27, 2020 prior written notice form notes that parents were concerned with the transition services that had been provided to the student and states that the team agreed to conduct an assessment in the area of transition skills to determine the student's strengths and needs. The team chose to use the TTAP for this assessment which is, according to the product website, designed for use with individuals with autism spectrum disorders. The instrument is intended to:

prepare for a successful, semi-independent adult life (i.e., personal development, recreational living, adult integration into employment and residential arrangements, etc.). The TTAP will also help providers identify the individual's principle transition goals, strengths and weaknesses. Second, a "Cumulative Record of Skills" (CRS), along with two data collection forms, provides an efficient method of ongoing assessment in community-based instruction. The TTAP can be used to facilitate educational and transitional planning. Emphasis is on evaluating the six major

functional skill areas including vocational skills, vocational behavior, independent functioning, leisure skills, functional communication, and interpersonal behavior.

The parents were interviewed as a part of the TTAP assessment and a summative TTAP report dated September 8, 2020 was reviewed by the IEP team at a multidisciplinary team meeting on September 29, 2020. The IEP team also reviewed and revised the student's IEP on September 29, 2020. The IEP team revised the annual goals for the student to address needs identified through the TTAP assessment.

The "Parent Comments/Concerns" section of the student's September 29, 2020 IEP contains the following "Comments/Concerns":

Parent expressed concern regarding [the student's] voice level, outward reaction to situations that she does not agree with, occasional inappropriate language in the home, and impulse control.

According to the IEP, "Social skills mentioned by the parent will be addressed via specially designed instruction to support her emotional needs."

A second parent concern states, "Parent would like to review her vocational activities monthly rather than quarterly."

In response, the IEP states, "The team will continue to update the progress reports quarterly. However, the team will continue to communicate weekly via the SDI sheet that includes information on programming for each goal."

The third parental concern states, "Parent requested that we use 'everyday language' when reporting in the progress report and the weekly report."

According to the IEP, "The team agreed to be sure to use 'everyday language' in written reports."

The IEP Team amended the student's special education services to increase the focus on areas of concern voiced by the parent. Parents were provided with prior written notice of the change to the IEP. Parent consent was not required because it was not a material change in service or substantial change in placement.

### Summary and Conclusions

School districts are required to ensure that parents have an opportunity to participate in special education decision-making regarding their child. That does not mean, however, that districts must agree to any and all changes requested by parents, nor are they required to adjust document formats or alter instructional methodology in order to accommodate parental requests. The ultimate responsibility for the provision of special education to students rests with the district, and when parents and the district cannot agree, the decision falls on the shoulders of the district.

Evidence shows that between the beginning of October 19, 2019 and October 19, 2020, the district met with the parents a total of four times to review and revise the student's IEP. At each of these meetings, the parents were present and had the opportunity to express their concerns. Records show that the district made modifications to the student's IEP in response to the parents' input. The parents were provided with prior written notice when the district made changes to the student's educational program and when the district declined to make changes that were requested by the parents. To improve communication with the parents, a weekly reporting system was implemented to provide more information regarding how the student's special education needs were being addressed. Further, the district conducted a transition assessment which allowed the parent additional input into the planning process. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Five:** The student is enrolled in general education classes despite the parents' objection.

### **Parents' Position**

The parents assert that they have repeatedly asked to have the student removed from general education classes such as biology because she lacks the basic foundational skills and knowledge to participate meaningfully. The parents believe that the student's time would be better spent in learning how to fill out job applications, handle money, and in developing an understanding of how to be safe in the community and online.

### **District's Position**

It is the position of the district that while the student requires specially designed instruction in the areas specified in her IEP, further removal of the student from the general education environment is unwarranted. The district contends that the student has been successful in her general education classes and asserts that the amount of time dedicated to instruction on transition-related skills determined by the IEP team, which included the parents, has conveyed sufficient support for the student to achieve her goals.

### **Applicable Statutes and Regulations**

The school district must ensure that children with disabilities are educated with children who do not have disabilities, to the maximum extent appropriate. Removing a child from the general education classroom must not occur unless the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily (K.S.A. 72-3420(a); 34 C.F.R. 300.114(a)(2)).

### **Investigative Findings**

The findings and conclusions in Issue 4 are incorporated herein by reference. An IEP team meeting was held on November 14, 2019 at the request of the parents. The parents stated that they wanted the student to be placed full time in the resource room. Although the student was not present at the meeting the

student's father reported that the student had told him that she would rather be in the resource room all day long.

The student's teachers were present and offered the following statements regarding her classroom performance strengths:

- The student asked questions more often than her peers in her English class.
- She was improving in her ability to ask questions.
- The student understood *The Crucible* at a high level.
- She was one of the first in her English class to raise her hand to participate in class discussions.
- She participated well in both individual and collaborative learning.
- She was considered an extrovert in the school setting.

During the first semester of the 2019-20 school year, the student earned the following grades in content area classes:

- \_\_\_\_\_ - C+
- \_\_\_\_\_ - B-
- \_\_\_\_\_ - B-
- \_\_\_\_\_ - C+
- \_\_\_\_\_ - C

For the second semester of the 2019-20 school year, the student earned the following grades:

- \_\_\_\_\_ - B-
- \_\_\_\_\_ - A
- \_\_\_\_\_ - A-
- \_\_\_\_\_ - B
- \_\_\_\_\_ - C+

The student had earned 24 of 26 credits required for graduation by the end of the 2019-20 school year. The student was on track to graduate in May of 2021.

The student earned the following grades in content area classes during the first quarter of the 2020-21 school year:

- \_\_\_\_\_ - A-
- \_\_\_\_\_ - B+
- \_\_\_\_\_ - D+

According to all IEPs developed for the student during the period of this complaint, the student is able to participate in the general state assessment and in district assessments with accommodations.

Student progress toward the attainment of her November 14, 2019 IEP goals was monitored in January, March, April, and September 2020. For two of her three goals, the student made sufficient progress in January, March, and April toward attainment of her goal but after the summer break demonstrated some regression in September. Progress was adequate for goal attainment at all monitoring periods for the third goal.

The student's Progress Report for the first quarter of the 2020-21 school year showed that the student is meeting or exceeding benchmark expectations with regard to the three annual goals in her September 29, 2020 IEP.

### Summary and Conclusions

While the parents have asserted that the student should be removed from her general education classes, they have provided no evidence to show that she is unsuccessful in the general education environment or that she is failing to meet established goals and objectives with the current level of special education support.

On the other hand, evidence provided by the district shows that the student *has* been successful in her general education classes. The student has earned passing grades in all of her assigned courses during the 2019-20 and 2020-21 school year and is on track to graduate with her same-age peers. Classroom teachers have reported that the student is actively involved in classroom

activities. There is no evidence to show that the education of the student in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. Additionally, the student made adequate progress throughout the 2019-20 school year toward achieving the goals on her IEP. She is making adequate progress toward achieving the new goals and objectives established in her September 29, 2020 IEP. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Six:** The district is not providing speech and transportation services that are needed by the student.

### **Applicable Statutes and Regulations Regarding Related Services, Including Speech and Transportation**

When developing the IEP, the IEP team must determine the special education, related services, and supplementary aids and services to be provided to the child or on behalf of the child in order to enable the child: (1) To advance appropriately toward attaining the annual goals; (2) to be involved in and make progress in the general education curriculum; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with other children with and without disabilities, in all of these activities (K.S.A. 72-3429(c)(4); 34 C.F.R. 300.320(a)(4)(i)-(iii)).

Related services are developmental, corrective, and supportive services that are required to assist a child with a disability to benefit from special education (K.A.R. 91-40-1(ccc); 34 C.F.R. 300.34(a)). Kansas regulations provide a list of related services that includes speech and language services ( K.A.R. 91-40-1(ccc)(1)(V)) and transportation, (K.A.R. 91-40-1(ccc)(W)).

### **Speech**

#### **Parents' Position for Speech:**

The parents feel that the student should be receiving speech support because she cannot pronounce many words correctly, does not know the meaning of

words, processes slowly, and has trouble coming up with the correct words to express herself.

#### **District's Position for Speech:**

The district asserts that when the student was reevaluated in January of 2019, no concerns were identified with regard to speech and language skills. Additionally, the district contends that communication has not been an identified area of need for the student during the period covered by this complaint (October 19, 2019 through October 19, 2020).

#### **Applicable Statutes and Regulations for Speech:**

In order to assure that the IEP team addresses all of the special education and related service needs of the child, there are several special factors that the IEP team must consider in the development and review of the IEP (K.S.A. 72-3429(d); 34 C.F.R. 300.324(a)(2), (b)(2)). These considerations must be documented but there is no requirement on where they are documented. Some districts may choose to include documentation of these considerations within the IEP while others may choose to keep documentation separately and maintain it in the student's file.

One of the special factors an IEP team must consider is the communication needs of the student (K.S.A. 72-3429(d)(7); 34 C.F.R. 300.324(a)(2)(iv)). The team must determine the unique communication needs of all children in order to help them achieve their educational goals. State and federal regulations at K.A.R. 91-40-1(000) and 34 C.F.R. 300.8(c)(11) define "Speech or language impairment" as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance."

#### **Investigative Findings for Speech:**

A reevaluation of the student was completed in January of 2019. Under the section "Speech and Language Assessment," the report of that reevaluation included the following statement: "[The student] does a good job in the school setting of communicating effectively with staff and students."

The parent was present at a reevaluation meeting on January 8, 2019 and signed the reevaluation report indicating that she agreed that “an evaluation addressing all areas of concern has been completed...”

The student's October 1, 2019 IEP contains a section labeled “Communication.” That section includes the following question:

Based upon the most recent evaluation and ongoing data collection does the student have needs in this area that require special education or related services?

According to the IEP, the team, which included the parent, determined that the answer to this question was “No.” However, in the section of the document entitled “Parent Comments/Concerns,” the IEP indicates that the parents expressed concerns that the student might need speech-language services, and the team agreed to “have [the] SLP do a screener with [the student].”

On October 2, 2019, the SLP came to the resource room while the student was present and engaged in a group activity with the class. By participating in the activity with the group, the SLP was able to observe the student. Notes compiled by the SLP show that the student demonstrated no articulation errors. She spoke in full and grammatically correct sentences, demonstrated normal voice quality and fluency with typical prosody, intonation, and pitch. The student took turns, helped other peers, and explained rules and directions. She asked and answered questions and demonstrated humor. The SLP shared her thoughts regarding the student's skills with the classroom teacher and school psychologist who concurred with her observations. By report of the SLP, the school psychologist agreed to share the SLP's feedback with the parents.

The student's IEP was revised on November 14, 2019. The “Communication” section of that IEP again shows that the team, which included the parent, did not believe that the student had needs in that area that required special education or related services.

The student's IEP was revised again on August 27, 2020. The student's mother participated in the IEP team meeting. The "Communication" section of the revised IEP continued to show that the team did not believe that the student had needs in the area of communication that require special education or related services.

The IEP team met to review and revise the student's IEP on September 29, 2020. Once again, the team – which included the parent – determined that the student did not have needs in the area of communication that required special education or related services.

### **Summary and Conclusions for Speech:**

Since October 1, 2019, the student's IEP Team, which has consistently included the student's mother, has considered the communication needs of the student. The IEP team determined on October 1 and November 14, 2019 and again on August 27 and September 20, 2020, that the student did not have communication needs that required special education or related services. A violation of special education statutes and regulations is not substantiated on this aspect of this issue.

## **Transportation**

### **Parents' Position for Transportation:**

The parents assert that the district should be transporting the student to a job site arranged through another agency because the district's job skills training has been inadequate.

### **District's Position for Transportation:**

It is the position of the district that it is not required to provide transportation for the student to her job because that job is not a part of IEP.

**Applicable Statutes and Regulations for Transportation:** Transportation is a related service when it is needed in order for the child to benefit from special education (K.A.R. 91-40-1(ccc); 34 C.F.R. 300.34(a)). Transportation as a related service means "travel to and from school and between schools; travel in and

around school buildings; and specialized equipment, if required to provide special transportation for a child with a disability (K.A.R. 91-40-1(ccc)(1)-(3); 34 C.F.R. 300.34(c)(16)(i)-(iii)).

#### **Investigative Findings for Transportation:**

The student attends the district high school which is located about 2 minutes from the student's home by car, or a 10-minute walk.

The parent and Vocational Rehabilitation Services within the Kansas Department for Children and Families pursued an after-school job for the student. On September 14, 2020, the student's mother sent an email to the director of special education of the school district to let the director know that the parent had spoken with the student's case manager from Vocational Rehabilitation Services. The parent wrote, "We believe we have secured a job for [the student.]. This would hopefully take her out of school after biology for the rest of the day."

The district agreed to an early release for this student, recognizing that many students in the district have been allowed early release for after-school jobs. Because two periods of special education services followed the student's biology class in her daily schedule, the district was aware that the student's schedule would need to be altered to ensure that that the student received the special education services required by her IEP. However, because the after-school job was not a part of the student's transition services, the district did not consider amending the student's IEP in order to include transportation as a related service.

According to the parent, the student has secured an after-school job at a local warehouse that does not require her to leave school early.

#### **Summary and Conclusions for Transportation:**

Like other students in the high school, this student was – with support from Vocational Rehabilitation Services – pursuing an after-school job. The district agreed to allow the student to leave school early to go to work but did not

consider providing the student with the related service of transportation to the work site because the job was not a part of the student's transition services. The after-school job is not part of the special education required by the student's IEP, thus the school district is not required to provide transportation to enable the student to access that job. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this aspect of this issue.

### Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

### Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, the written notice of appeal must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). Such notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report.

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



Diana Durkin  
Complaint Investigator

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

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

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON OCTOBER 27, 2020

DATE OF REPORT: NOVEMBER 25, 2020

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Public Schools). In the remainder of this report, USD #\_\_ may also be referred to as the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on October 27, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which will end on November 26, 2020.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on November 9, 2020 as part of the investigation process.

USD #\_\_ made the following school staff available for a telephone interview on November 11, 2020:

- \_\_\_\_\_, Mediation / Due Process Supervisor
- \_\_\_\_\_, Principal of \_\_\_\_\_ School

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #\_\_:

- Medical records from ComCare of Sedgwick County provided to \_\_\_\_\_ Academy on March 24, 2020
- USD #\_\_ School Calendar for the 2020-21 School Year
- Teacher Input for 504 Evaluation form dated August 5, 2020 completed by the student's fifth grade teacher at \_\_\_\_\_ Academy
- Email dated September 4, 2020 written by the parent to \_\_\_\_\_ [School Nurse], School Nurse
- Child Study Team Notes for the student dated September 9, 2020 through October 28, 2020
- Notes of parent contacts between September 9, 2020 through October 22, 2020 written by \_\_\_\_\_, School Social Worker
- Prior Written Notice (PWN) for Evaluation or Reevaluation and Request for Consent dated September 17, 2020
- Email dated September 21, 2020 written by the parent to Ms. \_\_\_\_\_ [Social Worker] and Ms. \_\_\_\_\_ [Principal]
- Email conversation dated September 23, 2020 at 10:46 a.m., 10:50 a.m., and 1:27 p.m. between the parent and Ms. \_\_\_\_\_ [Social Worker]
- Email dated September 23, 2020 at 2:33 p.m. written by the parent to Ms. \_\_\_\_\_ [Social Worker] and Ms. \_\_\_\_\_ [Principal]
- Email dated September 24, 2020 written by Ms. \_\_\_\_\_ [Principal] to the parent
- PWN for Evaluation or Reevaluation and Request for Consent dated September 24, 2020
- Email dated September 25, 2020 written by the parent to Ms. \_\_\_\_\_ [Principal]
- Email dated September 28, 2020 at 12:10 p.m., 1:26 p.m., and 2:19 p.m. between the parent and Ms. \_\_\_\_\_ [Principal]
- Email dated September 30, 2020 written by Ms. \_\_\_\_\_ [Principal] to the parent
- Evaluation Report from the Fundamental Learning Center dated October 7, 2020
- Teacher Input for 504 Evaluation forms dated between October 12, 2020 and October 14, 2020 completed by five of the student's teachers at \_\_\_\_\_ School
- Email dated October 13, 2020 written by the parent to Ms. \_\_\_\_\_ [Social Worker] and Ms. \_\_\_\_\_ [Principal]
- 504 Accommodation Plan with an implementation date of October 19, 2020

- Parent Consent to Initiate Section 504 Services signed by the parent on October 15, 2020
- Screenshot of text message dated October 21, 2020 written by Ms. \_\_\_\_\_ [Social Worker] to the parent
- PWN for Evaluation or Reevaluation and Request for Consent dated October 22, 2020
- Formal Complaint Request Form completed by the parent on October 22, 2020 and received by the KSDE on October 27, 2020
- The *Prior Written Notice and Consent Requirement & Guidance* document for USD #\_\_ updated October 27, 2020
- Email dated October 28, 2020 written by \_\_\_\_ [Mediation/Due Process Supervisor] to the parent
- PWN for Evaluation or Reevaluation and Request for Consent dated October 29, 2020
- List of documents provided to the parent on October 29, 2020
- The *Parent Request for and Evaluation or Reevaluation* guidance document for USD #\_\_ updated November 9, 2020
- Email dated November 9, 2020 written by Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] to the complaint investigator
- List of documents kept and maintained as educational records of the student by USD #\_\_
- Email dated November 10, 2020 written by the parent to Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor]
- Email conversation dated November 12, 2020 at 8:45 a.m., 10:18 a.m., and 11:43 a.m. between the parent and Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor]

### Background Information

This investigation involves an 11-year old male student. The student attended school in USD #\_\_ during pre-kindergarten, kindergarten, and part of first grade. Due to academic and behavioral concerns, the parent chose to homeschool the student at the end of first grade and then re-enrolled him in public school at the end of second grade. During the past 12 months, the student was enrolled in fifth grade at \_\_\_\_

\_\_\_\_\_ Academy during the 2019-20 school year and then transitioned to the \_\_\_\_\_ School for sixth grade during the 2020-21 school year.

USD #\_\_ referred and obtained written consent for a Section 504 evaluation of the student in March 2020 while the student was enrolled in fifth grade at \_\_\_\_\_ Academy. The parent requested an initial evaluation for special education on September 4, 2020, September 21, 2020 and October 13, 2020 while the student was enrolled in sixth grade at \_\_\_\_\_ School; however, USD #\_\_ refused each of the parent's requests for a special education evaluation. The student was found eligible for a 504 Plan on October 15, 2020. The parent then provided consent to conduct an initial special education evaluation on October 29, 2020. The student is currently being evaluated for special education and related services with an eligibility determination meeting scheduled for December 17, 2020.

### Issues

The IDEA allows allegations of noncompliance to be investigated for up to one year from the date the complainant files a written complaint with the state's department of education. In this case, the parent filed the written complaint with the KSDE on October 27, 2020 and the investigation will cover the time frame between October 27, 2019 and November 25, 2020.

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

**ISSUE ONE:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to the parent's request for an initial special education evaluation, specifically by not providing the parent with appropriate prior written notice (PWN) during the 2020-21 school year.

### Positions of the Parties

The parent reported that she made three requests for USD #\_\_ to conduct an initial evaluation of the student during the 2020-21 school year. Each time, the school district refused to conduct the evaluation citing "pre-assessment data" and "information from the student's previous school." The parent believes this description

of the data used as the basis for the school's decision to refuse her request for an initial evaluation is vague and not a complete listing of "each evaluation, assessment, or report."

USD #\_\_ conducted an internal investigation and determined that the parent was not provided with appropriate prior written notice (PWN) explaining the decisions and the basis for those decision on September 17, 2020, September 24, 2020, and October 22, 2020. Once this investigation was completed, technical assistance was provided to the Child Study Team at \_\_\_\_\_ School and an appropriate PWN was provided to the parent on October 29, 2020. In addition, the *Parent Request for and Evaluation or Reevaluation* guidance document for USD #\_\_ was updated on November 9, 2020 to clarify the requirements for providing appropriate PWN.

### Findings of the Investigation

The parent first requested an initial special education evaluation on September 4, 2020. The Child Study Team met on September 9, 2020 and determined that no disability was suspected and refused to conduct an evaluation for special education. USD #\_\_ provided a PWN to the parent on September 17, 2020. The PWN indicated USD #\_\_ was refusing to conduct an initial evaluation of the student because data obtained through pre-assessment of the student's needs did not indicate a need for a special education evaluation. The Description of the Data Used as a Basis for the Proposed or Refused Action section of the PWN lists, "Information from the student's previous school."

The parent made a second request for an evaluation on September 21, 2020. The Child Study Team met on September 23, 2020 and determined that no disability was suspected and refused to conduct an evaluation for special education. USD #\_\_ provided a PWN to the parent on September 24, 2020. The PWN indicated USD #\_\_ was refusing to conduct an initial evaluation of the student because "pre-assessment data indicates no need for such an evaluation at this time." The Description of the Data Used as a Basis for the Proposed or Refused Action lists, "Information regarding student needs from the student's previous school; Documentation of a referral for a 504 evaluation from the student's previous school; District assessments."

The parent made a third request for an evaluation on October 13, 2020. The Child Study Team met on October 21, 2020 and determined that no disability was suspected and refused to conduct an evaluation for special education. USD #\_\_ provided a PWN to the parent on October 22, 2020. The PWN indicated USD #\_\_ refused to conduct an initial evaluation of the student because the FastBridge assessment data did not support an evaluation at this time and the accommodations from the student's 504 plan had only been in effect for four days. The Description of the Data Used as a Basis for the Proposed or Refused Action lists, "FastBridge – Fall 20-21, Winter 19-20; Current 504 Plan, Parent request for special education evaluation."

### Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.503(b) require school districts to provide parents with prior written notice whenever they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to a child who has or is suspected of having a disability. This prior written notice must include (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and (4) A description of other options that the IEP Team considered and the reasons why those options were rejected.

In this case, USD #\_\_ was required to provide the parent with PWN that describes the refusal of the parent request for an initial special education evaluation, an explanation of the reason for that refusal, a description of the data used to make the decision to refuse the action, and describe the other options considered and why those other options were rejected. USD #\_\_ acknowledged the parent was not provided with a PWN that clearly explained and described the district's decision to refuse the parent's request to conduct an initial special education evaluation. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parent with appropriate prior written notice.

**ISSUE TWO:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately

respond to the parent's request for the student's educational records during the 2020-21 school year.

### Positions of the Parties

The parent reported that she requested access to the student's entire educational file on September 23, 2020 but the principal told her that the "the only records the school had on the student, who is now in 6<sup>th</sup> grade, were a random 5<sup>th</sup> grade report card, a birth certificate, and a Language Study document." The parent believes USD #\_\_\_ should have educational records for the student dating from his initial enrollment in the district, as far back as pre-kindergarten. The parent indicated that the principal provided her with some educational records but, as of November 10, 2020, she still had not been provided with all of the student's educational records. The parent stated,

I finally got a chance to go through the file that the principal gave me. There's not a whole lot of stuff in it. There are some write-ups / office referrals and another very generic PWN for 2016. There's no FastBridge scores, state test scores, grade cards, anything measurable at all.

The principal believes that she responded appropriately to the parents request for access to the student's educational records. She acknowledged that the parent requested the student's complete records from pre-kindergarten through sixth grade on September 23, 2020. On September 28, 2020 Ms. \_\_\_\_\_ [Principal] provided the parent with the educational records that she had access to including the results of the 2019-20 and 2020-21 FastBridge test results. She also informed the parent that the only educational records received from \_\_\_\_\_ Academy were his birth certificate, home language survey, and his 5<sup>th</sup> grade quarter 3 progress report. Ms. \_\_\_\_\_ [Principal] indicated that she could not provide any other educational records because the district's record system, Synergy, does not allow her to access the educational records from the elementary school level.

On October 28, 2020, Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] discussed the parent's allegations regarding the educational records request with Ms. \_\_\_\_\_ [Principal]. Subsequently, Ms. \_\_\_\_\_ [Principal] provided the parent with the following educational records on October 29, 2020:

- Student Profile, 2020-2021
- Fundamental Learning Center evaluation
- Section 504 Accommodation Plan
- PWNs, 2020, 2016
- Student Profile, 2016-2017
- Cognos Report, 2020-2021; Attendance Information, FastBridge
- Contact Log
- Attendance Profile, 2020-2021, 2019-2020, 2016-2017, 2015-2016, 2014-2015
- Student Incidents, 2019-2020, 2016-2017, 2014-2015
- Grade Cards, Q1 progress report 2020-2021, \_\_\_\_\_ Academy 5<sup>th</sup> Grade, Q3 progress report 2019-2020, \_\_\_\_\_ Academy 2019-2020, \_\_\_\_\_ Academy 2016-2017, \_\_\_\_\_ Academy 2015-2016, \_\_\_\_\_ Academy 2014-2015, \_\_\_\_\_ Academy 2013-2014
- Home Language Survey, 2014
- Certificate of Live Birth

USD #\_\_ conducted an internal investigation and determined that the parent was not provided with all of the student’s educational records from pre-kindergarten through sixth grade. Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] reported that she provided the parent with 283 pages of educational records on November 12, 2020. USD #\_\_ acknowledged that they did not respond appropriately to the parent’s request for access to the student’s educational records in a timely manner.

### Findings of the Investigation

Documentation shows the parent initially requested access to all of the student’s educational records from pre-kindergarten through sixth grade on September 23, 2020. The 45-day timeline to respond to this request ended on November 7, 2020.

Documentation and interviews show that USD #\_\_ provided a set of educational records to the parent on September 28, 2020 and an additional set of educational records on October 29, 2020. The parent reviewed all of this documentation and reported that records were still missing and informed Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] of this on November 10, 2020. Ms. \_\_\_\_\_ [Mediation/Due Process Supervisor] provided the parent with a third set of educational records on November 12, 2020 including the following:

- Request timeline
- Email communications from \_\_ \_\_\_\_, Principal
- Student Profile, 2020-2021
- Student Policy Acknowledgement, 2020-2021
- Formal Complaint
- Child Study Team notes, 2020-2021
- Social Worker notes
- Email communications from \_\_ \_\_\_\_, Social Worker
- Email communications from \_\_ \_\_\_\_, Nurse
- Section 504 Accommodation Plan
- PWNs, 2020, 2016
- Discipline Records
- Health file, \_\_\_\_ \_\_\_\_ Academy, 2019-2020
- Teacher Input for Section 504 Evaluation, teacher report from \_\_\_\_ \_\_\_\_ Academy
- Teacher Input for Section 504 Evaluation, teacher reports from \_\_\_\_ \_\_\_\_ MS [Middle School]
- Section 504 Accommodation Plan, 2020-2021
- Email communication from \_\_ \_\_\_\_, Nurse
- Enrollment History
- Student Profile, 2016-2017
- Student Profile, Cognos Report, 2020-2021, Attendance, FastBridge
- Contact Log
- Attendance Profile, 2020-2021, 2019-2020, 2016-2017, 2015-2016, 2014-2015
- Student Incidents, 2019-2020, 2016-2017, 2014-2015
- Grade Cards, Q1 progress report 2020-2021, \_\_\_\_ \_\_\_\_ Academy 5<sup>th</sup> Grade, Q3 progress report 2019-2020, \_\_\_\_ \_\_\_\_ Academy 2019-2020, \_\_\_\_ \_\_\_\_ Academy 2016-2017, \_\_\_\_ \_\_\_\_ Academy 2015-2016, \_\_\_\_ \_\_\_\_ Academy 2014-2015, \_\_\_\_ \_\_\_\_ Academy 2013-2014
- Home Language Survey, 2014
- Certificate of Live Birth

During an interview, the principal reported that she followed the procedure for responding to requests for educational records by collecting and providing the records she had access to in her school building. She indicated she was aware the records she

provided did not include the student's records from the elementary school level because the district's record system, Synergy, does not allow her to access records from the elementary school level. Ms. \_\_\_\_\_ [Principal] reported that she did not seek or attempt to obtain the missing records and ensure they were provided to the parent.

### **Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.613(a) require school districts to allow parents to inspect any educational records relating to their children that are collected, maintained, or used by the agency without unnecessary delay and in no case more than 45 days after the request has been made. Federal regulations at 34 C.F.R. 99.3 defines the term "educational record" as those records, files, documents, and other materials, which are directly related to the student, and are collected and maintained by the school district.

In this case, USD #\_\_ provided two incomplete sets of educational records to the parent within the 45-day timeframe. The principal was aware that the student's records from the elementary school level were not included in the records she provided to the parent, but she did not seek or attempt to obtain the missing records and ensure that they were provided to the parent in a timely manner. USD #\_\_ acknowledged that they did not respond appropriately to the parent's request for access to the student's educational records. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to respond appropriately to the parent's request for access to the student's educational records in a timely manner.

**ISSUE THREE:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately consider the results of an evaluation the parent obtained at private expense during the 2020-21 school year.

### **Positions of the Parties**

The parent reported she received a refusal to her September 4, 2020 request to conduct an initial special education of the student because "data was not available to support this action at this time." She then made another request on September 21,

2020 and again received a refusal to conduct the evaluation because “pre-assessment data indicates no need for such an evaluation at this time.” At this point, the parent arranged for an evaluation at the Fundamental Learning Center, at her expense, in order to provide the district with additional data to consider. The parent made a third request for an initial special education evaluation and provided the Fundamental Learning Center Evaluation Report to the principal and school social worker on October 13, 2020. Once again, the parent received a refusal to conduct an initial special education evaluation on October 22, 2020. The parent indicated this refusal was based on FastBridge assessments and the lack of providing the student’s 504 accommodations for an extended period of time. The parent believes the Fundamental Learning Center Evaluation Report was not even considered when the Child Study Team made the determination to refuse her request for an initial special education evaluation this third time.

USD #\_\_ conducted an internal investigation and determined that the Child Study Team did not appropriately consider the results of the Fundamental Learning Center Evaluation Report when making the determination to refuse the parent’s third request for an initial special education evaluation on October 22, 2020. Once this internal investigation was completed, the Child Study Team at \_\_\_\_\_ Middle School was instructed to reconvene and consider the Fundamental Learning Center Evaluation Report as well as the medical records from ComCare. At that time, the Child Study Team determined there was reason to suspect the student has a disability and may need special education and related services. USD #\_\_ provided a PWN requesting consent to conduct an initial evaluation was provided to the parent on October 29, 2020.

### **Findings of the Investigation**

The findings of Issue One are incorporated herein by reference.

The parent reported and documentation shows that she paid for the student to be assessed at the Fundamental Learning Center on October 7, 2020. The Fundamental Learning Center conducted testing in the areas of reading and mathematics and the results of the assessments concluded that the student displays multiple characteristics of both dyslexia and dyscalculia. The parent provided a copy of the Fundamental Learning Center Evaluation Report as an attachment to an email written to Ms. \_\_\_\_\_

[Principal] and Ms. \_\_\_\_\_ [Social Worker] on October 13, 2020 when she made the third request for an initial special education evaluation.

Interviews and documentation showed that USD #\_\_ provided the parent with the third PWN refusing to conduct an initial special education on October 22, 2020, but the Fundamental Learning Center Evaluation Report was not included in the list of data used as a basis for the refusal in the PWN. However, the student's 504 plan was referenced as data considered even though it was developed on October 15, 2020, which is two days after the district received a copy of the Fundamental Learning Center Evaluation Report.

The parent filed a formal complaint with KSDE on October 27, 2020. The USD #\_\_ Mediation / Due Process Supervisor conducted an internal investigation, which resulted in an acknowledgement that the Child Study Team at \_\_\_\_\_ School did not consider the results of the Fundamental Learning Center Evaluation Report. USD #\_\_ reconvened the Child Study Team at \_\_\_\_\_ School to consider the Fundamental Learning Center Evaluation Report. Following that meeting, on October 29, 2020, USD #\_\_ provided the parent with a PWN proposing to conduct an initial special education evaluation and requesting consent. This PWN listed the Fundamental Learning Center Evaluation Report as one of the data used as the basis for the proposed action.

### **Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.502(c) require school districts to consider the results of an independent educational evaluation obtained at private expense and shared with the school district in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student.

In this case, the parent obtained an evaluation of the student, at her own expense, on October 7, 2020. The parent made a request for an initial special education evaluation on October 13, 2020 and provided USD #\_\_ with a copy of the Fundamental Learning Center Evaluation Report on that same date. USD #\_\_ refused that request on October 22, 2020 and documentation shows the Fundamental Learning Center Evaluation Report was not considered when making that decision. Based on the

foregoing, a violation of special education statutes and regulations is substantiated for failing to consider the results of an independent educational evaluation obtained at private expense and shared with the school district in making the decision to refuse to conduct an initial special education evaluation of the student.

**ISSUE FOUR:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), proposed a delay in responding to the parent's request for an initial evaluation in order to conduct general education interventions during the 2020-21 school year.

### Positions of the Parties

The parent believes USD #\_\_ delayed the initial special education evaluation of the student during the 2020-21 school year. The parent reported,

The student has been hearing impaired for his entire education, and has struggled to read well. The school is aware of his hearing impairment, of his years of tutoring in reading, and his recent assessment which put him at first grade levels in his 6<sup>th</sup> grade year. They have ample reason to suspect that he is a child with a disability and asking for 6 more weeks to consider it through general education interventions (which could be used as part of his evaluation), is wasting more valuable time while the student struggles and becomes increasingly frustrated.

Having requested an initial special education evaluation for the student three times since the beginning of the 2020-21 school year, the parent felt exasperated when she received a text from the school on October 21, 2020, which asked her to "hold off on making a decision regarding special education testing for another five to six weeks so school staff could directly observe him once students returned to the school."

The principal reported the student transferred to \_\_\_\_\_ School at the beginning of the 2020-21 school year as a sixth-grade student. She indicated that school staff were not familiar with the student when the parent made the multiple requests for a special education evaluation at the beginning of the 2020-21 school year. Ms. \_\_\_\_\_ [Principal] stated that at the time of the parent requests, school staff had not had a chance to implement the required general education interventions (GEI), analyze the results of the GEI, and then determine if a disability was suspected. Ms.

\_\_\_\_\_ [Principal] stated that after each of the parent requests, the Child Study Team met and considered the data and information available at the time of each those meetings to determine if a disability was suspected in order to respond to the parent's request for an initial evaluation for special education.

USD #\_\_ conducted an internal investigation of this allegation and determined that the Child Study Team at \_\_\_\_\_ School inappropriately implemented the requirement to conduct GEI resulting in the delay of an initial special education evaluation of the student. On October 29, 2020, USD #\_\_ provided the parent with a PWN requesting consent to conduct an initial special education evaluation of the student was provided to the parent and an eligibility determination meeting has been scheduled for December 17, 2020. In addition, USD #\_\_ updated its *Parent Request for an Evaluation or Reevaluation* guidance document on November 9, 2020 to clarify the requirement to conduct GEI in situations where the parent requests an initial special education evaluation.

### Findings of the Investigation

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

The medical records from ComCare on March 24, 2020 documented the student's diagnoses of Post-traumatic stress Disorder, Disruptive Mood Dysregulation Disorder, Oppositional Defiant Disorder, and Attention Deficit Hyperactivity Disorder.

The Child Study Team notes state,

9/9: Mom first requested 504 and now is requesting testing for IEP. He has ADHD and he [sic] ODD, DMD, PTSD, high pitch hearing loss, and dyslexia (no official diagnosis). He was at KVC twice this summer. He needs teachers to be calm and positive. He does have a hearing aid. He may need a behavior plan. Refusal to evaluate sent in August of 2016.

The Teacher Input for 504 Evaluation form completed by the student's fifth-grade teacher indicated below average reading skills, writing skills, and poor interpersonal relationship skills. He reportedly had difficulty attending to tasks, following directions, adapting to changes in routine, and completing assignments.

The Teacher Input for 504 Evaluation forms completed by his sixth-grade Language Arts teacher rated his reading and writing skill as below average while his sixth-grade Math Intervention teacher also rated his math skills as below average. His sixth-grade teachers also noted the student has below average to poor skills for following directions and getting along with peers and adults.

The Fundamental Learning Center Evaluation Report dated October 7, 2020 concluded that the student displays a significant number of the characteristics of both dyslexia and dyscalculia. His reading skills for phonological awareness were documented to be significantly below grade level at a 44% accuracy level compared to an expected 98% accuracy level by age seven. His math skills assessment results indicated an urgent need for specialized instruction as the student could not name or write three-digit numerals, which are skills typically taught in the second grade.

The Explanation of Why the Action is Proposed or Refused section in the PWN provided to the parent on October 22, 2020 states:

A FastBridge reading assessment was repeated on 10-21-20 due to a discrepancy in scores between Fall 20-21 (high risk) and Winter 19-20 (College Pathway). The student scored in the Some Risk range on the FastBridge reading assessment completed on 10-21-20. A slight discrepancy in scores is also noted in the student's FastBridge math results. His score on the assessment completed in Winter 19-20 is in the Some Risk category, while his score on the math assessment given in the Fall 20-21 is in the High Risk category. Transitioning to middle school, adjusting to remote learning, and remote administration of the FastBridge assessment cannot be ruled out as contributing factors to the discrepancy in scores.

The Explanation of Why the Action is Proposed or Refused section in the PWN provided to the parent on October 22, 2020 states:

A 504 plan for the student was initiated on 10-19-20. \_\_\_\_\_ Child Study Team and 504 team would like to allow ample time for implementation of 504 accommodations." The Options Considered and Why the Options Were Rejected section of that PWN states,

“Accommodations from the student’s 504 plan have been in place for just four days. Requesting permission from the parent to withdraw her request for a special education evaluation to allow time to evaluate the efficacy of 504 accommodations was attempted.

The 504 Accommodation Plan, which was initiated on October 19, 2020, includes the following accommodations for the student:

- Teacher will have a video-call via TEAMS to check understanding regarding class content and expectations.
- Teacher will need to provide slow and direct instructions and redirections.
- The student will be seated closest to the area of instruction.
- The student will be encouraged to use his speech to text computer application, as needed.
- Counselor will have a weekly check-in with the student to work on positive male relationship, accepting responsibility, and accepting peer perspectives.
- Teacher will do a verbal check to ensure the student is on-task and has awareness of the next task.
- The student will be allowed to use the restroom as needed.

The USD #\_\_ Mediation / Due Process Supervisor conducted an internal investigation of this allegation and determined that the Child Study Team at \_\_\_\_\_ School inappropriately implemented the requirement to conduct GEI. USD #\_\_ acknowledged the student’s Child Study Team at \_\_\_\_\_ Middle School delayed the initial special education evaluation of the student that the parent first requested on September 4, 2020 by continuing to collect data from GEI despite having information that suggested that the student may be a child with a disability and in need of special education services.

The revised *Parent Request for an Evaluation or Reevaluation* guidance document for USD #\_\_ dated November 9, 2020, now appears to accurately describes the three options for responding to a parent request for an initial special education evaluation in detail and the implications of each for meeting the requirement to conduct GEI.

### Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.311 and Kansas state regulations at K.A.R. 91-40-7 require school districts to identify, locate, and evaluate all children with disabilities who need special education and related services.

The Office of Special Education Programs (OSEP) in the United States Department of Education issued guidance in a Memorandum dated January 21, 2011 that clarified the use of general education multi-tiered systems of supports (MTSS) including, but not limited to, Response to Intervention (RTI) strategies and the requirement to conduct a timely evaluation of students suspected of having a disability. The Memorandum states,

The regulations at 34 CFR 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR 300.304 - 300.311, to a child suspected of having a disability under 34 CFR 300.8 . . . It would be inconsistent with the evaluation provisions of 34 CFR 300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.

Chapter 2 in the *Kansas Special Education Process Handbook* explains the child find obligations of the Kansas state regulations at K.A.R. 91-40-7. Section C in Chapter 2 describes the screening and general education intervention (GEI) process and states, "In Kansas, this screening is conducted, in part, through the required implementation of general education intervention (GEI)."

Chapter 2, Section C.1. describes how the results of GEI are used to make data-based decisions to determine if the school district has reason to suspect a child may be a child with a disability and need special education and related services. If the documentation shows the GEI are inadequate to address the areas of concern for the child, the school district must refer the child for an initial special education evaluation.

Chapter 2, Section E., further explains that, if the parent requests an initial special education evaluation, the school must respond to the request within a reasonable period of time. The district has three possible responses including 1) continuing the

GEI process if the parent withdraws the request for an evaluation 2) the parent requests the evaluation be conducted without waiting for the GEI to conclude, and 3) the school refuses to conduct an the evaluation and provides the parent with appropriate PWN explaining that decision.

In this case, while USD #\_\_ is required to conduct GEI, the parent made multiple requests for an initial special education evaluation and even provided the district with the results of an evaluation paid for by the parent that reported the student had multiple characteristics of dyslexia and dysgraphia. In addition, the Child Study Team was in possession of documents showing the student was diagnosed with medical conditions that have the potential to impact learning. Other data available to the Child Study Team included teacher reports of both current and previous behavioral and academic concerns. While district assessment data was inconsistent, the data showed a downward trend. Even with the multiple changes in the school environment, the totality of this information should have caused the Child Study Team to at least suspect that the student may have a disability and need special education prior to October 29, 2020.

USD #\_\_ acknowledged the student's Child Study Team at \_\_\_\_\_ Middle School delayed the initial special education evaluation of the student thus failing to conduct the child find requirements in the IDEA. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to identify, locate, and evaluate all children with disabilities who are in need of special education and related services.

### Corrective Action

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

- A. Federal regulations at 34 C.F.R. 300.503(b) require school districts to provide parents with prior written notice whenever they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to a child who has or is suspected of having a disability. This prior written notice must include (1) A description of the action proposed or

refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and (4) A description of other options that the IEP Team considered and the reasons why those options were rejected.

USD #\_\_ acknowledged it did not provide the parent with appropriate PWN that clearly explained and described the district's decisions to refuse the parent's three requests to conduct an initial special education evaluation.

B. Federal regulations at 34 C.F.R. 300.613(a) require school districts to allow parents to inspect any educational records relating to their children that are collected, maintained, or used by the agency for purposes of complying with the IDEA without unnecessary delay and in no case more than 45 days after the request has been made.

USD #\_\_ acknowledged that it did not respond appropriately to the parent's request for access to the student's educational records in a timely manner when they failed to include the student's records from the elementary school level.

C. Federal regulations at 34 C.F.R. 300.502(c) require school districts to consider the result of an independent educational evaluation obtained at private expense and shared with the school district in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student.

USD #\_\_ acknowledged it failed to consider the result of an independent educational evaluation obtained at private expense and shared with the school district in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student when the Child Study Team did not consider the Fundamental Learning Center Evaluation Report when refusing to conduct an initial evaluation on October 21, 2020.

D. Federal regulations at 34 C.F.R. 300.311 and Kansas state regulations at K.A.R. 91-40-7 require school districts to identify, locate, and evaluate all children with disabilities who need special education and related services.

USD #\_\_ acknowledged it failed to identify, locate, and evaluate children with disabilities who need special education and related services during the past 12 months when the Child Study Team at \_\_\_\_\_ Middle School delayed the initial evaluation of the student during the 2020-21 school year.

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

1. Within 15 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.503(b) that require school districts to provide parents with prior written notice whenever they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to a child who has or is suspected of having a disability, which includes (1) A description of the action proposed or refused by the agency; (2) An explanation of why the agency proposes or refuses to take the action; (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and (4) A description of other options that the IEP Team considered and the reasons why those options were rejected.
  - b. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.613(a) that require school districts to allow parents to inspect any educational records relating to their children that are collected, maintained, or used by the agency for purposes of complying with the IDEA without unnecessary delay and in no case more than 45 days after the request has been made.
  - c. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.502(c) that require school districts to consider the result of an independent educational evaluation obtained at private expense and shared with the school district in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student.

- d. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.311 and Kansas state regulations at K.A.R. 91-40-7 require school districts to identify, locate, and evaluate children with disabilities who need special education and related services.
2. No individual corrective action is ordered at this time as USD #\_\_ provided the parent with appropriate PWN for Evaluation or Reevaluation and Request for Consent on October 29, 2020 and obtained consent on that same date. An eligibility determination meeting is already scheduled for December 17, 2020. It is noted that if parent consent had been obtained when USD #\_\_ provided the first PWN to the parent on September 17, 2020, the 60-school-day timeline to complete the initial evaluation and determine eligibility would not end until December 18, 2020. USD #\_\_ will provide documentation of the student's eligibility determination meeting being held within 60-school-days of September 17, 2020 to Special Education and Title Services (SETS) no later than December 31, 2020.
3. No later than January 29, 2021, USD #\_\_ will provide training to all members of the student's Child Study Team at \_\_\_\_\_ Middle School regarding the content of an appropriate PWN and the requirement to consider an independent educational evaluation obtained at private expense. In addition, the student's Child Study Team will be trained on the eligibility criteria for the 13 categories of disability described in the IDEA and factors that would trigger a reasons to suspect an exceptionality. No later than February 5, 2021, USD #\_\_ will provide documentation to SETS of the date and content of the training as well as who provided the training and who attended the training.
4. USD #\_\_ has already reviewed and revised the district-wide guidance document related to the required content of PWN and the three options for responding to a parent request for an initial special education evaluation. No later than December 6, 2020, USD #\_\_ will share this new guidance document with all Child Study Team members within the district and provide SETS with documentation of when and with whom the procedure was shared no later than December 13, 2020.

5. No later than January 29, 2021, USD #\_\_ shall review, revise, and create written procedures for responding appropriately to a parent request for access to educational records. No later than February 5, 2021, USD #\_\_ shall share this new procedure with all building administrators and registrars within the district and provide SETS with documentation of when and with whom the procedure was shared.
6. Further, USD # \_\_ shall, within 10 calendar days of the date of this report, submit to Special Education and Title Services one of the following:
  - a. a statement verifying acceptance of the corrective action or actions specified in this report;
  - b. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org).

### **Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). The notice of appeal must be emailed within 10 calendar days from the date of this report.

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing

a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect.

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON NOVEMBER 3, 2020

DATE OF REPORT: DECEMBER 3, 2020

This report is in response to a complaint filed with our office by \_\_\_\_\_, mother, on behalf of her son, \_\_\_\_\_. The remainder of this report will refer to \_\_\_\_\_ as “the student” and \_\_\_\_\_ as “the mother” or “the parent”.

The complaint is against USD #\_\_ (\_\_\_\_\_). Special education and related services are provided in USD #\_\_ by the \_\_\_\_\_ Special Education Cooperative #\_\_ (\_\_\_\_). The remainder of the report may also refer to USD #\_\_ and \_\_\_\_\_ [the cooperative] as the “district” or the “local education agency (LEA).”

The Kansas State Department of Education (KSDE) received the complaint on November 3, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which ended on December 3, 2020.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on November 18, 2020 as part of the investigation process. The parent requested and provided written consent for two other persons to be interviewed. \_\_\_\_\_, Speech/Language Pathologist at Every Child’s Voice, was also interviewed on November 18, 2020. \_\_\_\_\_, Intellectual and Developmental Delay (I/DD) Case Manager at Life Span LLC, was interviewed on November 20, 2020.

A telephone interview with USD #\_\_ staff was conducted on November 16, 2020; however, due to technical difficulties, this interview was not completed and the interview questions were provided to USD #\_\_ for a written response. The following school staff drafted the response to the interview questions:

- \_\_\_\_\_, Director of \_\_\_\_\_ [the cooperative]
- \_\_\_\_\_, Principal of \_\_\_\_\_ Elementary School
- \_\_\_\_\_, Speech/Language Pathologist at \_\_\_\_\_ [the cooperative]
- \_\_\_\_\_, Special Education Teacher at \_\_\_\_\_ [the cooperative]
- \_\_\_\_\_, Team Support Trainer at \_\_\_\_\_ [the cooperative]

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #\_\_:

- Initial Evaluation / Reevaluation and Eligibility Report dated January 31, 2017
- Individualized Education Program (IEP) dated January 15, 2019 and amended on August 15, 2019
- Multidisciplinary Team Staffing Summary dated November 5, 2019
- TASN Kansas Infinitec Coalition Statewide Assistive Technology Conference Registration forms for the session titled *Building AAC Awareness: Using AAC to Express a Range of Functions* held on December 6, 2019
- Initial Evaluation / Reevaluation and Eligibility Report dated December 12, 2019
- Multidisciplinary Team Staffing Summary dated December 12, 2019
- IEP dated December 12, 2019
- Email exchange dated January 28, 2020 between \_\_\_\_\_, Speech/Language Pathologist (SLP); \_\_\_\_\_, SLP at \_\_\_\_\_ [the cooperative]; and \_\_\_\_\_, Occupational Therapist (OT) at \_\_\_\_\_ [the cooperative]
- Speech, Language, & Feeding Reevaluation Report dated February 9, 2020 from Every Child's Voice
- IEP Amendment Between Annual IEP Meetings dated March 2, 2020 signed by the parent on April 24, 2020
- Online Training Certificates of Completion dated April 20, 2020 for session titled *Overview of Speech and Language Disorders for Paraprofessionals*
- IEP Goal Progress Reports for the 2019-2020 school year
- Online Training Certificates of Completion dated May 10, 2020 for session titled *Overview of Augmentative and Alternative Communication (AAC) and Core Vocabulary for Paraprofessionals*
- Multidisciplinary Team Staffing Summary dated August 5, 2020
- Email dated August 6, 2020 written by Ms. \_\_\_\_\_ [SLP] to Ms. \_\_\_\_\_ [SLP at cooperative] and \_\_\_\_\_, Special Education Teacher

- IEP dated December 12, 2019 and amended on September 9, 2020
- Timeline of Staff Trainings for Sign Language and AAC Support from 2018-2020
- Documentation of sign during speech/language sessions dated February 5, 2020 through September 21, 2020
- Email dated October 1, 2020 written by Ms. \_\_\_\_ [SLP] to Ms. \_\_\_\_\_ [special education teacher] and Ms. \_\_\_\_ [SLP at cooperative]
- Email dated October 27, 2020 written by Ms. \_\_\_\_\_ [special education teacher] to the parent
- Email dated November 13, 2020 written by Ms. \_\_\_\_\_ [special education teacher] to the parent
- Email dated November 20, 2020 written by Ms. \_\_\_\_\_ [special education teacher] to the parent
- Response to Interview Questions dated November 20, 2020
- Written Statement by Ms. \_\_\_\_ [OT at cooperative] dated November 4, 2020
- Written Statement by Ms. \_\_\_\_ [SLP at cooperative] dated November 8, 2020
- Written Statement by \_\_\_\_ \_\_\_\_, Paraprofessional at \_\_\_\_ [the cooperative], dated November 8, 2020
- American Sign Language Dolch Sight Word Cards
- Lesson Plan Template for Ms. \_\_\_\_\_ [special education teacher]
- Lessons Taught in September and October 2020 for Ms. \_\_\_\_\_'s [special education teacher's] classroom

### Background Information

This investigation involves a nine-year old male student who is enrolled in the fourth grade at \_\_\_\_ Elementary School in USD #\_\_. The student received early intervention services beginning at birth and was originally evaluated for special education and related services at the age of three. USD #\_\_ [a previous school district] found the student eligible for special education and related services due to the exceptionality of Developmental Delay and the student received early childhood special education services as a preschool student. The student enrolled in USD #\_\_ as a kindergarten student during the 2016-17 school year. USD #\_\_ reevaluated the student and found that he continued to be eligible for special education and related services under the exceptionality category of Developmental Delay. The student's most recent

reevaluation was during third grade and USD #\_\_ found the student eligible for special education and related services due to the exceptionality of Intellectual Disability. The student has received specialized instruction, occupational therapy, physical therapy, speech/language therapy and paraprofessional support throughout his entire educational career.

### Issues

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance that occurred not more than one year from the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-51(b)(1)). In this case, KSDE received the parent's written complaint on November 3, 2020 and the investigation will cover the one-year time frame between November 3, 2019 and December 3, 2020.

Based upon the written complaint, the parent raised two issues that were investigated.

**ISSUE ONE:** USD #\_\_, in violation of federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically the accommodation for sign language support during the past 12 months.

### Positions of the Parties

The parent reported the student first used the Signing Exact English (SEE) method to communicate as a preschooler and that sign language is his preferred method of communication. He is currently using a total communication approach where verbalizations are paired with SEE signs. She stated that all of the student's IEPs in effect during third and fourth grades have an accommodation that requires sign language support to be used during communication exchanges in all school settings, until the communication exchange is completed. The parent believes school staff have not provided this accommodation consistently during the past 12 months.

USD #\_\_ school staff stated:

The student uses verbal communication and gestures to communicate to others in the school setting. From observation of the student's interactions

with others, it is the SLP's professional judgment that the student's preferred method of communication is verbal language. He will use single words or simple phrases to communicate with others. He will also sometimes pair with a pointing gesture. The student will respond by speaking or imitating a sign if a model of sign language is provided. His ability to initiate sign independently to communicate is emerging, as evidenced by working with the SLP and SLP paraprofessional.

The special education teacher concurs with the observations of the SLP. It is the observation of the special education teacher that the student will primarily use verbal communication in both instructional and social settings. During Zoom sessions, the student uses verbal phrases such as "How's it going?" when greeting staff or peers. When given a prompt such as "Are you ready?" The student will typically respond with something like "Yeah" or "No." He also frequently uses the verbal command "Wait" when communicating to teacher and parent that he needs more time to complete a task.

From record review of the Receptive and Expressive Language section of the IEP in place at the beginning of the 2019-20 school year, it indicated that parent wanted to focus on using spoken words and possible Augmentative and Alternative Communication (AAC) device since sign could potentially limit who the student could communicate with in the future. At the time, the IEP team focused on fulfilling that request. At the annual review in December [2019], parent indicated that sign was important with meeting his communication needs so the team added the accommodation to address this concern. The IEP team has been working on implementing three modes of communication for the student in his learning environment: spoken words, sign paired with spoken words, and modeling on AAC communication device.

### **Findings of the Investigation**

This investigation covers the period between November 3, 2019 and November 3, 2020. The first IEP in effect during this time frame was developed on January 15, 2019 and amended on August 15, 2019. This IEP included an accommodation that requires

“sign language support for sight word reading instruction in the structured resource classroom for the length of sight word activities.”

USD #\_\_ stated that when the IEP was originally written, the student was receiving sight word instruction through the Edmark Reading Program. At that time the sign language support for the student would have included using signs for the specific words during each of the Edmark lessons. During this time frame, the curriculum was changed and the student began using the Unique Learning System (ULS) program and the sign language support was used as a strategy to help augment the student’s expressive and receptive language skills while he was learning to read vocabulary words from each unit. School staff reportedly modeled the signs for vocabulary words “when the student demonstrated a need for additional supports to learn words” during the scheduled vocabulary instruction each school day. School staff also stated, “Whenever possible, sign was included as a multi-sensory approach in a variety of lessons where the vocabulary words were used.”

The IEP Team developed the second IEP in effect during the investigation’s time frame on December 12, 2019. This IEP included an accommodation requiring “sign language support during communication exchanges in all school settings until communication exchange is complete.” Documentations shows USD #\_\_ purchased the SEE SIGN app for the SLP’s iPad as well as the iPad used in the special education classroom in order to implement this IEP accommodation.

The December 12, 2019 IEP was amended on March 2, 2020 and amended again on September 9, 2020. These IEPs became the third and fourth IEPs in effect during the investigation’s time frame. All of these IEPs continue to include the accommodation requiring “sign language support during communication exchanges in all school settings until communication exchange is complete.”

Both of these IEPs included goals to increase expressive and receptive vocabulary skills and improve articulation. IEP Goal Progress Reports for the 2019-20 and 2020-21 school years show the student made progress towards meeting these goals.

USD #\_\_ indicated that during the direct speech/language therapy sessions, the SLP and the SLP paraprofessional provided models of signs paired with verbal communication during language building activities in order to increase receptive and expressive language skills. USD #\_\_ stated:

While working with the student during speech and language sessions, there is a balance of keeping the momentum of his on task behavior to work on his goals and taking the time to look up the different signs on the app to use with him, risking interruption of on-task behavior. Some sessions, it was not used as much, if at all, due to the student staying on task and participating during a session (specifically while participating in a drill activity for articulation) very well or being successful with understanding the language and using verbal/expressive language during the session. Other multi-sensory support strategies are used during sessions, which include visual supports, verbal cues, and visual cues, which the student responds positively to as well.

During the second semester of the 2019-20 school year, the paraprofessional reported that she was trained to use the SEE SIGN app to help communicate with the student. Ms. \_\_\_\_ [the paraprofessional] indicated that she was instructed by her supervisors to use SEE signs and was provided with a ring clip of signs and several books about SEE signs were available as resources. She reported using sign during the morning calendar time when discussing the day of the week, the weather, and reading the social stories. She also reviewed basic signs such as colors, letters, and verbs like “work” and “walk” as well as used signs during reading time. Ms. \_\_\_\_ [the paraprofessional] gave an example of a story about going to the dentist and reading and signing the word dentist, teeth, brush, and smile. Ms. \_\_\_\_ [the paraprofessional] also used sign to discuss what was next on the student’s schedule e.g., going to the locker, to lunch, to speech/language therapy, to music, to the gym, to the nurse, to the bathroom, etc. Ms. \_\_\_\_ [the paraprofessional] observed, “At times, the student was super responsive to sign and would answer me verbally and with sign . . . . The student would sign when trying to communicate and I wasn’t understanding but many times it was the partial sign and it was hard to understand but was helpful . . . . I noticed on days he struggled in general he didn’t focus on signs. I did see more progress in his reading when I paired it with sign.”

USD #\_\_ further explained:

During instruction in the Structured Classroom, sign was used to support expressive and receptive language skills when working with vocabulary words as well as conversational skills on an as needed basis. Staff modeled signs for vocabulary words when the student demonstrated a need for additional supports to learn words. The student also used signs spontaneously in settings where a structured activity was taking place. For example, when preparing to transition into the hallway the student would use some sign that followed the visual prompts for hallway expectations (i.e. listening ears, hands to self, feet together, etc.). Additional supports were provided on a daily basis during instruction and throughout the daily schedule in conversation, as needed. Most conversational supports were in the form of directives such as “stand up,” “sit down,” “hands to self,” “stop”, “all done”.

### **Applicable Regulations and Conclusions**

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

Beginning on November 2, 2019 through the development and implementation of the December 12, 2019 IEP, USD #\_\_ was required to provide “sign language support for sight word reading instruction in the structured resource classroom for the length of sight word activities.” Documentation and interviews showed sign language was used as a strategy to help augment the student’s expressive and receptive language skills while he was learning to read vocabulary words in the Edmark and ULS reading programs.

Beginning on December 12, 2019 through November 3, 2020, USD #\_\_ was required to provide “sign language support during communication exchanges in all school settings until communication exchange is complete.” Interviews and documentation show school staff did not consistently implement this accommodation and that sign was only used in “conversational skills on an as needed basis.”

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP, specifically the accommodation to use sign language in all school settings until the communication exchange was complete between December 12, 2019 and November 3, 2020.

**ISSUE TWO:** USD #\_\_, in violation of federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide sign language training for school staff during the past 12 months.

### **Positions of the Parties**

The parent reported the student's IEP requires sign language training for the staff who work with the student. This is to enable these staff to implement the accommodation for using sign language in all school settings until the communication exchange has been completed. The parent indicated that the student had a paraprofessional who was proficient in sign language for several years, but this person was moved to another position and the student now works with three or four different paraprofessionals at school. The parent indicated she purchased the American Sign Language Dolch Sight Word Cards and provided them to the school in an effort to increase the sign language skills of school staff; however, these cards were never used and were ultimately returned to her. She believes the staff have not been trained in sign language as required by the student's IEPs.

USD #\_\_ reported that the \_\_\_\_ [cooperative] school staff have received ongoing formal and informal training to provide the accommodation for sign language support and Augmentative and Alternative Communication (AAC) exchanged in all school settings. USD #\_\_ believes it has provided the supports to school personnel as required by the student's IEPs in effect during the past 12 months.

### **Findings of the Investigation**

The findings of Issue One are incorporated herein by reference.

The IEP in effect between November 3, 2019 and December 12, 2019 does not include any requirement for staff to be trained in sign language. However, the IEP in effect beginning on December 12, 2019 contains a support for school personnel that

requires “annual training for any new support staff who work with the student on sign language.”

During the 2019-20 school year, \_\_\_\_ served as the speech/language paraprofessional while Ms. \_\_\_\_ worked as a special education classroom paraprofessional. USD #\_\_ reported that Ms. \_\_\_\_ [SLP paraprofessional] participated in a SEE sign language class in the spring of 2018 and that she worked with the student during the 2018-19 school year. Ms. \_\_\_\_ [special education classroom paraprofessional] reported that she was “trained for the Structured Classroom during the beginning of August 2019 and worked there till about August 23<sup>rd</sup> when I was transferred. I then transferred back to the Structured Classroom on November 4, 2019.” USD #\_\_ reported weekly informal training was provided by the SLP through discussions of how to implement sign during language activities. In addition, the support staff were provided with resources including the SEE SIGN app and SEE books “to use during instruction to look up any words needed.”

The December 12, 2019 IEP was amended on March 2, 2020 to change the required annual sign language training from being provided to only “new support staff” to being provided for “any support staff who work with the student on sign language.” The December 12, 2019 IEP was amended again on September 2, 2020 but the support for school personnel regarding the annual training for any support staff that work with the student on sign language was not changed.

USD #\_\_ reported that the support staff who have worked with the student during the 2020-21 school year include the speech/language paraprofessional, and special education classroom paraprofessionals \_\_\_\_, \_\_\_\_, \_\_\_\_, and \_\_\_\_\_. Ms. \_\_\_\_ [SLP paraprofessional] continues to have weekly discussions regarding the student’s communication needs, which includes informal training of using sign during speech and language sessions. The special education teacher has provided informal training to the four classroom paraprofessionals on using sign as an additional support to visual prompts that are provided in the student’s program.”

USD #\_\_ provided documentation of multiple trainings on Augmentative and Alternative Communication (AAC) that paraprofessionals attended during the 2019-20 school year. Paraprofessionals were registered to attend the TASN Kansas Infnitec Coalition Statewide Assistive Technology Conference for the session titled *Building AAC*

*Awareness: Using AAC to Express a Range of Functions* held on December 6, 2019. In addition, the paraprofessionals received Online Training Certificates of Completion dated May 10, 2020 for attending an online session titled *Overview of Augmentative and Alternative Communication (AAC) and Core Vocabulary for Paraprofessionals*.

### **Applicable Regulations and Conclusions**

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

In this case, USD #\_\_ was required to provide annual training on sign language to support staff who work with the student. Documentation and interviews showed the student has used SEE signs to communicate since preschool. While USD #\_\_ provided multiple SEE resources for use by support staff, facilitated informal discussions between the SLP and special education teacher, and paid for paraprofessionals to attend two trainings that presented overviews of AAC, there is no evidence that an annual training focusing on SEE was provided to support staff working with the student.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP, specifically support to school personnel, by not providing annual training on sign language to support staff who work with the student.

### **Corrective Action**

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

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

In this case, USD #\_\_ was required to implement the December 12, 2019 IEP which was amended on March 2, 2019 and again on September 9, 2019 during the past 12

months. These IEPs all required USD #\_\_ to provide “sign language support during communication exchanges in all school settings until communication exchange is complete.” However, interviews and documentation show school staff did not consistently implement this accommodation and that sign was only used in “conversational skills on an as needed basis.”

In addition, USD #\_\_ was required to provide annual training on sign language to support staff who work with the student. Documentation and interviews showed the student has used SEE signs to communicate since preschool and, while USD #\_\_ provided multiple SEE resources for use by support staff, facilitated informal discussions between the SLP and special education teacher, and paid for paraprofessionals to attend two trainings that presented overviews of AAC, there is no evidence that an annual training focusing on SEE was provided to support staff working with the student.

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

1. Within 15 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) which requires school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP.
2. No later than January 29, 2021, USD #\_\_ will provide training to all special education staff who work with the student on the requirement to implement the student’s IEP as written. No later than February 5, 2021, USD #\_\_ will provide documentation to SETS of the date and content of the training, the name and position of the person who provided the training, an attendance records with names, positions, and signatures of all staff who attended the training. In addition, USD #\_\_ will develop a plan for administration to monitor the implementation of the student’s IEP for the remainder of the 2020-21 school

year. USD #\_\_ will provide a copy of this plan to SETS for approval no later than January 4, 2021. Once approved by SETS, USD #\_\_ shall provide documentation consistent with the plan to SETS no later than five calendar days following the last day of the 2020-21 school year.

3. No later than January 4, 2021, USD #\_\_ shall identify and register all support staff who work with the student for a training specifically focused on SEE to occur no later than the last day of the 2020-21 school year. No later than January 8, 2021, USD #\_\_ will provide a copy of the registration forms to SETS. No later than the last day of the 2020-21 school year, USD #\_\_ will provide SETS with documentation to show all support staff have been trained on SEE.
4. Further, USD #\_\_ shall, within 10 calendar days of the date of this report, submit to Special Education and Title Services one of the following:
  - a. a statement verifying acceptance of the corrective action or actions specified in this report;
  - b. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org)

### Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). The notice of appeal must be emailed within 10 calendar days from the date of this report.

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON DECEMBER 2, 2020

DATE OF REPORT: JANUARY 1, 2021

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

The complaint is against USD #\_\_ (\_\_\_\_\_). Special education and related services are provided in USD #\_\_ by the \_\_\_\_\_ Special Education Cooperative #\_\_ (\_\_\_\_\_). In the remainder of the report, USD #\_\_ and \_\_\_\_\_ [the cooperative] may be referred to as the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on December 2, 2020. The KSDE allows for a 30-day timeline to investigate the child complaint, which will end on January 1, 2021.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the mother by telephone on December 16, 2020 as part of the investigation. On December 7, 2020, the mother requested and provided written consent for two other persons to be interviewed. The complaint investigator interviewed the student's father on December 15, 2020 and Angela Schmidt, Intellectual and Developmental Delay (I/DD) Case Manager at Life Span LLC, on December 14, 2020. The Complaint Investigator also conducted a telephone interview with \_\_\_\_\_, Director of \_\_\_\_\_ [the cooperative], on December 14, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the mother and USD #\_\_:

- Email dated November 2, 2020 at 12:33 p.m. from the mother to Ms. \_\_\_\_\_ [director of the cooperative]
- Email dated November 2, 2020 at 4:54 p.m. from Ms. \_\_\_\_\_ [director of the cooperative] to the mother
- Email dated November 3, 2020 from the mother to Ms. \_\_\_\_\_ [director of the cooperative]
- Email dated November 5, 2020 at 8:49 a.m. from Ms. \_\_\_\_\_ [director of the cooperative] to the mother
- Email dated November 5, 2020 at 10:33 p.m. from the mother to Ms. \_\_\_\_\_ [director of the cooperative]
- Email dated November 9, 2020 at 11:02 a.m. from Ms. \_\_\_\_\_ [director of the cooperative] to the mother
- Email dated November 9, 2020 at 11:04 a.m. from the mother to Ms. \_\_\_\_\_ [director of the cooperative]
- Email dated November 9, 2020 at 11:05 a.m. from Ms. \_\_\_\_\_ [director of the cooperative] to the mother
- Email dated November 13, 2020 from \_\_\_\_\_ \_\_\_\_\_, special education teacher, to the mother
- Email dated November 16, 2020 from Ms. \_\_\_\_\_ [special education teacher] to \_\_\_\_\_ \_\_\_\_\_, Occupational Therapist (OT); \_\_\_\_\_ \_\_\_\_\_, Speech/Language Pathologist (SLP); \_\_\_\_\_ \_\_\_\_\_, Principal of \_\_\_\_\_ Elementary School; Ms. \_\_\_\_\_ [director of the cooperative]; and the mother
- Notice of Meeting (NOM) dated November 16, 2020 for a November 18, 2020 IEP team meeting
- Email dated November 17, 2020 at 9:39 a.m. from the mother to Ms. \_\_\_\_\_ [special education teacher], Mr. \_\_\_\_\_ [principal], and Ms. \_\_\_\_\_ [director of the cooperative]
- Email dated November 17, 2020 at 6:03 p.m. from Ms. \_\_\_\_\_ [director of the cooperative] to the mother
- Individualized Education Program (IEP) dated December 12, 2019 and amended on November 18, 2020
- NOM dated November 30, 2020 for a December 9, 2020 IEP team meeting
- Email dated November 30, 2020 at 2:25 p.m. from Ms. \_\_\_\_\_ [special education teacher] to the mother

- Email dated November 30, 2020 at 3:55 p.m. from the mother to Ms. \_\_\_\_\_ [special education teacher]
- Email dated November 30, 2020 at 4:10 p.m. from Ms. \_\_\_\_\_ [special education teacher] to the mother
- Email dated December 2, 2020 at 2:25 p.m. from Ms. \_\_\_\_\_ [special education teacher] to the mother
- Response to the Allegations dated December 11, 2020 from Ms. \_\_\_\_\_ [director of the cooperative]
- Timeline for Formal Complaint 21FC\_\_-003 compiled by Ms. \_\_\_\_\_ [director of the cooperative]
- Teacher Information Page for the 2020-21 school year

### **Background Information**

This investigation involves a nine-year old male student who is enrolled in the fourth grade at \_\_\_\_ Elementary School in USD #\_\_. The student received early intervention services beginning at birth and was originally evaluated for special education and related services at the age of three. USD #\_\_ [a previous school district] found the student eligible for special education and related services due to the exceptionality of Developmental Delay and the student received early childhood special education services as a preschool student. The student enrolled in USD #\_\_ as a kindergarten student during the 2016-17 school year. USD #\_\_ reevaluated the student and found that he continued to be eligible for special education and related services under the exceptionality category of Developmental Delay. The student's most recent reevaluation was during third grade and, at that time, USD #\_\_ found the student eligible for special education and related services due to the exceptionality of Intellectual Disability. The student has received specialized instruction, occupational therapy, physical therapy, speech/language therapy and paraprofessional support throughout his entire educational career.

### **Issues**

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance with special education laws that occurred not more than one year from the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-

51(b)(1)). In this case, KSDE received the mother's written complaint on December 2, 2020 and the investigation will cover the one-year time frame between December 2, 2019 and December 2, 2020.

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

**ISSUE ONE:** USD #\_\_, in violation of federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parents with appropriate notification of the IEP team meeting held on November 18, 2020.

### Positions of the Parties

The mother reported that the student's father regularly attends the student's IEP team meetings. However, USD #\_\_ failed to invite the father to the November 18, 2020 IEP team meeting and he did not participate in that meeting.

The mother also reported that she was not told who would attend the November 18, 2020 IEP team meeting. The mother believed this meeting was for the purpose of amending the student's IEP to include a hybrid model learning plan and was going to be held between only herself and Ms. \_\_\_\_\_, the student's special education teacher. However, the mother reported that the student's full IEP team and the school district's attorney attended the November 18, 2020 IEP team meeting.

The mother indicated that if she had been aware that the entire IEP team was going to participate in the November 18, 2020 IEP team meeting, she would have invited additional persons with knowledge of the student to attend. Because of this misunderstanding, the mother indicated that she was not able to include the persons with special expertise that she regularly invites to participate in the student's IEP team meetings. The mother believes that Dr. Jane Adams, Executive Director of Keys for Networking, Inc.; Kara Peavey-McDonough, Speech/Language Pathologist (SLP) at Every Child's Voice; and Angela Schmidt, Intellectual and Developmental Delay (I/DD) Case Manager at Life Span LLC, have important information to contribute in the development of the student's IEPs. The mother stated that she always attempts to schedule any IEP team meeting at a time when at least two of these three persons can be in attendance.

The mother noted that the original purpose of scheduling an IEP team meeting in November 2020 was to discuss the parents' request for the student to transfer to \_\_\_\_\_ Elementary School. However, due to difficulty finding a mutually agreeable time that worked for everyone's schedule and the deadline to revise the student's IEP to address the student's needs in a hybrid model learning plan, the mother agreed to discuss amending the IEP to adjust for the hybrid learning plan with Ms. \_\_\_\_\_ [special education teacher] in a Zoom meeting to be held on November 18, 2020. She understood that the request for the transfer to \_\_\_\_\_ Elementary School would then be discussed at the student's annual IEP team meeting, which would be held in early December.

USD #\_\_ reported that the parents requested a transfer from \_\_\_\_\_ Elementary School to \_\_\_\_\_ Elementary School on November 2, 2020 and that multiple attempts were made to schedule an IEP team meeting at a mutually agreed upon date and time to discuss this request. However, no date and time had been found and there was an internal November 20, 2020 deadline to revise the student's IEP to include a hybrid model learning plan. The mother agreed to discuss amending the student's IEP to address the student's needs in the hybrid model learning plan on November 18, 2020.

USD #\_\_ acknowledged that the father was not invited to participate in the November 18, 2020 IEP team meeting. \_\_\_\_\_, Director of \_\_\_\_\_ [the cooperative], reported that she called the father to apologize for the fact that he had not been properly notified of the meeting. Ms. \_\_\_\_\_ [director of the cooperative] indicated that both parents were subsequently provided with appropriate notice of the IEP team meeting that was held on December 9, 2020.

In addition, Ms. \_\_\_\_\_ [director of the cooperative] reported that all certified staff at \_\_\_\_\_ [the cooperative] will participate in IEP training on January 18, 2021. This training will be conducted by Crystal Davis, coordinator from the Kansas Technical Assistance System Network (TASN), and will include information regarding providing appropriate IEP team meeting notification.

### Findings of the Investigation

Documentation and interviews showed that on November 2, 2020 USD #\_\_ initially proposed conducting an IEP team meeting to consider the parents' request for the student to transfer to \_\_\_\_\_ Elementary School. On November 3, 2020, the mother provided three possible dates and times to conduct this meeting.

Based on this information, Ms. \_\_\_\_\_ [director of the cooperative] emailed the mother on November 5, 2020 and scheduled the IEP team meeting for November 10, 2020 at 7:00 a.m. in the \_\_\_\_ [the cooperative] Boardroom. In that email, Ms. \_\_\_\_\_ [director of the cooperative] indicated Ashley Rohleder, the district's attorney from the Kansas Association of School Boards (KASB), would attend the IEP team meeting. She also stated that Ms. \_\_\_\_\_ [special education teacher] would send home a Notice of Meeting (NOM) for that IEP team meeting.

However, also on November 5, 2020, the mother reported to Ms. \_\_\_\_\_ [director of the cooperative] that one of her advocates would not be able to attend the meeting as scheduled and requested the meeting to be rescheduled. In a November 9, 2020 email, USD #\_\_ again asked for the mother to provide available dates and times to meet. The mother replied via email that same day indicating she was "still waiting to hear when everyone can meet again."

On November 13, 2020, Ms. \_\_\_\_\_ [special education teacher] emailed the mother regarding amending the student's IEP to address the student's needs in the hybrid model learning plan. Ms. \_\_\_\_\_ [special education teacher] stated,

To maintain compliance, we will need to have the amendment completed within 10 days of the changes being made, which will be next Friday, Nov. 20. Another caveat is that the student's annual IEP is due on Dec. 12, which we would likely want to look at scheduling the first week or so in December when we come back from Thanksgiving break. My proposal, if you would be agreeable, would be that we do the amendment paperwork now without a meeting and then schedule the annual meeting for the first week of December. That way we only have to find one date and time that works for the whole team rather than two.

On November 16, 2020, the mother had a verbal conversation with Ms. \_\_\_\_\_ [special education teacher] to plan a meeting for November 18, 2020 at 1:45 p.m.

following the student's scheduled Zoom instruction between herself and the special education teacher to discuss the student's needs in the hybrid model learning plan.

Ms. \_\_\_\_\_ [special education teacher] then sent an email dated November 16, 2020 to \_\_\_\_\_, Occupational Therapist (OT) at \_\_\_\_\_ [the cooperative]; \_\_\_\_\_, SLP at \_\_\_\_\_ [the cooperative]; \_\_\_\_\_, Principal of \_\_\_\_\_ Elementary School; Ms. \_\_\_\_\_ [director of the cooperative], and the mother stating "Per my conversation with the mother this morning, we will meet Wednesday afternoon at 1:45 after the student's afternoon Zoom session to go over the amendment paperwork."

An IEP team meeting was held on November 18, 2020 to amend the December 12, 2019 IEP to address the student's needs in the hybrid model learning plan. Participants in that meeting included Ms. \_\_\_\_\_ [special education teacher], Ms. \_\_\_\_\_ [OT], Ms. \_\_\_\_\_ [SLP], Mr. \_\_\_\_\_ [principal], Ms. Rohleder, and the mother.

The mother was provided with a copy of the November 18, 2020 amended IEP along with a copy of the written Notice of Meeting (NOM) dated November 16, 2020 via DocHub on November 20, 2020. This written notice was created in the WebKDSS IEP system and lists the roles of the required IEP team members that will attend the IEP team meeting but does not include the role of attorney or identify Ms. Rohleder as a participant in the IEP team meeting.

The student's IEP team met on December 9, 2020, to complete an annual review of the student's IEP. The parents confirm and documentation shows that both received appropriate notification of this meeting on November 30, 2020 and that both parents as well as Ms. Schmidt attended the December 9, 2020 IEP team meeting.

### **Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.322(a)(1)-(2) require school districts to ensure that the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, which includes notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place.

State regulations at K.A.R. 91-40-17(a)(2) require school districts to provide the parents with notice of the IEP team meeting at least 10 days in advance of the meeting.

Federal regulations at 34 C.F.R. 300.322(b)(1)(i)-(ii) require that the meeting notice must indicate the purpose, time, and location of the meeting and who will be in attendance and inform the parents of their right to invite other individuals who have knowledge or special expertise about the child.

Federal regulations at 34 C.F.R. 300.321(a)(6) allow the parent to invite other individuals who they believe have knowledge or special expertise about the child to participate as IEP team members in IEP team meetings.

Federal regulations at 34 C.F.R. 300.324(a)(4) allow changes to be made after the annual IEP team meeting if the parent of a child with a disability and the public agency agree not to convene an IEP team meeting for the purposes of making those changes and instead develop a written document to amend or modify the child's current IEP.

In this case, Ms. \_\_\_\_\_ [special education teacher] contacted the mother via email on November 13, 2020 and proposed amending the student's annual IEP for the purpose of adding a distance learning plan. The email stated, "My proposal, if you would be agreeable, would be to do the amendment paperwork now without a meeting and then schedule the annual meeting for the first week in December. That way we only have to find one date and time that works for the whole team rather than two." The mother and Ms. \_\_\_\_\_ [special education teacher] agreed to discuss the amendment without an IEP team meeting on November 18, 2020 following the student's regularly scheduled Zoom meeting.

Ms. \_\_\_\_\_ [special education teacher] subsequently sent an email and Zoom calendar invitation to Ms. \_\_\_\_\_ [OT], Ms. \_\_\_\_\_ [SLP], Mr. \_\_\_\_\_ [principal], Ms. \_\_\_\_\_ [director of the cooperative], and the mother to confirm a meeting to discuss the amendment on November 18, 2020 at 1:45 p.m.; however, the father was not included in either the email or the calendar invitation. Ultimately, Ms. \_\_\_\_\_ [special education teacher], Ms. \_\_\_\_\_ [OT], Ms. \_\_\_\_\_ [SLP], Mr. \_\_\_\_\_ [principal], Ms. Rohleder, and the mother participated in the amendment discussion held on November 18, 2020 at 1:45 p.m.

The interview and documentation shown that the mother and Ms. \_\_\_\_\_ [special education teacher] originally agreed to discuss the amendment between themselves in their roles as the parent and local education agency (LEA) without an IEP team meeting on November 18, 2020. However, multiple members of the student's IEP team along with the school district's attorney ultimately met with the mother on that date to discuss the student's needs in the hybrid model learning plan and to review and revise the student's IEP. The father was not provided notice of this meeting and neither parent was informed that the school district's attorney would be in attendance at the November 18, 2020 meeting.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parents with appropriate notification of the IEP team meeting held on November 18, 2020.

### **Corrective Action**

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

- A. Federal regulations at 34 C.F.R. 300.322(a)(1)-(2) require school districts to ensure that the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, which includes notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place.

In this case, interviews and documentation found that the father was not provided with any notification regarding the November 18, 2020 IEP team meeting and that he did not participate in that meeting.

- B. Federal regulations at 34 C.F.R. 300.322(b)(1)(i) require that the meeting notice must indicate the purpose, time, and location of the meeting and who will be in attendance.

In this case, interviews and documentation found that the notification of the meeting listing the participants in the November 18, 2020 IEP team meeting did not include the role or name of the school district's attorney who was in attendance at that meeting.

- C. Federal regulations at 34 C.F.R. 300.322(b)(1)(ii) require that the meeting notice must inform the parents of their right to invite other individuals who have knowledge or special expertise about the child. Federal regulations at 34 C.F.R. 300.321(a)(6) allow the parent to invite other individuals who they believe have knowledge or special expertise about the child to participate as IEP team members in IEP team meetings.

In this case, interviews and documentation found that the mother was not able to invite any of the three persons she believes has knowledge or special expertise about the student and regularly invites to attend the student's IEP team meetings to the November 18, 2020 IEP team meeting due to the failure of the district to provide her with appropriate notification of the meeting.

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

1. Within 15 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
  - a) Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.322(a)(1)-(2) that require school districts to take steps to ensure that the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate, which includes notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place.
  - b) Comply with federal regulations implementing the IDEA at 34 C.F.R. 300.322(b)(1)(i)-(ii) require that the meeting notice must indicate the purpose, time, and location of the meeting and who will be in attendance and inform the parents of their right to invite other individuals with knowledge or special expertise about the child.

- c) Comply with federal regulations implementing the IDEA at 34 C.F.R. 300.321(a)(6) that allow the parent to invite other individuals who they believe have knowledge or special expertise about the child.
2. It is noted that USD #\_\_ has already arranged for IEP training to be provided to all certified staff at \_\_\_\_ [the cooperative] on January 18, 2021. This training will be conducted by Crystal Davis, coordinator of the Kansas Technical Assistance System Network (TASN) and will include information regarding providing appropriate IEP team meeting notification. USD #\_\_ must ensure this training specifically addresses the requirements for which noncompliance was identified through this investigation. No later than January 19, 2021, USD #\_\_ will provide documentation to SETS of the content of the training, and an attendance record with names, positions, and signatures of all staff who attended the training.
  3. No later than January 15, 2021, the administration of USD #\_\_ and \_\_\_\_ [the cooperative] shall complete and submit to SETS a pre-training survey for administrators before the staff are trained as ordered in Corrective Action 2. No later than January 19, 2021, the administration of USD #\_\_ and \_\_\_\_ [the cooperative] shall complete and submit to SETS a post-training survey of the training as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_ [the cooperative].
  4. No later than January 19, 2021, every staff member who participated in the training ordered by Corrective Action 2 shall complete and submit to SETS a post-training survey for staff after the staff are trained as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_ [the cooperative].

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

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) A written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) A written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org)

### Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). The notice of appeal must be emailed within 10 calendar days from the date of this report.

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON DECEMBER 18, 2020

DATE OF REPORT: JANUARY 23, 2021

This report is in response to a complaint filed with our office by \_\_\_\_\_, mother, on behalf of her son, \_\_\_\_\_. The remainder of this report will refer to \_\_\_\_\_ as “the student” and \_\_\_\_\_ as “the mother” or “the parent”.

The complaint is against USD #\_\_ (\_\_\_\_\_ Public Schools). Special education and related services are provided in USD #\_\_ by the \_\_\_\_\_ Special Education Interlocal #\_\_ (\_\_\_\_\_). The remainder of the report may also refer to USD #\_\_ and \_\_\_\_\_[the interlocal] as the “district” or the “local education agency (LEA).”

The Kansas State Department of Education (KSDE) received the complaint on December 18, 2020. The KSDE allows for a 30-day timeline to investigate a child complaint, which can be extended for extenuating circumstances. In this case, the timeline was extended until January 23, 2021 due to school staff being unavailable to respond to the allegations during the holiday break.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent and the student by telephone on January 12, 2021 as part of the investigation process.

USD #\_\_ and \_\_\_\_\_[the interlocal] made the following staff available for a telephone interview on January 12, 2021:

- \_\_\_\_\_, Assistant Director of Special Education for \_\_\_\_\_[the interlocal]
- \_\_\_\_\_, Principal of \_\_\_\_\_ High School
- \_\_\_\_\_, Special Education Teacher
- \_\_\_\_\_, IEP Manager / Special Education Teacher

- \_\_\_\_\_, Special Education Teacher
- \_\_\_\_\_, General Education Teacher for the student's Government class
- \_\_\_\_\_, General Education Teacher for the student's Consumer Math class

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #\_\_:

- Formal Complaint Request Form completed by the parent dated December 18, 2020
- Response to the Formal Complaint written by \_\_\_\_\_, Assistant Director of Special Education for \_\_\_\_\_[the interlocal], dated January 6, 2021
- Letter by \_\_\_\_\_, IEP Manager / Special Education Teacher, dated January 4, 2021 to the Complaint Investigator
- Undated letter by \_\_\_\_\_, Teacher of the Jobs for America's Graduates (JAG) class, to the Complaint Investigator
- Letter by \_\_\_\_\_, Special Education Teacher, dated January 4, 2021 to the Complaint Investigator
- Undated letter by \_\_\_\_\_, Special Education Paraprofessional, to the Complaint Investigator
- Email dated January 4, 2021 from \_\_\_\_\_, Special Education Teacher, to Ms. \_\_\_\_\_ [IEP Case Manager/Special Education Teacher]
- Email dated January 4, 2021 from \_\_\_\_\_, Special Education Paraprofessional, to Ms. \_\_\_\_\_ [IEP Case Manager/Special Education Teacher]
- Official Transcript for the student showing school years 2017-18, 2018-19, and 2019-20
- Draft copy of the student's Individualized Education Program (IEP) dated January 30, 2019
- Final copy of the student's IEP dated January 30, 2019
- Multidisciplinary Team Staffing Summary dated January 30, 2019
- Draft copy of the student's IEP dated January 27, 2020
- Final copy of the student's IEP dated January 27, 2020
- Multidisciplinary Team Staffing Summary dated January 27, 2020

- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent (PWN) dated August 19, 2020
- Email dated August 21, 2020 from Ms. \_\_\_\_ [IEP Case Manager/Special Education Teacher] to the parent
- Draft copy of the student's IEP dated December 11, 2020
- Final copy of the student's IEP dated December 11, 2020
- Multidisciplinary Team Staffing Summary dated December 11, 2020
- Attendance Record for the 2019-20 school year
- Semester 1 grades for the 2020-21 school year for the following classes and teachers: JAG (\_\_\_\_), English 4 - Literature (\_\_\_\_), Culinary Essentials (\_\_\_\_), Photo Imaging (\_\_\_\_), Furniture and Cabinetry Fabrication I (\_\_\_\_), Consumer Math (\_\_\_\_), American Government (\_\_\_\_), and Men's Choir (\_\_\_\_)
- Edgenuity online report for the Lifetime Fitness class for the 2020-21 school year
- Attendance Record for the 2019-20 school year
- PowerSchool SIS Gradebook showing the student's grades and assignment record for the 2019-20 school year for the following classes: American History, JAG, English 3 – Literature, Current Events, General Science, Geometry, English 3 – Composition, and Men's Choir
- Special Education Staff Schedule for Spring 2019, Fall 2019, Spring 2020, and Fall 2020
- Email record from the WebKidss program showing emails sent to the parent from school staff between January 30, 2019 and December 15, 2020
- Emails dated between January 12 and January 14, 2021 between \_\_\_\_, Assistant Director of Special Education, and the Complaint Investigator
- USD #\_\_ School Calendar for the 2020-21 school year

### **Background Information**

This investigation involves a male student who turned 18 years old on \_\_\_\_\_. The student is currently enrolled in the twelfth grade at \_\_\_\_\_ High School in USD #\_\_. The student was originally evaluated for special education and related services while in the \_\_\_\_ grade during the 20\_\_-\_\_ school year. USD #\_\_ found the student

eligible for special education and related services due to the exceptionality of Other Health Impaired. He has received special education services as well as classroom accommodations/modifications (also known as supplementary aids and services) in the general education setting since that time.

### **Issues**

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance that occurred not more than one year from the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-51(b)(1)). In this case, KSDE received the parent's written complaint on December 18, 2020 and the investigation covers the one-year time frame between December 18, 2019 and December 18, 2020.

Based upon the written complaint, the parent raised three issues that were investigated.

**ISSUE ONE:** USD # \_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individual Education Program (IEP) as written, specifically by not providing the accommodations/modifications for assignments and tests during the 2020-21 school year.

### **Positions of the Parties**

The parent reported the student's IEP states that he is supposed to receive extra time to complete assignments and is supposed to be taken to a separate room where someone reads tests to him. The mother and the student indicated that these accommodations/modifications have only been provided in the American Government class during first semester of the 2020-21 school year. The parent believes that as a result, the student is failing a number of his classes which will impact his earning enough credits in order to graduate at the end of the school year. The parent stated that these same IEP accommodations/modifications were provided in all of his classes during the 2019-20 school year, which resulted in the student passing all of his general education classes.

The LEA reported that the student has received the accommodations/modifications of tests being given in a small group setting, the offer of tests being read to him, and extra time to complete class assignments by two times. USD #\_\_ and \_\_\_\_ [the interlocal] staff stated, "These are offered to the student but staff cannot make him take advantage of the accommodations and modifications. It is reported he often does not want help and does not want others to know he is in special education. The student has rejected tests being read to him even in a quiet one on one setting."

### Findings of the Investigation

Two IEPs were in effect during the 2020-21 school year to date. The student's IEP Team developed the student's first IEP at an IEP team meeting on January 27, 2020 and amended on August 24, 2020. The IEP Team developed the student's second IEP at an IEP team meeting on December 11, 2020. Both IEPs require the following accommodations/modifications be provided to the student in the general education classroom setting: 1) Tests given in a small group setting when tests are given; 2) Tests will be read to him when tests are given; and 3) the student will have extra time, 2 times, to complete in class assignments when in class assignments are given.

Ms. \_\_\_\_ [IEP Manager/Special Education Teacher] reported that teachers are reminded of the accommodations/modifications at the IEP team meeting and that they also have access to this information as a reminder notation in Powerschool. She stated, "The student knows of his accommodations/modifications as he has attended his IEP meetings and he was reminded that he has to advocate for himself if the teacher doesn't remember." Ms. \_\_\_\_ [IEP Manager/Special Education Teacher] then explained, "The Special Education Staff Schedule is printed each semester and posted outside of the special education teacher's classroom. Kids are encouraged to find us, based on this schedule, when they are needed to have a test read to them."

The student reported that the American Government class is the only class where he receives the IEP accommodations on a regular basis and that is because Mr. \_\_\_\_\_ [Special Education Teacher] is in the class to support the students with IEPs. Mr. \_\_\_\_\_ [Special Education Teacher] stated:

I take the student out of the government classroom to my classroom for tests. I constantly ask the student if he needs help and he never wants any.

Often when he has a test, it is just the two of us and I will ask if he needs me to read anything or explain anything and his answer is almost always no, he has it taken care of.

The student indicated that he had tried to take tests from other classes in a small group setting this school year, but was unable to locate a special education staff member to help him.

The student's transcript shows failing grades during both semesters of the 20\_\_-\_\_ school year. Failing grades were also recorded during first semester of the 20\_\_-\_\_ school year. The student was evaluated and found eligible for special education services at the beginning of the \_\_\_\_\_ semester of the 20\_\_-\_\_ school year and the transcript shows all passing grades for that semester. All passing grades were again reported for the 20\_\_-\_\_ school year.

School district staff indicated that the student's first semester grades for the 2020-21 school year are being negatively impacted by missing or incomplete assignments. The parent and student reported that following the filing of this complaint, the student was given the opportunity to complete several missing assignments and to re-take a test. School staff reported that the student should be able to earn passing grades in all of his first semester classes of the 2020-21 school year if the student accepts the opportunity to complete the missing assignments and re-take a test.

### **Applicable Regulations and Conclusions**

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

In this case, both of the IEPs in effect during the 2020-21 school year to date required the following accommodations/modifications be provided to the student in the general education classroom setting: 1) Tests given in a small group setting with a frequency of "when tests are given"; 2) Tests will be read to him with a frequency of "when tests are given"; and 3) the student will have extra time, 2 times, to complete in class assignments with a frequency of "when in class assignments are given". Interviews and

documentation showed that USD #\_\_ did not provide these accommodations/modifications on a regular basis in all of his classes but instead expected the student to advocate for himself and to seek out a special education staff by consulting a posted staff schedule and then requesting a special education staff member provide the required IEP accommodations/modifications. If the IEP team had intended for the student to advocate for himself and have a choice in accepting or rejecting an accommodation/modification, the IEP would have had to reflect that these accommodations/modifications were available with a frequency of “upon student request”.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student’s IEP, specifically the accommodations/modifications to read tests to the student, to administer tests in a small group setting, and to allow extra time to complete in class assignments during the 2020-21 school year.

**ISSUE TWO:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student’s Individual Education Program (IEP) as written, specifically by not providing special education support during the 2020-21 school year.

### **Positions of the Parties**

The parent reported the student’s IEP requires special education support services be provided during his math, English, and American Government classes. She indicated the student received these special education services during the 20\_\_-\_\_ school year and he earned all passing grades. However, American Government is the only class in which the student reports he has received the required special education support services during the current school year. The mother believes the student is struggling in his Consumer Math and English 4 – Literature classes because the special education support services are not being provided as required by the student’s IEP.

At the December 11, 2020 IEP team meeting, the mother indicated that school staff told her that the English 4 – Composition class during second semester would be very difficult for the student. She is very concerned that the student will fail this class and

will not be able to graduate if he does not receive the special education support services in the English class. The parent reported that she was not aware that the school district had reduced the student's special education support services in the December 11, 2020 IEP from 320 minutes to just 80 minutes every two weeks, and that she did not give consent for this change to take place.

The school district acknowledged that the student is only receiving 80 minutes of special education direct services during the American Government class in the general education setting five days per week, every two weeks this school year. USD #\_\_ and \_\_\_\_ [the interlocal] staff stated:

The student does have a special education teacher as a support in his Government class. In his Consumer Math class, the teacher is available to work closely with the student and serve the minutes on his IEP during his Seminar where she is also the teacher. During his English class the student does not have a para that specific hour. There are paras who are available to him to help with his English at other times of the day.

School staff reported that first semester started on August 27, 2020 using a hybrid model which included in-person learning for two days per week and remote learning for three days per week. Five days per week of in-person learning began on September 8, 2020. The first semester ended on January 15, 2021.

### **Findings of the Investigation**

The findings of Issue One are incorporated herein by reference.

The IEP dated January 27, 2020 and amended on August 24, 2020 required 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks. The parent, student, and school staff all reported that these special education services were provided in the government, math, and English classes during the 2019-20 school year.

Ms. \_\_\_\_ [IEP Case Manager/Special Education Teacher] expressed that it has been increasingly difficult to fill openings for special education staff in the 2020-21 school year due to the Covid-19 pandemic. She stated, "We are trying our best and

sometimes covering multiple classes to best serve all our students in the best way possible." Ms. \_\_\_\_ [IEP Manager/Special Education Teacher] further explained:

Special education staff are assigned to classrooms first to core classes and priority to younger students. As students age, they should be advocating more for themselves if they are needing additional support. All students have a class called seminar which allows students to meet with a teacher if needed to get clarification or additional help. Most special education students have their IEP manager as their teacher for this class. If they struggle with a particular class, they have that teacher as their seminar teacher, which the student is in his Consumer Math teacher's class this year.

The parent, student, and school staff all reported that special education support services have been provided in the American Government class by Mr. \_\_\_\_\_ [Special Education Teacher] during the first semester of the 2020-21 school year. Ms. \_\_\_\_ [IEP Manager/Special Education Teacher] stated,

The student has almost half of the core classes that he had last year so therefore his minutes have decreased due to this change . . . He does not have a special education staff member in his Consumer Math class but he has additional time with this teacher because he is in her seminar. This Math class does not have any tests. The grades are based on completing assignments. He does not have a special education staff member in his English class. He has been reminded multiple times that a para that he has worked with before is willing to help him if he ever needs and she is in this teacher's class during a different block.

The IEP dated December 11, 2020 requires 80 minutes of special education direct services in the general education classroom setting five days per week, every two weeks. School staff reported that these services are those that were provided in the American Government classes by Mr. \_\_\_\_\_ [Special Education Teacher] through the end of first semester and the special education support services that are scheduled to be provided by Mr. \_\_\_\_\_ [Special Education Teacher] during the American History class during second semester.

USD #\_\_ acknowledged that the parent was not provided with a PWN for a proposed material change in special education services following the December 11, 2020 IEP team meeting. The district also acknowledged that it did not request or obtain parent consent to reduce the special education services from 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks to 80 minutes of special education direct services in the general education classroom setting five days per week, every two weeks.

### **Applicable Regulations and Conclusions**

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

In this case, USD #\_\_ was required to implement the January 27, 2020 IEP that provided the student with 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks beginning on September 8, 2020 when the district began in-person instruction. These services were to continue to be provided in the student's math, government, and English classes during the 2020-21 school year. However, documentation review and interviews found the student only received the special education support services for 80 minutes five days per week, every two weeks in the American Government class during first semester. This reduction in the amount of services provided to the student appears to be the result of unilateral decisions made by special education staff to accommodate staffing patterns.

Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability. State regulations at K.A.R. 91-40-27(a)(3) require school districts to obtain parent consent before making any material change in service, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP.

Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability. State regulations at K.A.R. 91-40-27(a)(3) require school districts to obtain parent consent before making any material change in service, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP, specifically by not providing the special education services required by the student's IEP during the 2020-21 school year. In addition, a violation of special education statutes and regulations is also substantiated for failing to provide the parent with appropriate prior written notice and failing to obtain parent consent for a material change in service following the December 11, 2020 IEP team meeting.

**ISSUE THREE:** The USD #\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with a copy of the student's IEP during the past 12 months.

### **Positions of the Parties**

The parent reported to the complaint investigator that she was unable to provide documentation to support her allegations that the student's IEPs were not being implemented because she never received copies of the student's IEPs. The parent described being asked to sign and initial multiple documents at the end of each IEP team meeting and that she was not sure of exactly what she was signing. The parent noted that she was unaware of the material change in service in the December 11, 2020 IEP because she has not yet received a copy of that IEP.

The school district reported it has a procedure for providing the parents with a copy of the draft IEP at each IEP team meeting. This provision of the IEP copy is documented by the parent marking "yes" to the statement "I/We received a copy of the IEP in a

language I/We understand.” School staff indicated that this procedure was followed at the student’s IEP team meetings held on January 30, 2019; January 27, 2020; and December 11, 2020.

### **Findings of the Investigation**

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

The draft copies of the January 30, 2019 IEP and the January 27, 2020 IEP both include meeting participation records signed by the parent. These draft copies also include the statement “I/We received a copy of the IEP in a language I/We understand” and both IEPs show the parent initialed “yes” to these statements.

The draft copy of the December 11, 2020 IEP also includes a meeting participation record signed by the parent. This draft copy includes the statement “I/We received a copy of the IEP in a language I/We understand” which shows the parent checked “yes” to this statement.

### **Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.322(f) require school districts to provide the parent a copy of the student’s IEP at no cost to the parent.

In this case, interviews show that USD #\_\_\_ has a procedure to provide the parent with a draft copy of the IEP, which include the handwritten notes, at the IEP team meeting. Documentation shows written parent confirmation that a copy of the draft IEP was provided at the IEP team meetings held on January 30, 2019; on January 27, 2020; and on December 11, 2020. While the parent denied receiving a copy of the December 11, 2020 IEP in an interview with the complaint investigator, the parent acknowledged receiving a copy of the IEP by checking “yes” in response to the statement “I/We received a copy of the IEP in a language I/We understand” on the December 11, 2020 IEP meeting participation record.

Based on the foregoing, a violation of special education statutes and regulations is not substantiated for failing to provide the parent with a copy of the student’s IEP at no cost to the parent during the past 12 months.

### **Corrective Action**

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

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

In this case, USD #\_\_ was required to implement the January 27, 2020 and the December 11, 2020 IEPs during the 2020-21 school year. Both of these IEPs required the following accommodations/modifications be provided to the student in the general education classroom setting: 1) Tests given in a small group setting when tests are given; 2) Tests will be read to him when tests are given; and 3) the student will have extra time, 2 times, to complete in class assignments when in class assignments are given. However, interviews and documentation found that USD #\_\_ did not regularly provide these accommodations/modifications in all of his classes but instead expected the student to advocate for himself and seek out the accommodations/modifications required by his IEP during the first semester of the 2020-21 school year.

In addition, USD #\_\_ was required to implement the January 27, 2020 IEP that provided the student with 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks beginning on September 8, 2020 when the district began in-person instruction. These services were to continue to be provided in the student's math, government, and English classes during the 2020-21 school year. However, documentation review and interviews found the student only received the special education support services for 80 minutes five days per week, every two weeks in the American Government class during first semester.

- B. Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to a child who has or is

suspected of having a disability. State regulations at K.A.R. 91-40-27(a)(3) require school districts to obtain parent consent before making any material change in services, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP.

In this case, USD #\_\_ decreased the duration of special education services provided to the student at the December 11, 2020 IEP team meeting from 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks, down to 80 minutes of special education direct services in the general education classroom setting five days per week, every two weeks without providing the parent with appropriate prior written notice and without obtaining parental consent for this material change in services to be provided to the student.

It is important to note that the student turned 18 years of age on \_\_\_\_\_ and all of the rights accorded to the parent under state and federal special education law transferred to the student at that time (K.S.A. 72-3431(b)). USD #\_\_ must now provide prior written notice and notice of meeting to both the parent and the adult student (K.S.A. 72-3431(a)). USD #\_\_ must now obtain consent from the adult student for any material change in services or any other special education action that requires consent (K.S.A. 72-3431(b)).

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

1. Within 15 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

- b. Comply with federal regulations at 34 C.F.R. 300.503(a) which require school districts to provide parents and adult students with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to a child who has or is suspected of having a disability.
  - c. Comply with state regulations at K.A.R. 91-40-27(a)(3) which require school districts to obtain parent or adult student consent before making any material change in services, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in a child's IEP.
2. No later than March 1, 2021, USD #\_\_ will provide training to all special education paraprofessionals, special education teachers, general education teachers, general education administrators, and special education administrators who work at \_\_\_\_\_ High School on the following topics:
- a. the requirements to implement IEPs as written in compliance with 34 C.F.R. 300.323(c)(2), specifically complying with the frequency and duration for services and accommodations listed in the IEP;
  - b. the requirements of providing prior written notice to both the parent and adult student and obtaining parent or adult student consent in compliance with 34 C.F.R. 300.503(a), K.A.R. 91-40-1(mm), and K.A.R. 91-40-27(a)(3).

No later than March 5, 2021, USD #\_\_ will provide documentation to SETS of the date and content of the training, the name and position of the person who provided the training, and attendance records with names, positions, and signatures of all staff and administrators who attended the training.

3. No later than February 24, 2021, the administration of USD #\_\_ and \_\_\_\_ [the interlocal] shall complete and submit to SETS a pre-training administrator survey before the training ordered in Corrective Action 2 occurs. No later than March 5, 2021, the administration of USD #\_\_ and \_\_\_\_ [the interlocal] shall complete and submit to SETS a post-training survey of the training as ordered in

Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_[the interlocal].

4. No later than March 5, 2021, every staff member who participated in the training ordered by Corrective Action 2 shall complete and submit to SETS a post-training staff survey after the staff are trained as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_[the interlocal].
5. USD #\_\_ will develop a procedure for implementing the student's IEP accommodations for extra time on assignments, for tests to be given to him in small group settings, and for reading tests to him. USD #\_\_ will also develop a plan for administration to monitor the implementation of these accommodations for the student for the remainder of the 2020-21 school year. USD #\_\_ will provide a copy of this plan to SETS for approval no later than February 4, 2021. No later than five calendar days following the last day of the 2020-21 school year, USD #\_\_ shall provide SETS with documentation verifying that administration monitored the implementation of these accommodations consistent with the plan that was approved by SETS.
6. No later than January 25, 2021, USD #\_\_ is required to begin implementing the 320 minutes of special education direct services in the general education classroom setting five days per week, every two weeks, as originally required by the student's January 27, 2020 IEP amended on August 24, 2020. USD #\_\_ shall continue to implement these services until the IEP Team convenes to discuss whether making a change in the 320 minutes of service is appropriate, or until the LEA and adult student agree to make an amendment to the IEP without a meeting.

No later than 5 calendar days after the last day of providing the 320 minutes of special education direct services as originally required by the student's January 27, 2020 IEP amended on August 24, 2020 during the 2020-21 school year, USD #\_\_ shall provide SETS with a signed service log and statement of assurance verifying that this requirement was completed.

If the IEP Team determines that a change in services is appropriate, USD #\_\_\_ must provide both the parent and adult student with appropriate prior written notice. If the proposed change is a material change in services, USD #\_\_\_ must also request consent from the adult student. If the adult student refuses to consent to a material change of services, the proposed material change must not be implemented. No later than 5 days following the IEP Team meeting or the agreement to amend the IEP without a meeting, USD #\_\_\_ will provide SETS with copies of the Notice of Meeting or Agreement to Amend without a Meeting, the Prior Written Notice, and a copy of the IEP with changes that are made as a result of the meeting or agreement to amend. If a material change is proposed, USD #\_\_\_ must also provide SETS with a copy of the request for consent with the adult student's signature indicating either consent given or refused.

7. No later than February 1, 2021, USD #\_\_\_ shall make a written offer to the adult student for providing compensatory services for no less than the 240 minutes of special education direct services in the general education classroom setting five days per week, every two weeks, that were not provided from September 8, 2020 to date. These services shall be in addition to, not in place of, the special education direct services required by the student's IEP before it was changed without PWN and consent on December 11, 2020. The adult student will have the choice to accept all, none, or a portion of the offered compensatory services. USD #\_\_\_ shall provide a copy of this written offer to SETS and the decision of the adult student. If the adult student accepts all or a portion of the offer, USD #\_\_\_ shall notify SETS and the adult student in writing when the compensatory services have been completed.
8. No later than February 1, 2021, USD #\_\_\_ will provide SETS with documentation showing which assignments from the first semester of the 2020-21 school year that the student had the opportunity to complete and which test the student had the opportunity to retake. If the student completes these assignments and retakes the test, the district must provide SETS with documentation showing the completion and grade of each. If the student chooses not to complete the assignments or retake the test, the district must notify SETS in writing of that fact.

9. Further, USD #\_\_ shall, within 10 calendar days of the date of this report, submit to Special Education and Title Services one of the following:
- a. a statement verifying acceptance of the corrective action or actions specified in this report;
  - b. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c. a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org)

### Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). The notice of appeal must be emailed within 10 calendar days from the date of this report.

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON JANUARY 26, 2021

DATE OF REPORT FEBRUARY 25, 2021

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Public Schools). Special education and related services are provided in USD #\_\_ by the \_\_\_\_ County Special Cooperative #--- (\_\_\_\_\_). In the remainder of the report, USD #\_\_ and \_\_\_\_\_ [Cooperative] may be referred to as the "school", the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on January 26, 2021. The KSDE allows for a 30-day timeline to investigate the child complaint, which ends on February 25, 2021.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on January 28, 2021 and February 12, 2021 as part of the investigation. \_\_\_\_\_, Special Education Director of \_\_\_\_\_ [Cooperative] was interviewed on February 8, 2021. On February 9, 2021, \_\_\_\_\_ [Cooperative] made the following persons available to participate in an interview:

- \_\_\_\_\_, School Psychologist at \_\_\_\_\_ [Cooperative]
- \_\_\_\_\_, Autism Consultant at \_\_\_\_\_ [Cooperative]
- \_\_\_\_\_, School Nurse at \_\_\_\_\_ [Cooperative]
- \_\_\_\_\_, Principal of \_\_\_\_\_ Grade School in USD #\_\_
- \_\_\_\_\_, Special Education Teacher for grades 4-6 at \_\_\_\_\_ Grade School

- \_\_\_\_\_, Case Manager for the student and Special Education Teacher for the \_\_\_\_\_ Pride classroom
- Ms. \_\_\_\_\_ [Special Education Director]

In completing this investigation, the Complaint Investigator reviewed over 385 pages of documentation provided by the LEA. The following materials provided by the parents and the LEA were used as the basis of the findings and conclusions of the investigation:

- Parent Communication Log with entries dated from December 15, 2019 to January 26, 2021
- Individualized Education Program (IEP) dated September 19, 2019 and amended on March 4, 2020
- Prior Written Notice (PWN) for Change of Services/Placement dated March 20, 2020
- IEP dated September 4, 2020
- PWN for Initial Services, Placement, Change in Services/Placement and Request for Consent dated September 11, 2020
- Student's Daily Schedule
- Student's Healthcare Plan for Students in a School Setting
- Communication Log with entries written by \_\_\_\_\_ [School Nurse] dated from August 18, 2020 to February 26, 2021
- Email dated August 21, 2020 from \_\_\_\_\_ [Special Education Director] to \_\_\_\_\_ [Principal]
- Screenshots of texts between the mother and Ms. \_\_\_\_\_ [School Nurse] dated from August 26, 2020 to February 4, 2021
- Daily Communication Logs dated August 24, 2020 through January 28, 2021
- Email dated September 11, 2020 from the parents to Ms. \_\_\_\_\_ [Special Education Director]
- Email dated October 20, 2020 from \_\_\_\_\_ [Case Manager] to the father
- Email dated November 18, 2020 at 7:37 a.m. from the mother to Ms. \_\_\_\_\_ [Case Manager]
- Email dated November 18, 2020 at 9:17 a.m. from Ms. \_\_\_\_\_ [Case Manager] to \_\_\_\_\_ [Special Education Teacher]

- Email dated November 18, 2020 at 10:58 a.m. from Ms. \_\_\_\_\_ [Special Education Teacher] to Ms. \_\_\_\_\_ [Case Manager]
- Email dated November 18, 2020 at 12:22 p.m. from Ms. \_\_\_\_\_ [Case Manager] to Ms. \_\_\_\_\_ [Special Education Teacher]
- Email dated November 18, 2020 at 3:40 p.m. from Ms. \_\_\_\_\_ [Case Manager] to the mother
- Screenshot from the mother's phone of a text message dated November 20, 2020 written by \_\_\_\_\_, Superintendent of USD #\_\_ to patrons of USD #\_\_
- Email dated January 6, 2021 from Ms. \_\_\_\_\_ [Special Education Teacher] to Ms. \_\_\_\_\_ [Case Manager], Ms. \_\_\_\_\_ [Special Education Director], Mr. \_\_\_\_\_ [Principal], Ms. \_\_\_\_\_ [School Nurse], and \_\_\_\_\_ [School Psychologist]
- Screenshot of Google calendar invitation to "Student Meeting" on January 14, 2021 organized by Ms. \_\_\_\_\_ [Special Education Teacher]
- January 14, 2021 Meeting Notes written by the parents
- Screenshot of text message dated January 21, 2021 written by \_\_\_\_\_, Fourth Grade Teacher, to the parent
- Email dated January 26, 2021 from Mr. \_\_\_\_\_ [Principal] to Ms. \_\_\_\_\_ [School Psychologist], Ms. \_\_\_\_\_ [Special Education Director], Ms. \_\_\_\_\_ [Case Manager], and Ms. \_\_\_\_\_ [Special Education Teacher]
- Teacher Notes handwritten by Ms. \_\_\_\_\_ [Case Manager] with entries dated from January 5 to January 29, 2021
- Email dated February 4, 2021 from Ms. \_\_\_\_\_ [Special Education Teacher] to Ms. \_\_\_\_\_ [Special Education Director]
- Email dated February 8, 2021 from Kristi Wilson, School Nurse at \_\_\_\_\_ Grade School, to Ms. \_\_\_\_\_ [Special Education Director]
- Email dated February 16, 2021 from Ms. \_\_\_\_\_ [Special Education Director] to the Complaint Investigator
- Email dated February 21, 2021 from the mother to the Complaint Investigator
- Email dated February 23, 2021 from Ms. \_\_\_\_\_ [Case Manager] to Ms. \_\_\_\_\_ [Special Education Director]
- School Year 2020-21 Attendance Records for the student
- \_\_\_\_\_ [Cooperative] Response to Allegations written by Ms. \_\_\_\_\_ [Special Education Director]
- Daily Log Summary written by the parents

- 2020-21 School District Calendar for USD #\_\_

### Background Information

This investigation involves a ten-year old male student who is enrolled in the fourth grade at \_\_\_\_\_ Grade School in USD #\_\_. The student has multiple disabilities including autism, cortical visual impairment, and a seizure disorder. The student received early intervention services through \_\_\_\_\_ (\_\_\_\_\_ County, Kansas, Infant Development Services) and then Early Childhood Special Education Services for occupational therapy (OT), physical therapy (PT), and speech/language therapy in USD #\_\_. The family moved prior to the start of elementary school and the student was evaluated and found eligible for special education and related services at the age of five by USD #\_\_ where he received special education and related services in grades kindergarten through second grade. The student transferred to USD #\_\_ at the beginning of third grade where he continues to receive specialized instruction, occupational therapy, physical therapy, speech/language therapy, orientation/mobility services, and paraprofessional support.

### Issues

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance with special education laws that occurred not more than one year from the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-51(b)(1)). In this case, KSDE received the father's written complaint on January 26, 2021 and the investigation will cover the one-year time frame beginning on January 26, 2020 and ending on January 26, 2021.

Based upon the written complaint, the father raised two issues that were investigated.

**ISSUE ONE:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the required amount of special education services in the general education setting during the 2020-21 school year.

### Positions of the Parties

The parents reported that the student was completely removed from his general education classroom without their knowledge during the 2020-21 school year. They stated that the student is supposed to participate in music and physical education (PE) with his fourth grade peers in the general education setting. In addition, the student is supposed to be included in classroom academics through a modified curriculum as well as eat lunch and go to recess with his fourth grade peers in the general education setting. The parents shared that the student enjoys being with his peers and that the focus of these general education opportunities is socialization.

The parents report being told by school staff that the student's removal from the general education classroom was because the student has a medical exemption from wearing a mask at school and he is unable to maintain a six-foot social distance in the general education settings. However, they also report that school staff told them that the student's classroom desk was moved away from his peers' desks to create the six-foot social distance so that he could participate in the classroom activities. Based upon conversations with other school staff and several of the student's peers, the parents believe the student was not participating in the required general education activities with his peers.

USD #\_\_ and \_\_\_\_ [Cooperative] staff reported that the 2020-21 school year started with in-person instruction and that the student was provided with 145 minutes per day of special education support in the general education setting for modified academics and socialization, music and PE, as well as lunch and recess. The only times the student was not provided with the general education opportunities was due to the student sleeping, attending therapies, or being disruptive in the classroom.

Following the Thanksgiving break, USD #\_\_ moved to a hybrid model of instruction as a result of restrictions that were necessitated by the COVID-19 pandemic restrictions. In the hybrid model, all students were still allowed to attend school but students were kept together in cohort groups by classroom and not allowed to co-mingle with students from other classrooms. Masks and social distancing were required during hybrid instruction. USD #\_\_ and \_\_\_\_ [Cooperative] staff reported that the school nurse at \_\_\_\_\_ Grade School did not allow the student to go into Mrs. \_\_\_\_'s fourth grade classroom during hybrid learning because the student had a medical exception

to the mask requirement. However, the student did participate in music, PE, lunch, and recess in the general education setting because social distancing could be achieved and maintained in those settings.

All students in the district returned to in-person learning on January 25, 2021; however, Ms. \_\_\_\_\_ [Special Education Director] stated, “The teachers and support workers that work with the student were instructed to end his hybrid services upon return from winter break [on January 4, 2021] so that he could return to services within the classrooms.”

Ms. \_\_\_\_\_ [Special Education Director] reported the child’s September 9, 2019 IEP required 180 minutes per day of specialized instruction in the general education setting and the child’s September 4, 2020 IEP requires 160 minutes per day of specialized instruction in the general education setting. However, the student’s daily schedule only includes 145 minutes per day of specialized instruction in the general education setting. Ms. \_\_\_\_\_ [Special Education Director] also noted that the minutes of specialized instruction in both the special education and general education settings were mistakenly omitted from the student’s hybrid learning plan described in the PWN dated September 11, 2020. Ms. \_\_\_\_\_ [Special Education Director] acknowledged the student has not received the correct amount of specialized instruction in the general education setting during the 2020-21 school year.

### **Findings of the Investigation**

Documentation and interviews showed that the IEP in place when the 2020-21 school year began on August 24, 2020 was developed on September 9, 2019 and amended on March 4, 2020. This IEP requires 135 minutes per day of specialized instruction in the general education setting for socialization, music and PE. In addition, 45 minutes per day of specialized instruction during lunch is required for a total of 180 minutes of specialized instruction in the general education setting daily.

A second IEP was developed at an IEP team meeting beginning on September 4, 2020 and concluding on September 11, 2020. This IEP includes 50 minutes per day of specialized instruction in the general education setting for socialization and 30 minutes per day for music and PE. In addition, 80 minutes per day of specialized instruction

during lunch and recess is included for a total of 160 minutes of specialized instruction in the general education setting daily. This IEP does not include any specialized instruction to be provided during any periods of alternative learning options due to COVID-19.

The PWN for Initial Services, Placement, Change of Services/Placement and Request for Consent dated September 11, 2020 does not describe the district's proposal to change the amount of specialized instruction in the general education setting from 180 minutes per day to 160 minutes per day. Instead, this PWN describes the district's proposal to provide special education and related services to the student during any alternative learning option due to COVID-19 such as hybrid, remote, or other alternatives. But the September 4, 2020 IEP does not mention or describe any special education and related services that the IEP team determined would be provided to the student during any of the alternative learning options due to COVID-19.

During a hybrid phase, the PWN proposed providing the student with 30 minutes per week of direct PT services; 30 minutes per week of direct OT services; 30 minutes per week of specialized instruction for vision; 30 minutes per week of direct orientation and mobility (O&M) services; and 30 minutes per week of specialized instruction for speech/language. All of these services would be provided in the special education setting. USD #\_\_ acknowledged that the PWN dated September 11, 2020 mistakenly omitted the amount, frequency and duration of the specialized instruction in both the special education and general education settings that were to be provided to the student during a hybrid phase.

During a remote phase, the PWN proposed providing the student with 120 minutes per day of specialized instruction for academics; 30 minutes per week of direct PT services; 25 minutes per week of direct OT services; 15 minutes twice per month of specialized instruction for vision; 30 minutes per week of direct O&M services; and 15 minutes per week of specialized instruction for speech/language. All of these services would be provided in the special education setting.

The PWN describing the proposed special education and related services that were to be provided during hybrid and remote learning phases indicates that Ms. \_\_\_\_\_ [Special Education Teacher] mailed a copy to the parents on September 11, 2020. However, the mother wrote a note in the Daily Communication Logs on October 12,

2020 indicating that the IEP [including the PWN] had not been received or signed. On October 14, 2020, Ms. \_\_\_\_\_ [Special Education Teacher] responded in the Daily Communication Log indicating that a copy would be sent to the parents “after \_\_\_\_\_ [Ms. \_\_\_\_\_] [Case Manager] has all paperwork turned in.”

An email dated October 20, 2020 written by Ms. \_\_\_\_\_ [Case Manager] to the father indicated that the wrong PWN had been sent to the parents and advised them not to sign that document. In that same email, Ms. \_\_\_\_\_ [Case Manager] indicated a corrected PWN would be sent to them for their signature.

On November 18, 2020 at 7:37 a.m., the mother emailed Ms. \_\_\_\_\_ [Case Manager] indicating they had not yet received the corrected IEP [including the PWN] and had not signed it. At 9:17 a.m. that same date, Ms. \_\_\_\_\_ [Case Manager] emailed Ms. \_\_\_\_\_ [Special Education Teacher] stating, “I’m confused.....didn’t we send it home and it never got returned????? I just want to make sure I respond correctly.”

Ms. \_\_\_\_\_ [Special Education Teacher] responded via email at 10:58 a.m. stating, “I have no idea if it was sent. I would assume they would have received a copy from the district office.” Ms. \_\_\_\_\_ [Case Manager] then responded to Ms. \_\_\_\_\_ [Special Education Teacher] via email at 12:22 p.m. stating, “I thought you sent home the prior written notice because I couldn’t do it online.”

Ms. \_\_\_\_\_ [Case Manager] emailed the mother at 3:40 p.m. stating, “I will send home a hard copy on Monday [November 23, 2020]. One copy will be for you to keep at home and the other will be signed and returned.” Ms. \_\_\_\_\_’s [Case Manager] handwritten team meeting notes dated January 14, 2021 indicate that the IEP [including the PWN] was “sent in paper form and virtually without a return signature.”

The student’s daily schedule shows the student is integrated into the general education setting during in-person learning for a total of 145 minutes per day for lunch, recess, music, PE, writing, grammar, reading, art, and a Friday activity to be determined by the teacher.

Documentation and interviews show USD #\_\_\_ started in-person learning on August 24, 2020. The hybrid phase started on November 30, 2020 and ended on January 25, 2021.

The student's Healthcare Plan for Students in a School Setting documents that the student is medically exempt from wearing a mask. The Parent Communication Log entry dated August 4, 2020 states:

The father expressed concerns about the student not wearing a mask and therefore being required to be behind plexi-glass mentioned at the \_\_\_ board meeting were to be placed on student desks. This would not be recommended for the student as it will become a distraction for him. It is also the team's understanding that all other students will be wearing masks when they interact with the student, or will stay 6 feet away from him.

Documentation shows the district made accommodations to include the student in the general education setting while still following the COVID-19 restrictions. On August 21, 2020, Ms. \_\_\_\_\_ [Special Education Director] emailed the parent stating:

The student does meet exemption criteria for mask-wearing so he will not be required to wear a mask. However, he will have to follow social distancing guidelines where he will maintain a 6 foot distance from staff and students. I will note this is a rule for everyone, not just the student. However, it is more important that the student follow those guidelines since he will be in the general education class and not wearing a mask. He will be at the front of the room, closest to the door, so that he is not secluded in the back, but also a safe distance from his classmates. This also allows for ease in leaving the room if necessary.

In the August 27, 2020 entry in her parent communication log, Ms. \_\_\_\_\_ [School Nurse] noted:

The student has not been eating lunch well at school so far this year. There was a note written from parents in the communication book that they feel eating in the gym with his class is too much stimulus for him. After discussing with Mr. \_\_\_\_\_ [Principal] and Mrs. \_\_\_\_\_, school nurse, spoke with father about our current ideas and what we have tried at school. Explained that with the new covid regulations, only one class could eat in the commons area at a time and his entire class is assigned to eat in the gym. Told him that we got permission to sit at the staff table in the commons with the student to see if this will help with his eating. Told him we tried this and it seems to be helping as he has been eating for the past

couple of days. The staff table is near where the students walk after getting their trays and many are still able to say hello to the student as they go by. He is still able to hear them talking, etc. and he is now eating. The father said that he thought this was a good idea and agree that we will continue to have him eat in the commons area at the staff table.

The Daily Communication Logs consist of narrative reports of the student's school day; however, the format of the Daily Communication Logs does not require that an entry be made for every activity the student participates in throughout each school day. The Daily Communication Logs reflect that the student usually participated in the general education setting during music, PE, recess, and lunch unless the student was sleeping or being disruptive. The logs specifically document 30 times the student participated in the fourth grade general education classroom prior to November 30, 2020 when the hybrid phase started. During the hybrid phase, the logs show the student did not receive any services in the fourth grade general education classroom but did document some participation in music, PE, recess, and lunch.

Although Ms. \_\_\_\_\_ [Special Education Director] reported that the special education staff at \_\_\_\_\_ Grade School were told that the student was to end hybrid learning on January 4, 2021, an email dated January 6, 2021 written by Ms. \_\_\_\_\_ [Special Education Teacher] to Ms. \_\_\_\_\_ [Case Manager], Ms. \_\_\_\_\_ [Special Education Director], Mr. \_\_\_\_\_ [Principal], Ms. \_\_\_\_\_ [School Nurse], and Ms. \_\_\_\_\_ [School Psychologist] stated:

I had a message from \_\_\_\_\_ [Ms. \_\_\_\_\_] [Case Manager] today that I was to give the father another phone call. The call was to be in regard to what they had heard about the student not have a desk, which is untrue. He has a desk in class and it's where it's always been. They had heard that from a staff member they said. They have also had several students ask if the student is still in school because they never see him. Since we are in hybrid, he's unable to go into the classroom, which they have been told. He's still coming to my room and doing whatever is allowed in a large area such as PE and music when he can.

In addition, the Daily Communication Logs do not contain any mention of inclusion into the general education classroom until January 27, 2021.

## Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. In addition, Kansas regulations at K.A.R. 91-40-19(a) require each school district, teacher, and related services provider to provide special education and related services to the child in accordance with the child's IEP.

Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability. State regulations at K.A.R. 91-40-27(a)(3) require school districts to obtain parent consent before making a material change in services or a substantial change in placement. "Material change in services" is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP. "Substantial change in placement" is defined at K.A.R. 91-40-1(sss) as the movement of an exceptional child for more than 25% of the child's school day from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment.

Documentation shows the IEP developed on September 9, 2019 and amended on March 4, 2020 requires 180 minutes per day of specialized instruction to be provided in the general education setting while the IEP developed on September 4, 2020 requires 160 minutes per day of specialized instruction to be provided in the general education setting. This change results in a 20 minute difference in the amount of services being provided to the student in the general education setting.

The 20-minute difference in services equates to a 12% decrease in the amount of the specialized instruction provided to the student in the general education setting from those required by the previous IEP. The 12% decrease would not be considered a material change of services and therefore does not require written parental consent before implementing the proposed change.

However, this 20-minute change in the amount of specialized instruction would be considered to be a change to the provision of FAPE (free appropriate public education) to the student. As such, the LEA is required by the IDEA to inform parents of this proposed change to the provision of FAPE through appropriate PWN which would include a description of the proposed change of services, the basis and explanation for the proposed change as well as providing the parent with an explanation of their procedural safeguards.

The August 15, 2008 Letter to Heidi Atkins-Lieberman from the Office of Special Education Programs (OSEP) states:

Under 34 C.F.R. 300.17(d), FAPE means, among other things, special education and related services that are provided in conformity with an IEP that meets the requirements of federal regulation at 34 C.F.R. 300.320 through 300.324. Therefore, a proposal to revise a child's IEP, which typically involves a change to the type, amount, or location of the special education and related services being provided to a child, would trigger notice under 34 C.F.R. 300.503.

There is no documentation showing the parent was ever provided with appropriate prior written notice of the district's proposal to reduce the amount of the specialized instruction provided in the general education setting by a total of 20 minutes and thus change the provision of FAPE (free appropriate public education) to the student. The parent indicated they were not aware of and are not in agreement with any proposed reduction in the amount of time the student was to be included with his peers in the general education setting during the 2020-21 school year.

Because the parent was never provided with appropriate PWN of district's proposal to decrease the amount of special education services provided in the general education setting, USD #\_\_\_ was required to continue to implement the IEP in effect at that time which was the one developed on September 9, 2019 and amended on March 4, 2020 beginning August 24, 2020.

That IEP required 180 minutes per day of specialized instruction in the general education setting; however, documentation and interviews show that student was only receiving 145 minutes of specialized instruction in the general education setting during the period from August 24, 2020 to November 24, 2020 when USD #\_\_\_ provided in-

person instruction for all students. This reduction in the amount of services provided to the student appears to be the result of unilateral decisions made by special education staff to accommodate existing staff and classroom schedules.

The student was not provided a total of 35 minutes per day of specialized instruction in the general education setting during the period of in-person learning for a total of 67 days resulting in a total of 2,345 minutes or 39 hours of missed specialized instruction in the general education setting.

Documentation shows the parent was provided with a PWN describing the district's proposal to provide special education and related services to the student during any alternative learning options due to COVID-19 such as hybrid, remote, or other alternatives. However, USD #\_\_ acknowledged that the PWN dated September 11, 2020 mistakenly omitted the amount, frequency, and duration of any specialized instruction for academics and socialization that were to be provided to the student in either or both the general education or special education setting during the hybrid phase. It is unclear what services the IEP team determined should be offered to the student in order to provide FAPE because this same information was also omitted from the September 4, 2020 IEP. These omission makes it impossible to determine the amount, frequency, and duration of services that the LEA should have been provided during the hybrid phase.

Although the PWN describing the hybrid and remote learning plans indicates Ms. \_\_\_\_\_ [Special Education Teacher] provided the parents with a copy on September 11, 2020, a note in the Daily Communication Log on October 12, 2020 along with emails from the parent on October 20, 2020 and again on November 18, 2020 show the parent had not yet received a copy of the IEP dated September 4, 2020 and the PWN dated September 11, 2020 as of those dates.

An Email shows Ms. \_\_\_\_\_ [Case Manager] actually provided copies of these documents to the parents on November 23, 2020, which is 73 calendar days following the conclusion of the IEP team meeting. Ms. \_\_\_\_\_'s [Case Manager] handwritten team meeting notes dated January 14, 2021 confirm that the IEP was "sent in paper form and virtually without a return signature."

The basis for the miscommunication between USD #\_\_\_ and the parents which resulted in the filing of this allegation appears to be the omission of the description of the amount, frequency, duration, and location of special education and related services that USD #\_\_\_ proposed to be provided to the student during the hybrid phase and during in-person learning. The miscommunication occurred as a result of an incomplete PWN combined with a delay of 73 calendar days for the LEA to provide the parent with a PWN following the IEP team meeting which was held beginning on September 4 and concluding on September 11, 2020.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEPs, specifically by not providing the appropriate amount of special education services in the general education setting as required by the student's IEPs during the 2020-21 school year. In addition, a violation of special education statutes and regulations is also substantiated for failing to provide the parent with appropriate prior written notice during the 2020-21 school year.

**ISSUE TWO:** USD #\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to parent requests made during an IEP team meeting held during the 2020-21 school year.

### **Positions of the Parties**

The parents reported they have made multiple requests for the student's IEP to be amended to address behavioral concerns related to the student's biting of himself and others during the 2020-21 school year. The parents indicated that these requests were made to multiple school district staff in phone calls and emails as well as through notes written in the Daily Communication Logs. The parents indicated that the IEP team met on January 14, 2021 where the parents requested a behavior plan be developed to address the student's increased biting behavior. The parents stated that the special education team discussed these concerns and agreed to amend the IEP; however, a couple of days later, the parents indicate district staff told them that a behavior plan was not necessary and would not be added to the IEP.

USD #\_\_ acknowledged that a meeting with the parents was held on January 14, 2021. Ms. \_\_\_\_\_ [Special Education Director] stated, "My team indicated to me that this was a conference or staffing meeting requested by the parents so that they could receive updates. Parents requested monthly meetings for updates and communication purposes. This was not identified as an IEP team meeting, but a team conference as requested by the parents."

### Findings of the Investigation

The findings of Issue One are incorporated herein by reference.

An email dated January 6, 2021 from Ms. \_\_\_\_\_ [Special Education Teacher] to Ms. \_\_\_\_\_ [Case Manager], Ms. \_\_\_\_\_ [Special Education Director], Mr. \_\_\_\_\_ [Principal], Ms. \_\_\_\_\_ [School Nurse], and Ms. \_\_\_\_\_ [School Psychologist] stated, "He [the father] feels like we aren't communicating enough, even among ourselves and communication with them isn't enough. He wants a monthly or every 6 weeks meeting."

Ms. \_\_\_\_\_ [Special Education Teacher] scheduled a meeting on January 14, 2021 at 10:45 a.m. via Google Calendar Invitation. Persons invited to the meeting included \_\_\_\_\_, OT; \_\_\_\_\_, PT; \_\_\_\_\_, O&M instructor; \_\_\_\_\_, Speech/Language Pathologist (SLP); \_\_\_\_\_, Certified OT Assistant (COTA); Ms. \_\_\_\_\_ [School Nurse], Ms. \_\_\_\_\_ [School Psychologist], Mr. \_\_\_\_\_ [Principal], Ms. \_\_\_\_\_ [Case Manager], and Ms. \_\_\_\_\_ [Special Education Director].

The parents' notes from the January 14, 2021 meeting document multiple topics were discussed during the meeting including assistive technology for communication, specialized instruction in the general education setting, communication procedures between school staff and the parents, as well as the behavior concerns in regards to an increase in biting behavior and the parents' request for a behavior plan to be included in the IEP. In regards to the behavior plan, the notes state, "\_\_\_\_\_ [Ms. \_\_\_\_\_] [Case Manager] said she would add a behavior plan when we meet again March 8 at 10:45."

The parents received a note written in the Daily Communication Log on January 19, 2021 stating, "From Thursday's Meeting: I am relaying this information from \_\_\_\_\_ [Ms. \_\_\_\_\_] [Case Manager]. Due to the biting not causing a change in minutes or

services, there is no need to amend the IEP. Please call \_\_\_\_\_. [Ms. \_\_\_\_\_] [Special Education Director] if you have any questions.”

Ms. \_\_\_\_\_’s [Case Manager] email to Ms. \_\_\_\_\_ [Special Education Director] dated February 23, 2021 summarized the results of the January 14, 2020 meeting and stated:

Student biting - parents brought up student’s biting. He was biting more since returning from Christmas but still was not an issue at school. I said I would look at amending his IEP but it was already in there with parental concerns about him biting at home. \_\_\_\_\_ [Special Education Director], you told me not to amend his IEP because it was already in his IEP and was not impeding his learning at school. His biting at home is a concern to parents and they don't understand why it's not an issue at school. Amy has attempted to ask them about what they feel is excessive biting and what they would like us to communicate to them about his biting and they have not given us a definite answer.

In the Response to the Allegations provided to the Complaint Investigator on February 5, 2021, Ms. \_\_\_\_\_ [Special Education Director] stated:

The case managers were aware that the parents wanted the student on a behavior plan but \_\_\_\_\_ [Cooperative] staff reported that his “biting” behavior did not warrant the implementation of a behavior plan as he is easily redirected and after reading through the journal, biting has occurred 11 times total this year. They [the parents] also never reported to anyone, even after receiving the IEP in September, until late December that they were not happy with the IEP as written. However, once that was reported, a team meeting was scheduled. The team should have come to a resolution about the contents of the IEP. That didn’t happen and will be fixed immediately.

### **Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.501(b)(1)(ii) require school districts to provide parents with the opportunity to participate in meetings with respect to the provision of a free appropriate public education (FAPE) to the student. Federal regulations at 34 C.F.R. 300.501(b)(3) states that a meeting does not include informal or unscheduled

conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

Federal regulations at 34 C.F.R. 300.324(b)(1)(ii)(D-E) require public agencies to revise the IEP, as appropriate, to address the student's anticipated needs or other matters. Federal regulations at 34 C.F.R. 300.324(a)(4) allow changes to be made after the annual IEP team meeting if the parent of a child with a disability and the public agency agree not to convene an IEP team meeting for the purposes of making those changes and instead develop a written document to amend or modify the child's current IEP.

Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability.

Federal regulations at 34 C.F.R. 300.503(b) require prior written notice to include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards of this under IDEA part B and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of IDEA Part B; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal.

In this case, the district's position is that the meeting was a "conference or staffing meeting requested by the parents so that they could receive updates." However, the district also indicated that "They [the parents] also never reported to anyone, even after receiving the IEP in September, until late December that they were not happy with

the IEP as written. However, once that was reported, a team meeting was scheduled.” It is noted that the LEA did not provide any documentation of an IEP team meeting being scheduled in late December or early January, other than the meeting scheduled for January 14, 2021. It is also noted that because documentation shows that the parents were not provided with a copy of the IEP developed at the September 4, 2020 IEP team meeting until November 23, 2020 when Ms. \_\_\_\_\_ [Case Manager] sent both a paper and electronic copy of the IEP to the parent, it is reasonable to understand why the parent would not have indicated disagreement with the IEP until December.

The LEA believed the meeting held on January 14, 2021 was a parent / teacher conference or staffing while the parent believed this meeting to be an IEP team meeting because the LEA provided them with notification of the meeting, invited the student’s special education team to the meeting, and discussed the parents’ concerns and considered their request for a behavior plan.

As a result of the meeting on January 14, 2020, the parent believed that the district had agreed to amend the student’s IEP to include a behavior plan. USD #\_\_ noted that the case managers were aware that the parents wanted the student on a behavior plan but the \_\_\_\_ [Cooperative] staff did not believe that his “biting” behavior warranted the implementation of a behavior plan.

District staff informed the parent that a behavior plan would not be included in the student’s IEP four days following the meeting via a note in the Daily Communication Log that stated, “From Thursday’s Meeting: I am relaying this information from \_\_\_\_ [Ms. \_\_\_\_\_] [Case Manager]. Due to the biting not causing a change in minutes or services, there is no need to amend the IEP. Please call \_\_\_\_\_. [Ms. \_\_\_\_\_] [Special Education Director] if you have any questions.”

Regardless of whether the meeting was an IEP Team meeting or some other type of meeting, the IDEA required USD #\_\_ to provide the parent with an appropriate PWN refusing their request for a behavior plan. The PWN requirement is triggered when a school makes a proposal to or a parent makes a request to initiate or change 1) identification, 2) evaluation, 3) placement, or 4) provision of FAPE. Here the parent made a request to change the provision of FAPE to the child by adding a behavior plan to the IEP. That request triggered a requirement for the school to respond with a PWN.

That PWN would either refuse the parent's requests, or it would propose to implement the parent's request, which could include a proposal to hold another meeting. That PWN was required to include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards of this under IDEA part B and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of IDEA Part B; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parent with appropriate prior written notice during the 2020-21 school year.

### Corrective Action

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

- A. Federal regulations at 34 C.F.R. 300.323(c)(2) and Kansas regulations at K.A.R. 91-40-19(a) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, interviews and documentation found that the student was not provided with the 180 minutes per day of specialized instruction in the general education setting as required by the IEP in effect during in-person learning in the 2020-21 school year. USD #\_\_ acknowledged that the student was only provided with 145 minutes per day of specialized instruction in the general education setting during in-person learning. It is unclear how much specialized instruction in the general education setting was missed during the hybrid phase because the amount, frequency, and duration of

services to be provided was omitted on both the IEP developed on September 4, 2020 and the PWN dated September 11, 2020.

- B. Federal regulations at 34 C.F.R. 300.503(a) which require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability and state regulations at K.A.R. 91-40-27(a)(3) which require school districts to obtain parent consent before making any material change in service, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP.

In this case, interviews and documentation found that USD #\_\_\_ never provided the parents with appropriate PWN for the proposed 12% decrease in the amount of specialized instruction in the general education setting resulting from the IEP team meeting held on September 4 and September 11, 2020.

In addition, documentation shows that USD #\_\_\_ did not provide the parents with PWN a reasonable time following the IEP team meeting held beginning on September 4 and concluding on September 11, 2020. The PWN dated September 11, 2020 was not provided to the parents until November 23, 2020, which is 73 calendar days following the IEP team meeting.

- C. Federal regulations at 34 C.F.R. 300.503(b) which require school districts to provide parents with prior written notice that includes (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA Part B and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of IDEA Part B; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected;

and (7) a description of other factors that are relevant to the agency's proposal or refusal.

In this case, the parent's requested a behavior plan for the student at the January 14, 2021 meeting and the district refused that request. However, USD #\_\_\_ failed to provide the parent with appropriate PWN describing the rationale for that refusal and the parent's procedural safeguards following the meeting.

While the parents were provided with an appropriate PWN dated September 11, 2020 describing the district's proposal to provide special education and related services to the student during periods of hybrid, remote, and other learning options due to COVID-19, USD #\_\_\_ acknowledged that this PWN mistakenly omitted the description of the amount, frequency, and duration of any specialized instruction for academics and socialization that was to be provided to the student in either or both the general education or special education setting during the hybrid phase. It is unclear what the IEP team determined was appropriate to provide the student with FAPE because this same information is also omitted from the September 4, 2020 IEP.

D. Federal regulations at 34 C.F.R. 300.324(b)(1)(ii)(D-E) which require public agencies to revise the IEP, as appropriate, to address the student's anticipated needs or other matters and federal regulations at 34 C.F.R. 300.324(a)(4) which allow changes to be made after the annual IEP team meeting if the parent of a child with a disability and the public agency agree not to convene an IEP team meeting for the purposes of making those changes and instead develop a written document to amend or modify the child's current IEP.

In this case, the meeting with the parent on January 14, 2021 resulted in the parent's belief that the LEA and the parents had agreed to amend the student's IEP to include a behavior plan to address the biting behavior. However, the district was not in agreement to amend the IEP but failed to reconvene the IEP team to consider and discuss the parent's request for a behavior plan.

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

1. Within 15 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurances to KSDE Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) and state regulations at K.A.R. 91-40-19(a) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.
  - b. Comply with federal regulation implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.503(a) which require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability. Comply with state regulations at K.A.R. 91-40-27(a)(3) which require school districts to obtain parent consent before making any material change in service, which is defined at K.A.R. 91-40-1(mm) as an increase or decrease of 25% or more of the frequency or duration of a special education service, related service, or supplementary aid or service specified in the child's IEP.
  - c. Comply with federal regulations at 34 C.F.R. 300.503(b) which require school districts to provide parents with prior written notice that includes (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA Part B and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of IDEA Part B; (6) a description of other options that the

IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal.

- d. Comply with federal regulations at 34 C.F.R. 300.324(b)(1)(ii)(D-E) which require public agencies to revise the IEP, as appropriate, to address the student's anticipated needs or other matters and federal regulations at 34 C.F.R. 300.324(a)(4) which allow changes to be made after the annual IEP team meeting if the parent of a child with a disability and the public agency agree not to convene an IEP team meeting for the purposes of making those changes and instead develop a written document to amend or modify the child's current IEP.
2. No later than April 9, 2021, USD #\_\_\_ will provide training for all staff members who provide general and special education services and supports to the student including general and special education teachers, related services providers, school psychologists, and LEA representatives on the topics of IEP implementation, IEP team meetings, and the requirements for PWN. USD #\_\_\_ must ensure this training specifically addresses the requirements for which noncompliance was identified through this investigation. No later than April 16, 2021, USD #\_\_\_ will provide documentation to SETS of date of the training, the name and credentials of the trainer, the content of the training, and an attendance record with names, positions, and signatures of all staff who attended the training.
  3. No later than March 12, 2021, the administration of USD #\_\_\_ and \_\_\_\_ [Cooperative] shall complete and submit to SETS a pre-training survey for administrators before the staff are trained as ordered in Corrective Action 2. No later than April 16, 2021, the administration of USD #\_\_\_ and \_\_\_\_ [Cooperative] shall complete and submit to SETS a post-training survey of the training as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_ [Cooperative].

4. No later than April 16, 2021, every staff member who participated in the training ordered by Corrective Action 2 shall complete and submit to SETS a post-training survey for staff after the staff are trained as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of \_\_\_\_ [Cooperative].
5. No later than March 8, 2021, USD #\_\_ is required to begin implementing the 180 minutes of specialized instruction in the general education setting as originally required by the IEP developed on September 9, 2019 and amended on March 4, 2020. USD #\_\_ shall continue to implement these services until the IEP Team convenes to discuss whether making a change in the 180 minutes of service is appropriate, or until the LEA and parent agree to make an amendment to the IEP without a meeting.

No later than 5 calendar days after the last day of providing the 180 minutes of specialized instruction in the general education setting as originally required by the IEP developed on September 9, 2019 and amended on March 4, 2020, USD #\_\_ shall provide SETS with a signed service log and statement of assurance verifying that this requirement was completed.

6. No later than March 25, USD #\_\_ shall reconvene the student's IEP team to determine the types, amounts, frequency, and duration of the special education and related services to be provided during any hybrid or remote phases of distance learning.

In addition the IEP team will consider the parents' request for a behavior plan to address the biting behavior at that time. If the IEP Team determines that a change in services is appropriate, USD #\_\_ must provide the parent with appropriate prior written notice. If the proposed change is a material change in services, USD #\_\_ must also request consent from the parent. If the parent refuses to consent to a material change of services, the proposed material change must not be implemented. No later than 5 days following the IEP Team meeting or the agreement to amend the IEP without a meeting, USD #\_\_ will

provide SETS with copies of the Notice of Meeting or Agreement to Amend without a Meeting, the Prior Written Notice, and a copy of the IEP with changes that are made as a result of the meeting or agreement to amend. If a material change is proposed, USD #\_\_\_ must also provide SETS with a copy of the request for consent with the parent's signature indicating either consent given or refused.

7. USD #\_\_\_ will develop a plan for administration to monitor the implementation of the student's IEP in regards to the provision of the required specialized instruction in the general education setting for the remainder of the 2020-21 school year. USD #\_\_\_ will provide a copy of this plan to SETS for approval no later than March 9, 2021. No later than five calendar days following the last day of the 2020-21 school year, USD #\_\_\_ shall provide SETS with documentation verifying that administration monitored the implementation of these services consistent with the plan that was approved by SETS.
8. No later than March 12, 2021, USD #\_\_\_ shall make a written offer to the parents of compensatory services for no less than 39 hours of specialized instruction in the general education setting to address the student's socialization with typical peers that were not provided during the in-person learning phase during the 2020-21 school year. This offer must include a schedule for the provision of the compensatory services. The parents will have the choice to accept all, none, or a portion of the offered compensatory services. USD #\_\_\_ shall provide a copy of this written offer, including the schedule to SETS. If the parents accept all or a portion of the offer, USD #\_\_\_ shall notify SETS and the parent in writing when the compensatory services have been completed. If the parents decline the offer of compensatory services, USD #\_\_\_ shall notify SETS of that fact in writing.
9. USD #\_\_\_ shall review, revise, and create written procedures for ensuring that parents are provided with PWN and copies of finalized IEPs in a timely manner. This written procedure will be shared with SETS for approval no later than April 9, 2021. No later than April 23, 2021, USD #\_\_\_ shall share this new procedure with all special education case managers, school psychologists, and LEA representatives within the district and provide SETS with documentation of when and with whom the procedure was shared.

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

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) A written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) A written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f). Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org)

### Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals must be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org). The notice of appeal must be emailed within 10 calendar days from the date of this report.

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

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

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

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_  
\_\_\_\_\_ Public Schools: 21FC\_\_-001

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced with the filing of a complaint on January 26, 2021, by \_\_\_\_ \_\_\_\_\_, on behalf of his son, \_\_\_\_ \_\_\_\_\_. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on February 25, 2021. That Complaint Report concluded that there were substantiated violations of special education statutes and regulations.

Thereafter, the school district filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the Complaint Report, the notice of appeal, and the response to the district's notice of appeal submitted by the parent. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

### PRELIMINARY MATTERS

Scope of Review on Appeal: The Appeal Committee limits its inquiry to the issues investigated in the Complaint Report and presented in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report issued on February 25, 2021. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

In the notice of appeal, the district appeals corrective actions 1, 2, 3, 4, 7, and 9, stating that they consistently attend training about IEP processes, they have written procedures in place, and they have a compliance officer who audits each IEP (Notice of Appeal, p.5). Pursuant to K.A.R. 91-40-51(f)(1), either party to a complaint "may appeal any of the **findings or conclusions** of a compliance report prepared by the special education section of the department [KSDE]..." [emphasis added]. This regulation makes no provision for the appeal of corrective actions. The Appeal Committee may

remove, alter, or add corrective actions if appropriate in light of the Appeal Committee's decision regarding the findings and conclusions of the Complaint Report, but it will not address any direct appeal of corrective actions.

Clarification of Parent's Rights (Procedural Safeguards): In light of statements made by both parties in the Complaint Report and in the appeal materials, there appears to be a misunderstanding or miscommunication about parent rights. The Appeal Committee offers the following information to clarify, for both parties, some of the rights that parents have and do not have under the Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act.

- Consent- A school district must request and obtain informed written consent from the parent before doing any of the following:
  - conducting an evaluation or reevaluation of the child (34 C.F.R. 300.300(a),(c))
  - providing special education and related services to the child for the first time (34 C.F.R. 300.300(b))
  - making a material change in services (increase or decrease of 25% or more of the duration or frequency of a special education service, related service, or supplementary aid or service specified in the IEP) (K.A.R. 91-40-1(mm), 91-40-27(a)(3))
  - making a substantial change in placement (the movement of an exceptional child, for more than 25% of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment) (K.A.R. 91-40-1(sss), 91-40-27(a)(3))

A school district is not required to request or obtain informed written consent from the parent before making a change in services that is less than material (less than 25%) or a change in placement that is less than substantial (up to 25% of the school day). However, the school district must still provide the parent with a prior written notice before making any change to an IEP (34 C.F.R. 300.503(a)), and IEP changes (no matter how minor) must only be made in an IEP Team meeting or through the IEP amendment process (34 C.F.R. 300.320(a), 300.324(a)(4), (a)(6)).

- Signing the IEP and Parent Participation- A school district is not required to request or obtain informed written consent from the parent for the IEP document itself. There is no requirement or right of the parent to "sign the IEP." The IEP is a document developed, reviewed and revised by the entire IEP Team (34 C.F.R. 300.22, 300.23, 300.320-324). School districts must give the parents the opportunity to participate in IEP Team meetings and in the development of the IEP (34 C.F.R. 300.322, 300.324), but parents do not have unilateral control over IEP Team meetings or the contents of the IEP document. A parent who disagrees with

the contents of the IEP (or other special education matters) has the right to file a formal complaint with the Kansas State Department of Education, such as this one (34 C.F.R. 300.153), request mediation (34 C.F.R. 300.506) or to request a due process hearing (34 C.F.R. 300.507).

- Notice of IEP Team Meeting- A school district must provide the parent with a written notice of an IEP Team meeting at least 10 days before the meeting is scheduled to occur (K.A.R. 91-40-17(a)(2)). The purpose of this notice is to inform the parents about the date, time, location, and purpose of the meeting, as well as who will attend the meeting (K.A.R. 91-40-17(b)).
- Prior Written Notice (PWN)- A school district must provide the parent with written notice a reasonable time before initiating or changing the identification (eligibility/disability category) of the child, an evaluation of the child, the placement of the child, or the provision of FAPE to the child (the IEP). In addition, a school district must provide the parent with written notice within a reasonable time in response to a parent's request to initiate or change the identification of the child, to conduct an evaluation or reevaluation of the child, to change the placement of the child, or to make any change to the provision of FAPE to the child (the IEP). See 34 C.F.R. 300.503(a). The purpose of this notice is to inform parents about actions the school proposes or refuses to take, the reasons for the proposal or refusal, the data that supports the proposal or refusal, other options the IEP Team considered and the reasons those options were rejected, and other factors relevant to the proposal or refusal. The PWN also informs parents about how they can find information regarding their rights under special education law and provides a list of sources parents can contact for assistance in understanding those rights. See 34 C.F.R. 300.503(b).

#### DISCUSSION OF ISSUES ON APPEAL

The Complaint Report dated February 25, 2021 addressed two issues, and the investigator found/substantiated violations of special education laws within both issues. On appeal, the district disputes some, but not all, of the findings in the Complaint Report (Notice of Appeal, p.1). The Appeal Committee will address only those findings the district disputes, the findings not in dispute are sustained.

ISSUE ONE: USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education ACT (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the required amount of special education services in the general education setting during the 2020-21 school year.

*Failure to Provide 180 Minutes of Specialized Instruction:*

Under ISSUE ONE, the investigator found that the school district failed to provide special education and related services in accordance with the student's IEP (34 C.F.R. 300.323(c)(2); K.A.R. 91-40-19(a)) because the IEP in effect at the time required 180 minutes of specialized instruction in the general education setting per day, but the school district only provided 145 minutes (Complaint Report, pp.13, 19).

During the investigation, the district acknowledged that the student did not receive the correct amount of specialized instruction in the general education setting (Complaint Report, p.6), and the district does not dispute this finding on appeal. However, the district seems to take issue with the description of the Daily Communication Log format on page 9 of the Complaint Report, stating on appeal (Notice of Appeal, p.3) "This daily log was requested specifically by the parents. [The district] presented a more detailed daily log, however, parents denied using the more detailed log as they did not like the format and wanted their log form used." Information about the Daily Communication Log was included in the Complaint Report because it contained evidence of the amount (minutes) of specialized instruction the student was receiving in the general education setting. The investigator correctly described the format of the Daily Communication Log in the Complaint Report; furthermore, the format of the log is not relevant to the outcome of this finding.

For the foregoing reasons, the Appeal Committee sustains the investigator's finding of a violation of 34 C.F.R. 300.323(c)(2) and K.A.R. 91-40-19(a) for failing to provide 180 minutes of specialized instruction in the general education setting daily.

*Failure to Provide PWN Before Reducing Special Education Services by 20 Minutes:*

Under ISSUE ONE, the investigator found that the school district failed to provide the parents with a PWN before making a change to the provision of FAPE to the child (34 C.F.R. 300.503(a)). The student's IEP (dated September 9, 2019) in effect at the beginning of the 2020-21 school year included 180 minutes of specialized instruction in the general education setting daily, but the IEP was revised in a meeting (on September 4 and 11, 2020) to include only 160 minutes of specialized instruction in the general education setting daily (Complaint Report, p.6). The investigator found that this daily 20-minute reduction in services was a change to the provision of FAPE to the child, and a school district must provide parents with appropriate prior written notice a reasonable time before making a change to the provision of FAPE to the child. The investigator pointed out that PWN must include "a description of the proposed change of services, the basis and explanation for the proposed change... [and an] explanation of their [parents'] procedural safeguards." (Complaint Report, p.11). The investigator also cited *Letter to Heidi Atkins-Lieberman* (August 15, 2008) from the Office of Special

Education Programs (OSEP) which states, “a proposal to revise a child’s IEP, which typically involves a change to the type, amount, or location of the special education and related services being provided to a child, would trigger notice under 34 C.F.R. 300.503.” (Complaint Report, pp.11-12).

On appeal, the district admits they did not provide the parents with a PWN document describing the 20-minute reduction in services (Notice of Appeal, pp.4, 5). However, the district argues that the “parents were very well aware of the changes” because they were active participants in the September 4, 2020 IEP meeting, because the draft IEP discussed at the meeting listed 160 minutes of specialized instruction in the general education setting daily, and because the parents “had the 2019 IEP with them comparing the times from the previous year to the current IEP service times.” (Notice of Appeal, pp. 4, 5).

The Appeal Committee finds that whether the parents were aware or not aware of the 20-minute reduction of specialized instruction in the general education setting is irrelevant to the issue at hand. The relevant federal regulation, 34 C.F.R. 300.503(a), describes when PWN must be provided to parents: “**Written notice that meets the requirements of paragraph (b)** of this section must be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or **change** the identification, evaluation, or educational placement of the child or **the provision of FAPE** to the child [emphasis added].” Paragraph (b) of that same regulation, 34 C.F.R. 300.503(b), then describes all of the content that the written notice must include: “The notice required under paragraph (a) of this section must include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation, procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards of [IDEA Part B] and, the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of [IDEA Part B]; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency’s proposal or refusal.”

In this case, the requirement to provide parents with PWN was triggered when the school district proposed to change the specialized instruction in the general education setting from 180 minutes daily to 160 minutes daily because this was a change to the provision of FAPE to the child (see 34 C.F.R. 300.503(a) and OSEP *Letter to Heidi Atkins-Lieberman*). When this proposal to change the minutes was made, the district was required to provide the parents with a PWN that contained all 7 required elements

listed in 34 C.F.R. 300.503(b). The Appeal Committee finds that providing parents with a copy of the 2019 IEP and a draft of the 2020 IEP to compare against each other does not meet this content requirement. There is no evidence in the Complaint Report or before the Appeal Committee to show that the school district provided the parents with written notice that included: (1) a description of a daily 20-minute reduction in specialized instruction in the general education setting, (2) an explanation of why the school district proposed to reduce the minutes from 180 to 160 daily, (3) a description of each evaluation, procedure, assessment, record, or report the school district used as a basis for the 20-minute reduction, (4) a statement of procedural safeguards, (5) sources to contact for assistance in understanding IDEA Part B, (6) a description of options other than the 20-minute reduction that the IEP Team considered and the reasons why those other options were rejected, and (7) a description of other factors that are relevant to the 20-minute reduction.

For the foregoing reasons, the Appeal Committee sustains the investigator's finding of a violation of 34 C.F.R. 300.503 for failing to provide the parents with a PWN containing all 7 required elements before changing the specialized instruction in the general education setting from 180 minutes daily to 160 minutes daily.

*Failure to Provide PWN dated September 11, 2020 within a Reasonable Time:*

Under ISSUE ONE, the investigator found that the school district failed to provide the parents with prior written notice (PWN) within a reasonable time (34 C.F.R. 300.503(a)). The school district created a PWN, dated September 11, 2020, describing a proposal to provide special education and related services to the student during alternative learning options due to COVID-19 (hybrid and remote). The investigator found, and the school district acknowledged, that while the September 11, 2020 PWN included the frequency and duration of specialized instruction for academics in the remote learning phase, it omitted that information for the hybrid learning phase. (Complaint Report, p.7). The district does not dispute this finding about the omitted information on appeal. At issue on appeal is whether this PWN dated September 11, 2020 was provided to the parents within a reasonable time. The investigator concluded that the PWN was dated September 11, but was not provided to the parents until November 23 (Complaint Report, pp.13, 19). This conclusion was based on the following evidence presented to the investigator:

- 1) A note from the parent in the student's Daily Communication Log on October 12 indicating that the IEP [emphasis added] had not been received or signed (Complaint Report, pp.7, 13);
- 2) An October 20 email from the student's case manager to the father "indicated that the **wrong PWN** had been sent to the parents and advised

them not to sign that document...a **corrected PWN** would be sent to them for their signature [emphasis added]" (Complaint Report, pp.7, 13); and 3) A November 18 email conversation among the mother, the student's case manager, and the student's special education teacher in which the mother indicated to the student's case manager that they had not yet received the **corrected IEP** [emphasis added] and had not signed it (Complaint Report, pp.7, 13). The case manager then emailed the special education teacher stating, "I'm confused.....didn't we send it home and it never got returned???? I just want to make sure I respond correctly." The special education teacher replied to the case manager stating, "I have no idea if it was sent. I would assume they would have received a copy from the district office." The case manager then responded to the special education teacher with "**I thought you sent home the prior written notice because I couldn't do it online** [emphasis added]." Finally, the case manager replied to the mother's original email stating, "I will send home a hard copy on Monday [November 23, 2020]. One copy will be for you to keep at home and the other will be signed and returned." (Complaint Report, pp.8, 13).

On appeal, the district argues that "**IEP documents** [emphasis added] were both emailed and mailed on both September 4, 2020, and September 8, 2020." (Notice of Appeal, p.1). To support this statement, the district provided screenshots of a software system that keeps track of when documents are sent electronically and when the parent has viewed them. Describing the screenshots, the district states "the above images demonstrate that not only did the parent receive the **IEP documents** [emphasis added] on both 9/4/2020 and 9/8/2020, but also indicates that they did, in fact, view the **IEP** [emphasis added] from the 9/8/2020 email sent. In addition, our MIS clerk keeps data to track when **finalized IEPs** [emphasis added] are sent to parents after review, the below [referring to another screenshot] demonstrates that the **finalized IEP** [emphasis added] was sent 9/28/2020 from our MIS clerk." (Notice of Appeal, p.3).

In response to the district's notice of appeal, the father indicated that the October 12 note in the Daily Communication Log was "asking where we sign the final copy." The father also acknowledges that, "It was never stated on October 12, 2020 that the **IEP** [emphasis added] was never received. It should be noted that we did not think the **IEP** [emphasis added] was correct and were awaiting the final copy to be sent home and signed. We have never had **Prior Written Notice** [emphasis added] explained... We understood **PWN** [emphasis added] to mean you were receiving notice of the meeting. The computer notation from [the district] of **IEP** [emphasis added] receipt on

September 4<sup>th</sup> and 8<sup>th</sup> were never disputed.” (Parent Response to Notice of Appeal, p.1).

The Appeal Committee notes that there seems to be a misunderstanding or miscommunication between the parties about the difference between an IEP and a PWN. The screenshots submitted by the district on appeal show that 1 form was sent electronically to the parents on 9/4/2020 and on 9/8/2020, and that the parent viewed the form on 9/8/2020. The screenshots themselves do not indicate what type of form was sent to the parent on these dates, but the district states that the screenshots are evidence that the **IEP** was sent to and viewed by the parents: “the above images demonstrate that not only did the parent receive the **IEP documents** [emphasis added] on both 9/4/2020 and 9/8/2020, but also indicates that they did, in fact, view the **IEP** [emphasis added] from the 9/8/2020 email sent.... the below [referring to another screenshot] demonstrates that the **finalized IEP** [emphasis added] was sent 9/28/2020 from our MIS clerk.” (Notice of Appeal, p.3). The parents do not dispute that they received the IEP on September 4 and 8 (Parent Response to Notice of Appeal, p.1). Based on the foregoing evidence, the Appeal Committee finds that the draft IEP was provided to the parents on September 4 and 8, and the final IEP was provided to the parents on September 28. However, the date that the **IEP** was provided is irrelevant to the issue at hand, which is whether the district provided the September 11 **PWN** to the parents within a reasonable time as required by 34 C.F.R. 300.503(a).

This regulation requires that the PWN “must be given to the parents of a child with a disability **a reasonable time before** [emphasis added] the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.” KSDE has a long-established policy (since 2002) that “when the school district is required to provide parents with a written notice of the district’s proposal or the district’s refusal of a parent’s proposal, unless there is some unusual circumstance, a reasonable time in which to provide such notice to the parents is 15 school days.” (See the Kansas Special Education Process Handbook Chapter 1 Section D.; also see “Reasonable Time” memo posted at <https://www.ksde.org/Default.aspx?tabid=614>). While the evidence shows that the **IEP** was provided to the parents on September 4, 8 and 28, there is no evidence before the Appeal Committee to show that the September 11 **PWN** was provided to the parents within a reasonable time. The Appeal Committee finds that the October 20 and November 18 emails, described above on pages 6 and 7, are sufficient evidence to sustain the investigator’s finding that the appropriate PWN dated September 11 was not provided to the parents within a reasonable time, in violation of 34 C.F.R. 300.503(a).

ISSUE TWO: USD # \_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond appropriately to parent requests made during an IEP team meeting held during the 2020-21 school year.

*Failure to Respond with Appropriate PWN when District Refused the Parents' Request:*

Under ISSUE TWO, the investigator found that the school district failed to provide the parent with appropriate PWN when the district refused the parents' request for a behavior plan (34 C.F.R. 300.503(b)) (Complaint Report, pp.18, 20). According to the Complaint Report, a meeting was held on January 14, 2021, and the parents along with several school staff were in attendance (Complaint Report, pp.14-15). The investigator found, based on the parents' January 14, 2021 meeting notes, that the parents made a request at that meeting to add a behavior plan to the student's IEP (Complaint Report, pp.15, 17). The investigator also found that "[t]he parents received a note in the Daily Communication Log on a January 19, 2021 stating, 'From Thursday's Meeting: I am relaying this information from [the student's case manager]. Due to the biting not causing a change in minutes or services, there is no need to amend the IEP. Please call [the special education director] if you have any questions.'" (Complaint Report, pp.15, 17-18). The investigator then concluded that the parents' request to add a behavior plan to the IEP was a request to change the provision of FAPE to the child, and that request triggered a requirement for the school to respond with a PWN which must include all 7 content elements required by 34 C.F.R. 300.503(b) (Complaint Report, p.18).

On appeal, the district argues that the parents never requested to add a behavior plan to the IEP, rather they requested to add a description of the biting behavior in the present levels of academic achievement and functional performance (PLAAFP) section of the IEP (Notice of Appeal, pp.4, 5). The district also argues that the January 14, 2021 meeting in which the parents made their request was not an IEP team meeting, but a meeting to provide updates and receive medical updates from the parents (Notice of Appeal, p.5). In response to the district's notice of appeal, the father states that he said very clearly that he wanted a behavior plan during the January 14, 2021 meeting and that the parents felt that it was an IEP team meeting because of a phone conversation with the student's special education teacher that occurred prior to receiving the meeting invitation (Parent Response to Notice of Appeal, p.2).

Clearly, the parties disagree about what the parents requested to add to the IEP, but the parties do agree, and there is sufficient evidence to support, that the parents did request to add information about the biting behavior to the IEP. Whether the parents requested to add a behavior plan in the IEP or requested to add information to the

PLAAFP section of the IEP is irrelevant to the issue at hand. The parties also disagree about whether the January 14, 2021 meeting was an IEP team meeting or some other type of meeting, but again this is irrelevant to the issue at hand. The investigator concluded on page 18 of the Complaint Report:

Regardless of whether the meeting was an IEP Team meeting or some other type of meeting, the IDEA required USD #\_\_\_ to provide the parent with an appropriate PWN refusing their request for a behavior plan. The PWN requirement is triggered when a school makes a proposal to or a parent makes a request to initiate or change 1) identification, 2) evaluation, 3) placement, or 4) provision of FAPE. Here the parent made a request to change the provision of FAPE to the child by adding a behavior plan to the IEP. That request triggered a requirement for the school to respond with a PWN. That PWN would either refuse the parent's request, or it would propose to implement the parent's request, which could include a proposal to hold another meeting.

The Appeal Committee declines to decide what the parents requested to add to the IEP or whether the January 14, 2021 meeting was an IEP team meeting. Even if the Appeal Committee were to agree with the district that the parents requested the biting behavior to be added to the PLAAFP section of the IEP and that the January 14, 2021 meeting was not an IEP team meeting, that would not change the fact that the parents made a request to change the provision of FAPE to the child. *Any time* a school district refuses a parent's request or proposal to initiate or change the identification, evaluation, placement, or provision of FAPE to the child, the school district must communicate that refusal with an appropriate PWN that includes all 7 content elements required by 34 C.F.R. 300.503(b). Here the parent made a request to change the provision of FAPE to the child either by adding a behavior plan to the IEP (according to the parent) or by adding information about the behavior in the PLAAFP section of the IEP (according to the district). That request could have been made in a staff meeting, an IEP team meeting, a phone conversation, an email, or a note and it would not change the analysis here. The very fact that the parents made the request to change the provision of FAPE to the child required the district to communicate their refusal with an appropriate PWN. For the foregoing reasons, the Appeal Committee sustains the investigator's finding that the district violated 34 C.F.R. 300.503(b) by failing to provide the parents with appropriate PWN when refusing the parents' request to change the provision of FAPE to the child.

*Failure to reconvene IEP Team to Consider and Discuss Parents' Request for Behavior Plan:* Under ISSUE TWO, the investigator found that the district was not in agreement to

amend the IEP to add a behavior plan but failed to reconvene the IEP team to consider and discuss the parents' request for a behavior plan in violation of 34 C.F.R. 300.324 (Complaint Report, pp.20-21).

The district's arguments on appeal are the same as described above (that the parents requested an addition to the PLAAFPs rather than a behavior plan, and that the January 14, 2021 meeting was not an IEP team meeting) (Notice of Appeal, pp.4-5).

For the same reasons stated above, these arguments are irrelevant to the issue at hand. When a school district refuses a parent's request or proposal to change the provision of FAPE to their child, the school district's obligation is to communicate that refusal in the form of an appropriate PWN that includes all of the 7 content elements required by 34 C.F.R. 300.503(b). However, contrary to the investigator's conclusion, nothing in the law requires the school district to also reconvene the IEP team to consider and discuss the parent's request again. The regulation cited by the investigator, 34 C.F.R. 300.324(b)(1)(ii)(D)-(E), requires IEP teams to revise the IEP, as appropriate to address the child's anticipated needs or other matters. This regulation does not require IEP teams to convene IEP team meetings any time a parent makes a request to add something to the IEP. The other regulation cited by the investigator, 34 C.F.R. 300.324(a)(4) states that in making changes to a child's IEP, the parent and the school district *may agree* to amend or modify the IEP without a meeting. This regulation permits parents and school officials to negotiate proposed changes to the IEP without a meeting. The regulation does not require the school district to agree to amend the IEP nor to convene an IEP Team meeting when a parent's proposal is refused. When parents and school officials use this process to consider changes to an IEP without an IEP meeting, and a change that is proposed by a parent is refused, the parent may request an IEP meeting so that the IEP team can consider the parent's proposal. When a parent requests an IEP meeting to discuss a proposal that has been refused through the IEP amendment process, the district should schedule a meeting for that purpose, unless there are unusual circumstances. For the foregoing reasons, the Appeal Committee overturns the investigator's finding that the district violated 34 C.F.R. 300.324 by failing to reconvene the IEP team to consider and discuss the parent's request.

### CONCLUSION

The Appeal Committee concludes that the Complaint Report is sustained on all but one of the investigator's findings of violations of law. The Appeal Committee overturns the investigator's finding of a violation of 34 C.F.R. 300.324(b)(1)(ii)(D)-(E) and 300.324(a)(4) for failing to reconvene the IEP team to consider and discuss the parents' request.

Because the finding of a violation of 34 C.F.R. 300.324 is overturned, the Appeal Committee concludes that Corrective Action 6 must be adjusted to remove the requirement for the IEP team to consider the parents' request for a behavior plan in an IEP Team meeting. Corrective Action 6 is now amended to state the following:

6. a. No later than March 25, USD #\_\_ shall reconvene the student's IEP team to determine the types, amounts, frequency, and duration of the special education and related services to be provided during any hybrid or remote phases of distance learning. If the IEP Team determines that a change in services is appropriate, USD #\_\_ must provide the parent with appropriate prior written notice. If the proposed change is a material change in services, USD #\_\_ must also request consent from the parent. If the parent refuses to consent to a material change of services, the proposed material change must not be implemented. No later than 5 days following the IEP Team meeting or the agreement to amend the IEP without a meeting, USD #\_\_ will provide SETS with copies of the Notice of Meeting or Agreement to Amend without a Meeting, the Prior Written Notice, and a copy of the IEP with changes that are made as a result of the meeting or agreement to amend. If a material change is proposed, USD #\_\_ must also provide SETS with a copy of the request for consent with the parent's signature indicating either consent given or refused.
- b. No later than April 1, USD #\_\_ shall provide the parents and SETS with a prior written notice (PWN) responding to the parents' request to address the student's biting behavior in the IEP. This PWN must include all of the elements required by 34 C.F.R. 300.503(b) and may either refuse the parents' request or propose to implement the parents' request, which could include a proposal to discuss the matter in an IEP Team meeting.

All other corrective actions ordered by the Complaint Report remain in effect as written and the school district must begin to fulfill the corrective actions immediately (K.A.R. 91-40-51(f)(2)). Pursuant to K.A.R. 91-40-51(e)(1)(B), the school district may request, in writing, an extension of time within which to complete one or more of the corrective actions, together with justification for the request.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 24th day of March, 2021.

APPEAL COMMITTEE:

Brian Dempsey

Laura Jurgensen

Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON FEBRUARY 1, 2021

DATE OF REPORT: MARCH 3, 2021

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

**Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with the student's mother on February 2, 9, and 23, 2021. On February 3, 2021, the investigator spoke via telephone conference call with \_\_\_\_\_, principal of the \_\_\_\_\_ [virtual school sponsored by the school district], and with \_\_\_\_\_, Admissions Coordinator for the school. The investigator spoke again with Mr. \_\_\_\_\_ [principal] on February 10 and 23, 2021. On February 9, 2021, the investigator spoke by telephone with \_\_\_\_\_, Director of Special Education for the \_\_\_\_\_ Special Education Interlocal.

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

- Individualized Education Program (IEP) for the student dated November 4, 2019
- Record of Application dated April 22, 2020
- Online Enrollment Policy for the district
- Phone Survey dated May 1, 2020
- Denied Application Email dated May 7, 2020
- Family Access Academic History

## Background Information

This investigation involves an eleven-year-old boy who is currently enrolled in fifth grade in his local school district. The student has attended his neighborhood school since kindergarten and was determined eligible to receive special education services under the category of Autism.

According to the parent, she began to look for virtual educational opportunities for the student in the spring of 2020 when the COVID-19 pandemic escalated. The student has been diagnosed with asthma, and an older brother also has health issues that would put him at high risk for complications should he contract the virus. Additionally, the student's father has compromised lung function. The family was interested in finding an educational program for the student that would minimize the family's risk for exposure to the virus. The local school district did not have a virtual school, so the parent contacted virtual schools in other districts in hopes of enrolling the student.

At the beginning of the 2020-21 school year, having been denied enrollment in two virtual school programs, the student was enrolled in his home district. General and special education services were initially provided to the student under a remote learning model. According to the parent, services are currently delivered under a hybrid model wherein the student attends school for 4 hours a day and works remotely for the rest of the school day.

In a telephone call with the investigator on February 23, 2021, the parent indicated that she had not yet determined whether a virtual environment would be best for the student for the 2021-22 school year. In a subsequent email on February 28, 2021, the parent reported that she has accepted a placement for the student offered by another district-sponsored virtual school.

## Issue

In her complaint, the parent alleges that the district refused to admit the student into the district's virtual school because of the needs identified in his IEP.

## Applicable Statutes and Regulations

Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), at 34 C.F.R. 300.110, require each state to ensure that districts take steps to “ensure that its children with disabilities have available to them the same variety of educational programs and services available to nondisabled children in the area served by the district.” Accordingly, the Kansas State Department of Education ensures this requirement through K.A.R. 91-40-3(a) which requires each Kansas school district to “ensure that children with disabilities have available to them the same variety of educational programs and services that are available to nondisabled children served by the school district.” If a district offers a virtual school option to students without disabilities, that same option must be available to students with disabilities. Additionally, if a district allows non-resident enrollment generally in its virtual program, non-resident students with disabilities may not be precluded from enrollment either solely or in part because of their disability.

A document produced by the Special Education and Title Services Team in cooperation with the Career Standards and Assessment Services Team at the Kansas State Department of Education entitled “FAQ on Students with Disabilities and Virtual Schools and Programs” dated August 5, 2020 provides guidance on a number of special education legal questions. Question 1 asks, “Can we choose not to enroll students with disabilities in our virtual school or program?”

The answer to that question is as follows:

No. The Office of Special Education Programs (OSEP) has confirmed, in Letter to Barnes, 41 IDELR 35 (OSEP 2003) that the IDEA does not allow states to waive or relax the special education requirements for virtual schools. Therefore, all IDEA requirements apply to virtual schools, including conducting evaluations, developing and implementing IEPs which offer a FAPE, and providing procedural safeguards. Further, IDEA regulations at 34 C.F.R. § 300.110 state that students with disabilities must have the same variety of educational programs available to them as non-disabled students. Therefore, students with disabilities must be provided with the same opportunities to participate in virtual schooling as non-disabled students, and to receive a FAPE while in the virtual program.

The Office for Civil Rights (OCR) has also held that online school admission criteria which a) deny admission to a student with a disability solely because the student needs special education or related services, or b) place different requirements upon a student with a disability than students without a disability, are inconsistent with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, thus discriminatory. See Quillayute Valley (WA) Sch. Dist. No. 402, November 16, 2007 (108 LRP 17959, 49 IDELR 293).

A virtual school may, for example, require that an applicant for admission be a resident of the state. The school may require that a parent or other “Learning Coach” be available to support the applicant for 4 hours a day during the time that school is in session or during school hours. An applicant may be required to show that, at the time of his/her application or in the semester immediately preceding that application, he/she was enrolled in a public or private school within the state. A virtual school may not, however, refuse enrollment to a student because he/she has an IEP or because the services or accommodations/modifications specified in the student’s IEP require the school to provide instruction to the student that is in some way different from the instruction provided to students without disabilities.

As is the case with brick and mortar schools, virtual schools cannot select for enrollment only those students who are most likely to find success in the virtual school setting. Every school should hold the success of its students as its primary goal. However, the identification of factors that might make a virtual school environment challenging for some students should guide school staff to focus on strategies that would mitigate the impact of those factors for any given student. It should not be used to deny enrollment to students, particularly if the students most impacted are students with disabilities.

Question 12 in the FAQ document asks, “Once a student with disabilities completes the application process, whose responsibility is it to decide whether the student should be admitted?” The answer to that question is, in part, as follows:

The decision of whether to admit a student into a virtual school or virtual program is the responsibility of school administration. That decision must be based on neutral, non-discriminatory admissions criteria that apply to all students.

An applicant may be asked to provide a copy of his/her IEP as a part of the application process, but the fact that an applicant has an IEP can play no part in decisions regarding admission (see Questions and Answers 9 and 11 in the FAQ document).

**After** a student with an IEP has been admitted, it is important that an IEP Team meeting be convened to address how the student's needs will be addressed in the virtual school setting. Answer 12 in the FAQ document continues as follows:

Once a student with disabilities applies for attendance at a virtual school *and is accepted*, an IEP Team meeting should be scheduled to determine whether any temporary changes in services are needed in order for the student to be successful in the virtual school option. If temporary changes to the IEP are necessary, the IEP Team should make those temporary changes, provide the parents with a prior written notice of the temporary changes, and obtain parent consent when the temporary changes require consent. The IEP in existence prior to the student's enrollment in the virtual school should be retained as the district's offer of FAPE, and the prior written notice of temporary changes should explain that the changes made to the IEP to meet the needs of the student in a virtual school are temporary and that, upon disenrollment from the virtual school, the student's temporary IEP services will end and the IEP services in existence prior to the student's enrollment in a virtual school will automatically resume, without a meeting and without any additional notice or consent.

Question 4 of the document asks, "How should a school handle a situation where the parent wants their student with a disability to participate in a virtual school option offered by the school district, but school administrators or the other members of the IEP Team believe the student could or should attend school onsite in the brick and mortar building instead?"

The answer to this question is as follows:

If a parent wishes for their child to participate in an alternative option for accessing the general education curriculum that the district is offering to all students, the child meets the non-discriminatory admissions criteria that applies to all students, and the other members of the child's IEP Team do not believe that the parent's choice will provide the child with

FAPE in the LRE, then the offer of FAPE should be kept intact in the child's IEP. However, the IEP Team should also create a temporary plan for services and supports needed for the child to participate in the alternative option chosen by the parent. Here are some guidelines to consider when creating such a plan:

1. This temporary plan should include language indicating that the IEP Team does not believe the child's participation in the parent's chosen alternative option provides the child with a FAPE. However, because the child meets the non-discriminatory admissions criteria that applies to all students, the child will participate in the alternative option at the parent's request.
2. The plan should also indicate that the change in services and supports articulated for the child's participation in the alternative option are temporary and will apply only until such time as the child leaves the alternative option, at which time the original set of services and supports in the IEP developed prior to the child's participation in the alternative option will resume automatically without any action of the IEP team and without any additional notice or parent consent.
3. If there are any services and supports that the IEP Team determines cannot reasonably be provided in the parent's chosen alternative option, the IEP Team should make that clear to the parent and state in the plan that those services and supports will be provided at the school building if the parent chooses to make their child available onsite. Note that this should not be an "all or nothing" offer, meaning that all of the services and supports that can be reasonably provided in the alternative option should be provided; then only the remaining services and supports that cannot be reasonably provided should be made available on site.
4. To the extent these temporary services and supports are a change from what is currently stated in the IEP, a Prior Written Notice "PWN" is needed; parent consent is also needed if the temporary services constitute a material change in services.
5. Making these temporary changes to the IEP can be accomplished by convening an IEP Team meeting (virtually, if needed) or by the parent and school agreeing to amend the IEP without a meeting.

Question 21 of the document asks, "If a student with an IEP is participating in a virtual school option and is not making appropriate progress in the general education curriculum or toward meeting his/her IEP goals, what should the school do?"

The answer is as follows:

In any instance when a student is not making appropriate progress, the IEP Team would need to meet and discuss what changes can be made to the services and supports to address the lack of progress [34 C.F.R. 300.324 (b)(1)(ii)(A)]. This can be accomplished by convening an IEP Team meeting [virtually, if needed] or by the parent and the school agreeing to amend the IEP without a meeting.

#### Parent's Position

According to the parent, she was "advised that they would not be able to enroll [the student] in [the virtual school] due to his IEP needs."

#### District's Position

The district contends that the fact that the student had an IEP played no part in the school's decision not to enroll him in their program.

#### Investigative Findings

The virtual school, one of twelve schools in the district, provides general education to students in grades kindergarten through twelve as well as credit recovery, summer courses, and advanced placement courses. At the virtual school, all special education supports for students enrolled in the school are provided by an area interlocal agency. At the time the student applied for enrollment, one special education teacher was assigned to the school by the interlocal.

At the time of the student's application for enrollment in April 2020, the school was accepting out-of-district students. All students – both in-district and out-of-district – were required to submit an application for admission to the school.

Overall enrollment limits for the virtual school are driven by staffing capacity. For the 2020-21 school year, the school had planned to increase the number of

students by 75-100 students without changing the teaching full time equivalent (FTE) that was in place in second semester of the 2019-20 school year. After the Governor of Kansas ordered the closure of all school buildings in the spring of the 2019-20 school year to slow the spread of the COVID-19 pandemic, and with uncertainties surrounding what the 2020-21 school year might look like, the decision was made in early July 2020 to close enrollment to out-of-district students for the 2020-21 school year.

The school has established an optimum class size model of 25 students at each elementary grade level. As a common practice, approximately 28 students are accepted for enrollment in each elementary grade level at the beginning of the academic year. According to the school, some parents (or identified learning coaches) determine after the first few weeks that they are not able to provide the level of support required by the program, and students are withdrawn from the school, leaving class sizes at the optimum level of 25.

The school does not place a limit on the total number of students with disabilities that are enrolled or the number of students with disabilities that are enrolled at any given grade level. However, according to the school, they do “monitor the number of students with disabilities we have enrolled to ensure adequate teaching FTE is available to serve IEP requirements, and have ongoing communication with [the special education interlocal] to manage personnel needs related to special education.”

The “FAQ’s” section of the website for the virtual school includes the following question and answer:

Does [the school] enroll students with Special Education needs?

If a student has an IEP [Individualized Education Plan], the [school] special education team will need to review the IEP to determine if the student’s needs can be met through the virtual program. We have certified Special Education teachers on staff who work closely with special education students

During the 2020-21 school year, approximately 16% of the total population of students served by public school districts across the state of Kansas are students with disabilities receiving services under an IEP. In the district in which the virtual school is located, 8.4% of students are students with disabilities for

the 2020-2021 school year. According to KSDE data for the 2019-20 school year, the September 2019 head count for the virtual school was 3540 students. KSDE data shows that, as of December 1, 2019, 1% of those students had IEPs. For the 2020-21 school year, KSDE data shows that 3859 students were enrolled in the virtual school as of September 2020. As of December 2020, KSDE data shows that 2.6% of those students had IEPs.

The school asserts that state data misrepresents the school's acceptance of students with IEPs because the September head count numbers include over three thousand students who are enrolled in the virtual school on a part-time basis. This group of students takes only one or two classes through the virtual school, receiving special education and related services at their primary school.

It is the school's position that the percentage of students with IEPs is better represented by its full-time student population. According to the school, a total of 889 students currently attend the virtual school on a full-time basis. Eighty-two of those students (9%) have IEPs. During the 2019-20 school year, the number of students attending the virtual school full time was 375. Of that total, forty (11%) were students with IEPs.

No category of disability is specifically excluded from enrollment in the school. The 82 students with IEPs enrolled full time in the school for the 2020-21 school year fall into the following disability categories:

- Speech Language: 11 (13% of the students with IEPs)
- Learning Disabilities: 29 (35% of the students with IEPs)
- Autism: 10 (12% of students with IEPs)
- Other Health Impaired: 15 (18% of students with IEPs)
- Emotional Disturbance: 6 (7% of students with IEPs)
- Developmental Delay: 11 (13% of students with IEPs)

Students who have been identified for special education under the category of Autism or Autism Spectrum Disorder have been enrolled in the virtual school during the previous three school years. During the 2017-18 school year, one student diagnosed with Autism or Autism Spectrum Disorder was enrolled. During the 2018-19 school year, there were three students with an Autism diagnosis, and in the 2019-20 school year, seven. During the 2020-21 school year, 10 students identified with a primary exceptionality of Autism or Autism Spectrum Disorder are enrolled.

A total of 583 new students applied for enrollment for the 2020-21 school year. Twenty percent of the applicants had IEPs or 504 Accommodation Plans. Out of the pool of applicants, 346 were accepted and 237 were denied enrollment. Sixty-two of the accepted students (18%) had IEPs. Of the 237 students who were denied enrollment, 53 (22%) had either an IEP or 504 Accommodation Plan.

Students are not automatically excluded from enrollment if they do not have passing grades in all classes, if they have not earned all credits, or if their reading is below grade level. However, according to the school, grades, attendance, or credit placement may be considered by staff in order “to determine the potential opportunity for success in the virtual environment.”

Decisions regarding the acceptance or rejection of applications for enrollment are made by the virtual school’s Admissions Committee which is comprised of the principal, the counselor for the applicant’s grade level, the lead teacher, admissions coordinator, registrar, and special education teacher. Grade level teachers are also included when deemed necessary. This group meets weekly to discuss enrollment applications and, according to a statement from the school, uses a team approach “consisting of a qualitative evaluation of whether or not [the virtual school’s] learning environment is appropriate to set up the student for success.”

No formal decision-making rubric is used by the Admissions Committee, and individual criteria rankings are not established for each individual applicant.

Enrollment applications are considered using seven criteria established by the school. According to the school, these criteria “reflect what experience has shown...to be...important indicators that a prospective student is a good match and can experience success at [the school]. Our administration has worked with Kansas State Department of Education [KSDE] staff in an ongoing manner to address concerns around graduation rates for...students. Thus, [the school believes] that in order to be responsive to the concerns that KSDE had regarding graduation rates, a thoughtful and comprehensive approach is needed to ensure that we are setting students up for success based on the criteria that we have established. Not every student is a good candidate for virtual education.”

The criteria established by the school includes the following:

- 1) Current teaching FTE capacity: Capacity at the virtual school is based upon the number of teaching staff assigned by the district to the virtual school.
- 2) Applicant's phone survey: School staff contact parents for a telephone interview. According to the district, questions covered in this interview were developed to facilitate the collection of information regarding factors which, based upon the prior experience of school staff, contribute to student success in the blended, online environment of the virtual school. The school believes that these questions assist the admissions committee in selecting those students most likely to be successful in a virtual environment. Several of the questions provide information related to other criteria listed below.
- 3) Available transcripts, historical grades, and reading and math grade level: The school does not generally accept secondary students who are behind in credits or who are not with their original cohort. The school also generally does not accept elementary students whose skills in reading and/or math fall two or more grade levels below grade placement.
- 4) IEPs, 504 Accommodation Plans, or learning plans: The school looks at these documents to determine what accommodations/strategies have been used by the applicant's previous school.
- 5) Ability to adapt the school's approved curriculum to meet the needs of the student: The school asserts that its approved curriculum can be modified to meet the needs of students. However, the admissions committee must determine whether the needs of a given student will require the school to ask for permission from the KSDE Assistant Director for Career Standards and Assessment Services (CSAS) who is responsible for the supervision of virtual schools in the state to modify its previously submitted assurance document.
- 6) Parents' capacity to provide needed support: The admissions committee must determine whether the parent/Learning Coach for

the student has the capacity to provide 4-6 hours per day of support to the student during the hours when virtual school teachers are available.

- 7) Student need for a virtual setting: The admissions committee might give preference to a student whose chances for educational success would be improved by admission to a virtual school.

According to the school principal, the admissions committee sometimes gives priority to the applications of students with siblings already enrolled in the school and to students who have previously been enrolled.

A student's application for enrollment may be denied if the admissions committee determines that a deficiency in any of the school's established criteria is present.

Applicants are notified via a standardized email "form letter" as to whether a student has been accepted for enrollment or rejected.

On April 22, 2020, the parent submitted an on-line application for this student to attend fifth grade in the virtual school for the 2020-21 school year. The admissions coordinator completed a telephone interview with the parent regarding the application on May 1, 2020.

The parent supplied the school with a copy of the student's November 4, 2019 IEP. The student had an active IEP from his home district calling for special education support in both general and special education settings as well as 40 minutes per week of direct speech and language service and 10 minutes a month of consultative occupational therapy services.

According to the student's November 2019 IEP, the student required small group instruction for reading with 1:1 assistance and repeated review and drill and had needs in the area of reading of basic sight words. He had an annual goal that would increase his reading and decoding of simple words within his daily routine from 58% to 80%.

The student's November 2019 IEP also contained an annual goal to increase basic addition and subtraction computation skills as well as addition and subtraction with regrouping from above 70% accuracy to 80% accuracy.

The November 2019 IEP states that no accommodations were required for the student. Under the “Supplementary Aids and Services” section of the IEP, it is noted that the student needed:

- A slant board;
- a movement cushion;
- a pencil grip;
- headphones;
- read aloud of questions and answer choices in daily assignments and assessments in both general and special education classrooms;
- a separate, quiet setting for assessments;
- shortened assignments;
- modified assignments; and
- the use of a scribe with lengthy written instructions or tasks.

The “Program Modifications” section of the student’s November 2019 IEP states that “[The student] receives a modified curriculum in Reading and Math, according to his instructional level” in a special education classroom.

The “Participation in District-Wide Assessment” section of the IEP states, “Student will participate in district-wide assessments with accommodations as listed in the Accommodations and/or Supplementary Aids and Services sections of the IEP.”

The student’s IEP also includes goals in the area of receptive/expressive language, articulation, social skills, and fine motor skills.

The virtual school states that it would have been able to provide the student with the level of services specified in his November 2019 IEP. At the time of the student’s application, the admissions committee did not feel that the student’s above-mentioned math deficits would have a significant impact on his success in accessing the general curriculum. However, addressing the student’s reading needs might have required a lower-level reading course which, in turn, would have necessitated the use of a different or modified curriculum. The school may, therefore, have been required to request permission to modify a Kansas Virtual Schools Assurance Document previously submitted to the KSDE Assistant Director for Career Standards and Assessment Services (CSAS).

At the time the student applied for admission, 12 students were scheduled to return for fifth grade, and four new students had already been accepted for enrollment. Some openings were being held for in-district students. Approximately five slots were available at the fifth-grade level for out-of-district students.

A total of 45 new students applied for enrollment in the fifth grade at the virtual school at the same time as the student. Twenty-three of those students were accepted; 22 were denied enrollment. Three of the 23 accepted fifth-grade students (13%) had IEPs. Seven of the 22 fifth-grade students whose applications were denied (32%) had either an IEP or a 504 Accommodation Plan. Currently, there are five students in the fifth grade at the virtual school who have an IEP (17.2% of the total fifth grade enrollment of 29 students). One student has a 504 Accommodation Plan.

Three of the special education students currently enrolled in the fifth grade are identified under the category of Learning Disabilities. One of the students is identified under the category of Other Health Impaired, and one is identified under the category of Emotional Disturbance.

According to the district/school, when considering this student's application, the admissions committee had concerns with regard to three of the school's established admissions criteria:

- Available transcripts, historical grades, and reading and math level: The student was more than two levels delayed in his reading skills.
- Ability to adapt our approved curriculum to meet the needs of the student: According to the school/district, information needed for admissions committee consideration of this criteria was unavailable at the time of the student's application because it was based on "a succeeding decision of KSDE." According to the school principal, because the student's needs would have necessitated modifications to the curriculum used by the school, the school would have had to submit a request to the KSDE Assistant Director for Career Standards and Assessment Services (CSAS) to modify their assurance document in order to provide those modifications. At the time the student's application was being considered, the school had not submitted a request for a modification of the assurance document to the state. According to the

school principal, submission of a request for a modification to the assurance document was a procedural requirement but such requests were routinely accepted.

- Parents' capacity to provide needed support: Notes from a telephone interview with the admissions coordinator on May 1, 2020, indicate that the parent would be the "Learning Coach" for the student and was "willing to dedicate 4-6 hours of work daily to school." According to the interview record, the parent – a contract employee with the State of Kansas – worked from home and was able to set her own schedule. The parent indicated that an internet connection was available in the home and that she was "very comfortable" with technology. According to the school principal, the committee nonetheless had concerns that the parent would not be able to provide the necessary level of support. The district did not provide the investigator with any record of the school's reason for these concerns.

On May 7, 2020, the admissions coordinator sent an email to the parent to provide notice that the student's application for admission had been denied. The email did not provide any specific reasons for the rejection of the application beyond the following:

- If you applied mid-semester to [the school], your application was likely declined with concerns about a loss of credit resulting from a late start.
- If you applied mid-year to [the school], your application may have been declined due to lack of space in specific placement in our program.

Since the student was applying for the 2020-21 school year, rather than making a mid-year application for the 2019-20 school year, neither statement above applies.

### Summary and Conclusions

Looking for educational options for the student that would minimize the family's exposure to COVID-19, the parent made application in April 2020 to the virtual school which was, at the time of application, accepting out-of-district students. The admissions committee from the virtual school considered the student's application based upon a set of "criteria" developed by the school and denied the student's application.

The questions at the heart of this complaint investigation are:

- 1) Did the school district establish admissions criteria that ensure children with disabilities have the same opportunity to be admitted to the district's virtual school as nondisabled children? and
- 2) Did the school district's application of its admission criteria to this student ensure this student had the same opportunity to be admitted to the district's virtual school as a nondisabled child?

Asserting that "not every student is a good candidate for virtual education," the school developed a set of seven "criteria" that would assist in the identification of students who would be a "good match" for the virtual school and could experience success.

For each applicant, the admissions committee considers the number of student vacancies available at the time of application based on the teaching FTE and reviews responses provided by the parent in a telephone interview with the admissions coordinator (criteria 1 and 2).

Three of the seven admissions criteria used by the school relate to a student's academic performance and to any unique needs the student might have. Each of these three criteria could result in students with disabilities not having the same opportunity to participate in the virtual school as a nondisabled student.

- 1) Under the criteria – "Available transcripts, historical grades, and reading and math grade levels" – the admissions committee considers the academic performance of the applicant. Admission is generally denied if a student's reading and/or math skills fall two or more grade levels below grade placement.

In order to be deemed eligible for special education services under an IEP, a student must be determined to have a categorical exceptionality (disability or giftedness) and must demonstrate a need for special education and related

services because of that exceptionality. Generally, for a student with a disability, that need is demonstrated by underperformance in a general education setting. Therefore, students with disabilities receiving services under an IEP are inherently more likely to have delays in academic performance than students who have not been determined to have a disability and who do not have IEPs.

2) Another of the criteria considered by the admission committee is “IEPs, Accommodation Plans, or learning plans.” While the school asserts that it can meet the needs of students who have such documents, the inclusion of this criteria in the district’s admission criteria suggests that a student could be denied admission either because he or she has an IEP or because something in a student’s IEP would lead the team to deny admission to the school because the admissions committee believes the student would not be a “good match” for the school.

Because one of the school’s admissions criteria relates to IEPs or 504 Accommodation plans, an unequal burden is placed on students with disabilities. Students who do not have a disability will have neither an IEP nor a 504 Accommodation Plan, so this criterion does not apply to students without disabilities. While the school may ask for a copy of a student’s IEP to assist with planning for instruction, the fact that a student has an IEP should play no part in decisions regarding student admission.

3) Another criterion – “Ability to adapt our approved curriculum to meet the needs of the student” – calls on the admission committee to consider potential for successful integration into the curriculum used by the virtual school. If the needs of a student required the virtual school to utilize a different curriculum, the school would have to submit a request to modify the assurance document they had previously submitted to the KSDE Assistant Director for Career Standards and Assessment Services (CSAS) which specified the curriculum that would be used by the school.

It is the responsibility of a school to meet the curricular needs of its students, providing modification as those needs demanded. A school may not deny a student enrollment because he or she struggles in the primary curriculum adopted by the school.

Again, there is a greater likelihood that students with disabilities might require a modified curriculum than students without disabilities; this is the very essence

of special education. "Special education" means "specially designed instruction to meet the unique needs of a child with a disability" (34 C.F.R. 300.39(a)(1); K.S.A. 72-3404(i); K.A.R. 91-40-1(kkk)(1)). "Specially designed instruction" means "adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum..." (34 C.F.R. 300.39(b)(3); K.A.R. 91-40-1(III)). The inclusion of admission criteria related to curriculum modification places an unequal burden on students with disabilities and denies them access to the very services guaranteed under the IDEA.

For the 2020-21 school year, the virtual school enrolled students with a wide range of disabilities. However, students with disabilities represented a greater percentage of students denied enrollment for the 2020-21 school year (22%) than were represented among the students accepted for enrollment (18%). For the 2020-21 school year, a smaller percentage of students with disabilities were enrolled in the virtual school than were enrolled in the sponsoring school district (2.6% for the virtual school versus 8.4% for the sponsoring district). The percentage of students with disabilities enrolled in the virtual school was also below the average for all school districts in the state as a whole with regard to students with disabilities (16%).

The student who is the focus of this complaint was, according to the school, denied admission to the virtual school because he was more than two years below grade level in the area of reading – a deficit specifically identified and addressed in his November 2019 IEP. Additionally, the school stated that the academic needs identified in the student's IEP might have required the district to submit a revised assurance document to the KSDE Assistant Director for Career Standards and Assessment Services (CSAS) in order for the school to provide modifications to the established school curriculum. At the time the admissions committee was considering the student's application, a revised assurance document had not yet been submitted.

The third reason given for rejecting the student's application was that the school felt that the parent might not be able to provide the 4-6 hours of "Learning Coach" support the virtual school required. However, no evidence was provided to support this decision. The questionnaire provided by the school shows that the parent had confirmed that she worked from home and had a flexible schedule that would allow her to provide the required level of support.

Three of the criteria used by the virtual school to make decisions regarding the acceptance or rejection of applications for admissions would place an unequal burden on students with disabilities. While the school has accepted students with disabilities, the overall percentage of students with disabilities enrolled in the virtual school for the 2020-21 school year falls significantly below the percentage of students with disabilities enrolled in school districts across the state and within the district in which the virtual school is located. The student at the center of this complaint was denied admission in part because he was reading more than two years below grade level. Additionally, the student's IEP called for a modified curriculum that the school was unsure it could provide. Both of these factors are clearly tied to the student's disability. In making decisions regarding admission, the virtual school has applied criteria which created a barrier for students with disabilities. A violation of special education statutes and regulations is substantiated for failing to ensure that children with disabilities have available the same variety of educational programs and services that are available to children without disabilities.

### Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. The district failed to comply with 34 C.F.R. 300.110 and K.A.R. 91-40-3(a), which require that the district shall ensure that children with disabilities have available to them the same variety of educational programs and services available to nondisabled children served by the district. Specifically, the criteria used by the virtual school admissions committee do not provide the same opportunity for admission for students with disabilities as compared to students without disabilities, and the school's application of its admissions criteria to this student in particular denied him the same opportunity for admission as a student without a disability.

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

- 1) Submit to Special Education and Title Services (SETS), within 10 days of the date of this report, a written statement of assurance stating that it will comply with 34 C.F.R. 300.110 and K.A.R. 91-40-3(a) by developing and implementing admissions criteria for the virtual school which are based on neutral admissions criteria that provide the same opportunity for

admission to disabled and nondisabled students, regardless of whether a student is disabled.

- 2) Within 25 days of the date of this report, USD #\_\_ shall develop neutral admissions criteria that provide the same opportunity for admission to the virtual school to disabled and nondisabled students and shall submit these criteria to Special Education and Title Services (SETS) for approval.
  - a) Upon receipt of this report, the virtual school shall immediately cease using the seven admissions criteria described in this report and make no decisions regarding any new applications for admissions until the new admissions criteria have been approved by SETS. Furthermore, any future admission decisions must only be made by USD #\_\_ staff who have been trained in the revised admissions criteria.
  - b) Within 5 days of the date when SETS approves new admissions criteria, the virtual school shall provide training on the revised criteria to all staff members who might be a member of the admissions committee. USD #\_\_ shall submit documentation of the training to SETS, including the date of the training, name and position of the trainer, contents of the training, and an attendance record with signatures and positions of all staff who attended the training.
- 3) Within 25 days of the date of this report, USD #\_\_ shall develop procedures to be used by the virtual school with regard to the review and implementation of the IEPs of all students admitted into the school. USD #\_\_ may choose to consult with the \_\_\_\_\_ Special Education Interlocal when developing these procedures. These procedures shall be submitted to SETS for approval.
  - a) No new students shall be considered for admission into the virtual school until these procedures have been approved by SETS.
  - b) Within 5 days of the date when SETS approves the revised procedures, the virtual school shall provide training to staff on the

implementation of those procedures. USD #\_\_ shall submit documentation of the training to SETS, including the date of the training, name and position of the trainer, contents of the training, and an attendance record with signatures and positions of all staff who attended the training.

- 4) The administration of the virtual school shall complete and submit to SETS a pre-training administrator survey and a post-training administrator survey both before and after the training ordered in Corrective Actions 2b and 3b occurs. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the virtual school administration.
- 5) Every staff member who participated in the training ordered by Corrective Actions 2b and 3b shall complete and submit to SETS a post-training staff survey after the staff are trained as ordered in Corrective Actions 2b and 3b. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the virtual school administration.
- 6) Within 5 days of the date when SETS approves new admissions criteria, USD #\_\_ shall contact this parent to offer her the opportunity to submit a new application for enrollment in the virtual school. Within 20 days of the date when SETS approves new admissions criteria USD #\_\_ shall provide SETS with written documentation of the notice to the parent and inform SETS of the parent's decision regarding reapplication. If the parent opts to make application for the student for the 2021-22 school year, USD #\_\_ shall, by no later than May 31, 2021, notify SETS as to whether or not the student met the revised criteria for application for enrollment. If the student did not meet the criteria for enrollment, the district shall provide SETS with an explanation as to why not.
- 7) Within 25 days of the date of this report, USD #\_\_ shall identify an individual within the district or the interlocal who will be responsible for supervising the implementation of the approved admissions criteria and shall provide SETS with the information listed below. The district may

choose to consult with the \_\_\_\_\_ \_\_\_\_\_ Special Education Interlocal regarding the selection of this supervisor.

- a) The name and position of the supervisor; and
  - b) a plan as to how supervision will be provided and how successful implementation of the plan will be reported to SETS.
- 8) No later than October 1, 2021, the supervisor identified above in Corrective Action 7 shall submit to SETS a summative report of the actions taken by the district. The report should include the following:
- a) The date new admission criteria and procedures were implemented;
  - b) summative information regarding the number and percentage of students with disabilities who apply for admission for the 2021-22 school year and the number of students with disabilities who were denied admission; and
  - c) determinant factors for each student with a disability whose application for admission was denied.
- 9) Further, USD #\_\_ shall, within 10 calendar days of the date of this report, submit to SETS one of the following:
- a) A statement verifying acceptance of the corrective action or actions specified in this report;
  - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
  - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f).

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). Due to COVID-19 restrictions, the written notice of appeal may either be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. Such notice of appeal must be delivered within 10 calendar days from the date of this report.

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



Diana Durkin  
Complaint Investigator

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

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

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

(2) If an appeal committee affirms a compliance report that requires corrective action by an agency, that agency shall initiate the required corrective action immediately. If, after five days, no required corrective action has been initiated,

the agency shall be notified of the action that will be taken to assure compliance as determined by the department. This action may include any of the following:

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_\_,  
\_\_\_\_\_ Public Schools: 21FC\_\_\_\_-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on February 1, 2021, by \_\_\_\_\_, on behalf of her son, \_\_\_\_\_. In the remainder of this decision, Ms. \_\_\_\_\_ will be referred to as "the parent," and \_\_\_\_\_ will be referred to as "the student." An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education, and Title Services team at the Kansas State Department of Education. Following the investigation, a Complaint Report, addressing the allegation, was issued on March 3, 2021. That Complaint Report concluded that there was a violation of special education regulations.

Thereafter, the district filed an appeal of the Complaint Report. Upon receipt of the appeal, an appeal committee was appointed and it reviewed the original complaint filed by the parent, the Complaint Report, the district's notice of appeal, and the parent's response to the district's appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

PRELIMINARY MATTERS

1.

A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Complaint Report. That regulation states, in part, that: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal.

2.

No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate

investigation. The Appeal Committee's function will be to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

3.

The complaint appeal process is governed by state board of education regulation K.A.R. 91-40-51(f). That regulation specifies that a party to a state complaint may appeal “any of the findings or conclusions of a compliance report...” Accordingly, the Appeal Committee has authority to review only the findings or conclusions in a complaint report. The Appeal Committee does not have authority to consider an appeal of corrective actions in a complaint report. When an Appeal Committee overrules a finding or a conclusion in the report, the Appeal Committee may delete or alter corrective actions related to the finding or conclusion that was overruled, but the Appeal Committee has no authority to address an appeal objecting to a corrective action standing alone.

4.

In the third paragraph of the district’s letter of appeal, the district states that the parent did not follow the Kansas State Department of Education (KSDE) guidelines for filing a complaint that are published in the Kansas Special Education Process Handbook because the parent did not provide a copy of the complaint to the school district. Providing a copy of the complaint to the school district is a condition for filing a complaint which is in law and, when not fulfilled, could result in KSDE refusing to investigate a complaint. However, failure to provide a copy of the complaint to the district does not remove the authority of KSDE to investigate the complaint, as long as a copy of the complaint is actually delivered to the district. The United States Department of Education has issued guidance on this subject, stating that it encourages states to adopt procedures whereby states forward the complaint directly to the school district so that the failure of a parent to do so does not delay the complaint process (See, Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR 232, Question B-17 [OSERS 2013]). Kansas has adopted and used such procedures for many years. Special Education and Title Services sent a notice of receipt of the complaint by e-mail on February 1, 2021 to \_\_\_\_ \_\_\_\_, Special Education Director and to \_\_\_\_ \_\_\_\_, Superintendent. A copy of the parent’s complaint was attached to that notice. Accordingly, the district was in receipt of the parent’s complaint on February 1, 2021, and KSDE was authorized to proceed on that date, and did proceed, with an investigation of the complaint. In addition, in her letter to the Appeal Committee, dated March 18, 2021, the parent documented that she mailed a

copy of her complaint to \_\_\_\_\_ eCademy, \_\_\_ N. Main St., \_\_\_\_\_, KS \_\_\_\_, on January 30, 2021.

5.

The district's letter of appeal consists of three initial paragraphs regarding:

First, the district confirmed that it would comply with 34 C.F.R. § 300.110. This was addressed administratively by KSDE in a separate communication, and will not be addressed by this Appeal Committee.

Second, the district requested an extension of time to complete Corrective Action No. 9. This was also addressed administratively by KSDE in a separate communication, and will not be addressed by this Appeal Committee.

Third, the district stated that the parent had not provided the district with a copy of the complaint. The Appeal Committee has addressed that issue above, in Preliminary Matters, No. 4.

Fourth, the district provided this statement: "Finally, the district appeals corrective action items #3, #4, & #5 for the following reasons:" Four bullet points followed. As referenced in Preliminary Matters No. 3, the Appeal Committee does not have authority to consider an appeal of corrective actions, and will not do so. However, the Appeal Committee recognizes that, in this portion of the appeal, the district went beyond objections regarding only corrective actions and asserted that the investigator's conclusions "repeatedly demonstrate a significant bias in favor of the complainant and assumptions of facts not in evidence, indeed wholly relying on a statement of the complainant that admission was denied due to disability." For that reason, the Appeal Committee conducted a full review of the decision, including whether the investigator demonstrated a bias toward the parent, considered statements supplied by both the parent and the district, and whether there is sufficient factual basis to support the investigator's findings and conclusions. As stated in Preliminary Considerations 1, above, by regulation, the party submitting an appeal must provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Appeal Committee does not attempt to locate the missing support. In this appeal, where the district states that the investigator repeatedly demonstrated a significant bias in favor of the complainant, assumed facts

not in evidence, and wholly relied on statements of the complainant, the Appeal Committee found no credible support in the appeal, or in the investigator's report, for such conclusions.

### DISCUSSION OF ISSUE ON APPEAL

This complaint involved a single issue: whether the district refused to admit the student into the district's virtual school because of the needs identified in the student's IEP. The investigator found that the student was denied admittance, in part, because he was reading more than two years below grade level and because the student's IEP required a modified curriculum. In addition, the investigator concluded that three specified admissions criteria for admission to the virtual school placed an unequal burden on students with disabilities. These findings resulted in a conclusion that the district was in violation of federal regulation 34 C.F.R. § 300.110, which requires districts to make their educational programs and services equally available to children with disabilities. Moreover, the investigator concluded that the failure to comply with 34 C.F.R. § 300.110 applied not only to the student who was the subject of this complaint, but also to children with disabilities in general (See Report, p. 19).

The Appeal Committee agrees with the investigator's conclusion that 34 C.F.R. § 300.110 applies to criteria for admission to any public school program, including a virtual school. A virtual school operated by a Kansas public school is a public school and, as such, is subject to all of the requirements of special education. Among those requirements is to make such public school programs equally available to children with disabilities. Developing criteria for admission to public school programs that place requirements or limitations on children with disabilities that are either not placed on general education students or which are more burdensome for children with disabilities is inconsistent with the clear intent of 34 C.F.R. § 110.

### Statistical Analysis

In its appeal, the district argues that the investigator's statistical analysis is flawed because the percentage differences for admission between children with disabilities and general education students is insignificant, and so those percentages "clearly denote an absence of discrimination toward admitting students with disabilities." The Appeal Committee does not agree with the district's analysis, but does find that the percentages do not denote clear discrimination on the part of the district. In addition, the Appeal Committee notes that the investigator did not put much, if any, emphasis on the statistical analysis. In the portion of the report titled "Summary and

Conclusions" there is only a very brief reference, on page 18, regarding the statistics of the overall virtual school program admissions. The remainder of the Summary and Conclusions portion of the report are directed at the admissions criteria, and how those criteria are used. Accordingly, because the statistical analysis used by the investigator does not clearly support the investigator's conclusions, the Appeal Committee is notifying both parties that any findings or conclusions in the report that are based solely on the statistical analysis used by the investigator (if any) are overruled.

### Admissions Criteria

What remains is whether the criteria used by the district to grant or deny admission into the virtual school program denied this student, and/or children with disabilities in general, an equal opportunity to participate in the district's virtual school. The right to have an equal opportunity to participate in a school program can be jeopardized in three ways:

- (a) Direct discrimination. Direct discrimination is a policy or practice by which children with disabilities are denied participation in a district program because of their disability. There was no finding in this complaint that direct discrimination has or is occurring
- (b) Disparate Impact. Disparate impact is a policy or practice which makes participation in a district program by a child with a disability more difficult, and so less likely than similarly situated children who do not have a disability.
- (c) Undue Burden. Undue burden is a policy or practice that sets a standard for participation by children with disabilities that is not applied to general education students.

In the "Summary and Conclusions" portion of the report, the investigator concluded that three of the criteria used by the district for admission to the virtual school interfere with the right of a child with a disability to have an equal opportunity to participate in the virtual school program of the district.

Those criteria were:

First:

"Available transcripts, historical grades, and reading and math grade levels" -

the admissions committee considers the academic performance of the applicant. Admission is generally denied if a student's reading and/or math skills fall two or more grade levels below grade placement." (See p. 16-17).

With regard to this criterion, the investigator observed that in order to be deemed eligible for special education a child must be in need of specially designed instruction (Report, p. 17). The Appeal Committee agrees with this observation, and further notes that in order to be eligible for special education, the student's disability must adversely affect the child's educational performance. Accordingly, the Appeal Committee agrees with the investigator's finding that "Therefore, students with disabilities receiving services under an IEP are inherently more likely to have delays in academic performance than students who have not been determined to have a disability and who do not have IEPs." (Report, p. 17). The investigator concluded that "The student at the center of this complaint was denied admission in part because he was reading more than two years below grade level." (Report, p. 19). That conclusion was supported by the evidence presented in this complaint, and is an example of disparate impact. This criteria for admission to this public school program is tied to educational performance, and so disfavors children who have a disability that adversely affects educational performance (the very definition of a child with a disability). This criterion made it more difficult for this student, and makes it more difficult for children with disabilities in general, to be admitted to the district's virtual school program.

Second:

"IEPs, Accommodation Plans, or learning plans." The investigator concluded that "While the school may ask for a copy of a student's IEP to assist with planning for instruction, the fact that a student has an IEP should play no part in decisions regarding student admission (See Report, page 17)." The Appeal Committee agrees with this conclusion for the very reason stated in the report on page 17, that: "Because one of the school's admissions criteria relates to IEPs or 504 Accommodation plans, an unequal burden is placed on students with disabilities. Students who do not have a disability will have neither an IEP nor a 504 Accommodation Plan, so this criterion does not apply to students without disabilities." The Appeal Committee agrees with the investigator that this criterion is an example of a failure to make a program equally available due to undue burden. There is a distinct difference between asking for a copy of an IEP to assist with planning for instruction (which is not an additional burden

for admission) and making the existence of an IEP or an accommodation plan a criterion for admission (an additional burden, that is not applied to general education students).

Third:

"Ability to adapt our approved curriculum to meet the needs of the student" - calls on the admission committee to consider potential for successful integration into the curriculum used by the virtual school. If the needs of a student required the virtual school to utilize a different curriculum, the school would have to submit a request to modify the assurance document they had previously submitted to the KSDE Assistant Director for Career Standards and Assessment Services (CSAS) which specified the curriculum that would be used by the school. (See Report, p. 17).

The Appeal Committee agrees that this admission criterion: "The ability to adapt our curriculum to meet the needs of the student" is an unacceptable admission criteria in any program operated by any public school in this state. It is an example of both disparate impact and undue burden on children with disabilities.

Moreover, Kansas statute, K.S.A. 72-3410(a)(2), requires Kansas public schools to provide a Free Appropriate Public Education (FAPE) to any child who enrolls in the district. A FAPE includes all special education and related services in a child's IEP, including modifications to instruction that are specified in an IEP.

Accordingly, the Appeal Committee fully supports the investigator's conclusion on page 18 of the report, stating that:

Again, there is a greater likelihood that students with disabilities might require a modified curriculum than students without disabilities; this is the very essence of special education. "Special education" means "specially designed instruction to meet the unique needs of a child with a disability" (34 C.F.R. 300.39(a)(1) ; K.S.A 72-3404(i); KAR. 91-40-1(kkk)(1)). "Specially designed instruction" means "adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum..." (34 C.F.R. 300.39(b)(3); KAR. 91-40-1(III)). The inclusion of admission criteria related to curriculum modification places an unequal

burden on students with disabilities and denies them access to the very services guaranteed under the IDEA.

After a review of the complaint report and all of the material submitted in this appeal, the Appeal Committee finds that the complaint report: (a) contains a comprehensive review and analysis of both the parent's position and the district's position; (b) accurately articulates the evidence presented; (c) bases the decision on the evidence presented; (d) correctly interprets the applicable law; and (d) reaches a decision supported by the evidence presented.

#### CONCLUSION

The statistical analysis used by the investigator is overruled. All other portions of the report are sustained.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 24th day of March, 2021.

APPEAL COMMITTEE:

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Mark Ward

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Christy Weiler

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Brian Dempsey

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON APRIL 1, 2021

DATE OF REPORT: APRIL 30, 2021

This report is in response to a complaint filed with our office by Dr. \_\_ \_\_\_\_, principal of \_\_ \_\_\_\_ Catholic School in \_\_\_\_, Kansas. For the remainder of this report, Dr. \_\_\_\_ will be referred to as "the complainant."

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone on April 6, 2021 with the complainant. On April 7, 2021, the investigator spoke by conference call with Dr. \_\_ \_\_\_\_, Director of the \_\_ \_\_ \_\_ \_\_ Special Education Cooperative (\_\_ \_\_ \_\_), and \_\_ \_\_ \_\_, Assistant Director for the cooperative. On April 28, 2021, the investigator spoke by telephone with Dr. Jamie Finkeldej, Associate Superintendent of Schools for the Catholic Diocese of Wichita.

In completing this investigation, the complaint investigator reviewed more than 110 documents provided by the parties. Those most relevant to this investigation are listed below.

- Current IEPs for nine students at the private parochial school
- IEP dated January 7, 2020 for student #1
- IEP amendment for student #1 dated September 22, 2020
- Excerpts provided by the complainant from email correspondence between various staff members during the 2020-21 school year
- Email dated October 27, 2020 from the special education teacher to the assistant director of the cooperative
- Email dated October 28, 2020 from the special education teacher to the assistant director of the cooperative
- Email exchanges between October 28, 2020 and November 1, 2020 between the special education teacher to a general education teacher

- Email exchanges during October and November 2020 between the special education teacher and a general education teacher regarding a student's needs in the area of math
- Email dated November 3, 2020 from the special education teacher to a general education teacher
- Email exchanges between November 7 and 8, 2020 between the special education teacher and a general education teacher
- Email exchanges between November 18 and 19, 2020 between the special education teacher and a general education teacher
- Email dated December 6, 2020 from the special education teacher to the general education homeroom teacher for a special education teacher at the private school
- Email exchanges dated March 4, 2019 through April 1, 2021 between the complainant and the records clerk for the cooperative
- Email dated February 25, 2021 from the special education teacher to the complainant
- Email exchanges dated April 7 and 8, 2021 between the special education teacher and general education teachers at the school
- Email dated April 15, 2021 from the special education teacher to the assistant director for the cooperative
- Email exchange dates April 16, 2021 between the special education teacher and the technology teacher
- Screenshot of the database user access for the complainant
- IEP Snapshot for each of the nine private school students on the caseload of the special education teacher
- Unsigned and undated copy of an Affirmation of Consultation document

### **Background Information**

According to the director of the cooperative, there is only one private school in the \_\_\_\_ [cooperative] service area. Prior to the 2018-19 school year, the district provided only speech and language services to students enrolled in the private school. As the number of private school students determined eligible to receive special education services in categories other than speech and language increased, the district began providing special education services to those students in a public school located about 3 minutes away from the private school.

Beginning the second semester of the 2018-19 school year, the district hired a

retired former employee with special education certification to provide half-time on-site special education services to students enrolled in the private school. That same teacher was already a half-time employee of the private school. The teacher continued to work for the private school and for the district during the 2019-20 school year and retired from both positions at the end of the school year.

Beginning in the fall of the 2020-21 school year, the district placed a different special education teacher at the private school on a half-time basis. That special education teacher – the parent of a student in the private school – works at the nearby district public elementary school in the morning from 7:30 to 11:30 AM and then travels to the private school at 11:30 AM where she works until 3:30 PM. A half-time paraeducator was also placed at the private school by the district.

### Issues

In her complaint, the complainant identified two issues as follows:

**Issue One:** The district did not comply with special education regulations because

- a) general education teachers were not provided with full access to the IEPs of special education students enrolled in the private school; and
- b) the special education teacher proposed changes to the IEPs of special education students enrolled in the private school without prior consultation with either the Student Improvement Team for the building or the students' general education teachers.

#### A) Access to IEPs

##### Complainant's Position:

The complainant asserts that the special education teacher assigned by the district to provide special education services at the private school during the 2020-21 school year failed to provide general education teachers with information regarding their specific responsibilities related to the students' IEPs. According to the complainant, classroom teachers were not provided with "full access" to their students' IEPs and were instead provided with an "accommodation form" with little or no accompanying explanation. The

complainant states that communication between the special education teacher and general education teachers has been solely by email. According to the complainant, the special education teacher has not attended any Student Improvement Team (SIT) meetings during the 2020-21 school year despite being asked by the complainant to meet with the team.

The complainant asserts that the approach used by the special education teacher to convey information about accommodations and modifications led to particular confusion regarding the responsibilities of the general education teacher in the case of one student. The remainder of this complaint report will refer to this student as "student #1."

District's Position:

The district asserts that, during the 2020-21 school year, general education teachers at the private school were informed by the special education teacher of their responsibilities with regard to their special education students through the provision of IEP snapshot documents. Full access to IEPs of these students has been available through the district-provided web access given to the building principal, the complainant.

Applicable Statutes and Regulations:

Kansas regulations, at K.A.R. 91-40-16, provide direction regarding IEP requirements. K.A.R. 91-40-16(b)(4) states that the district must ensure 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.

K.A.R. 91-40-16(b)(5), states that each teacher and provider described above must be informed of:

- that individual's 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.

Investigative Findings:

According to the special education teacher, she followed standard district practice by providing a copy of a "snapshot IEP" to the general education

teachers of every student on her caseload at the beginning of the 2020-21 school year. Each snapshot document contains:

- the date of the IEP Team meeting;
- goals and benchmarks/objectives including baseline information, relevant state standards and indicators for each goal, and evaluation procedures;
- supplementary aids and services (accommodations/modifications);
- assistive technology needs of the student; and
- supports to be provided for school personnel.

Students in grades three through eight rotate between three different teachers. The special education teacher states that she made copies of snapshots for each of the student's teachers so that all of the teachers for each child would have the information. Through email exchanges with the special education teacher in April 2021, general education teachers confirmed that they were in possession of snapshot IEPs for their students.

The special education teacher also asserts that she provided copies of snapshot IEPs to the technology teacher at the private school who serves as testing coordinator for the building in order for the technology teacher to have the information she needed to report required testing accommodations. While the technology teacher contends that she was not given this information, she stated in an email to the special education teacher dated April 16, 2021 that she was aware of the accommodations needed for each student and had entered that information into the testing system in the Fall of 2020.

According to the special education teacher, it has been her practice to provide teachers with updated copies of the snapshots as IEPs have been reviewed and revised throughout the school year. The special education teacher states that these snapshots were either placed in the mailbox of the teachers or were hand delivered.

In the course of this investigation, the investigator reviewed an IEP Snapshot for each of the nine students served by the special education teacher.

According to the director of the cooperative, it is the practice of the district to allow the general education teachers of special education students to request a login to view in the special education database the IEPs of special education

students assigned to their classroom. Further, according to the district, all building principals are provided with access to that database so that they are able to view the IEPs of their students and are able to provide copies of the documents to any IEP team member with a “need to know” the contents of these documents

An email dated March 4, 2019 shows that, as building principal, the complainant was given “administrative view” access to the IEP database containing all special education students at the private school. In that email, the records clerk for the cooperative assigns the complainant a username and password and provides login instructions.

On December 30, 2020, the records clerk responded to a request from the complainant for access to the special education records of students at the private school. In response, the records clerk copied her message of March 4, 2019 in which she had provided login information. In email exchanges in December of 2020 as well as January and April 2021, the records clerk and the complainant discuss problems the complainant has experienced logging into the system. On April 7, 2021, the complainant confirmed in a telephone conversation with the investigator that she has access to the database. The complainant also provided the investigator with copies of the IEPs of nine students.

The student referenced above in the “Complainant’s Position” section will be referred to as “student #1” for the purpose of this investigation. According to the complainant, student #1 was not physically present for a period of time at the beginning of the 2020-21 school year due to a COVID-19 quarantine, and his general education teacher was unaware of her responsibilities with regard to his accommodations and modifications in the area of math.

The “Supplementary Aids and Services” section of the January 7, 2020 IEP for student #1 includes the following statement:

Provide an alternative curriculum for math at his appropriate instructional level, which is currently one grade level below his peers.

That same statement was included in the IEP Snapshot provided to the general education teacher at the start of the school year. The same statement was included in the December 3, 2020 IEP for student #1 as well as the IEP Snapshot

provided to the general education teacher following the December 2020 annual review.

On September 25, 2020, the general education teacher for student #1 sent an email questioning the special education teacher as to who was entering grades for the student. The special education teacher responded, "You do the grades for him. I am only doing the grades for the kids that come to me for their core instruction. [Student #1] is not supposed to come to me for core instruction, but in addition to his instructional time."

On October 12, 2020, the special education teacher sent an email to the complainant expressing concern that student #1 was not receiving math instruction from the general education teacher. According to the email, the general education teacher had requested math grades for the student from the special education teacher. The special education teacher stated, "He is supposed to be getting his core instruction from [the general education teacher] just with modifications." The complainant stated that she wanted to hold a meeting to discuss the issue, and the special education teacher replied that she would be able to meet the following day.

In an email to the complainant dated October 28, 2020, the special education teacher noted that student #1 was failing in math for the first quarter. The special education teacher stated that she did not think that it was "fair" for the student to receive a failing grade because his classroom teacher was not "giving him instruction on any of his [worksheets] she sent home. His teacher still isn't providing any modifications to his work other than having him do the odds or evens. I told the para to let me know if he struggles with the grade level work and I will contact the teacher to help her get similar assignment that are just a step or two back."

In additional emails in November 2020, the special education teacher and the general education teacher continued to communicate about who was responsible for developing and implementing math modifications for student #1. On December 7, 2020, a meeting was held to attempt to resolve this issue and other communication concerns. Present were the complainant, the director and assistant director for the cooperative, the superintendent for the diocese, the special education teacher, and the general education teacher.

#### Summary and Conclusions:

At the beginning of the 2020-21 school year, the special education teacher provided copies of IEP snapshots to the general education teachers of all of the students on her caseload at the private school. In addition to other information, these snapshots inform the teachers of their 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. Email evidence provided by the district confirms that general education teachers received copies of their student's IEP snapshots.

Additionally, the complainant has been given access to the special education database so that she – like principals at public schools in the district – can view and print copies of IEPs should a general education teacher or other staff member with a “need to know” the contents of the full IEP make a request to see the document. Evidence provided by the district shows that access was first granted to the complainant in March 2019. The complainant was able to access student IEPs in support of her complaint as recently as April 7, 2021.

Questions that arose regarding the modification of math instruction for student #1 were not the result of any failure on the part of the school district to provide the general education teacher with access to the student's IEP or to provide information regarding responsibility for the implementation of that IEP including responsibilities related to accommodations and modifications.

General education teachers – including the general education teacher of student #1 – were informed through the provision of snapshot IEPs of their responsibilities related to implementing student IEPs as well as the specific accommodations, modifications, and supports that must be provided for their students. The district has also established a system that provides general education teachers with full access to their students' IEPs through the building principal. Under the circumstances described above, a violation of special education statutes and regulations is not substantiated on this aspect of this issue.

## B) Changes in Services

### Complainant's Position:

The complainant contends that the special education teacher contacted parents about possible changes to students' IEPs without first consulting with either the Student Improvement Team (SIT) or classroom teachers.

### District's Position:

It is the position of the district that it is common practice for a special education service provider to solicit input from members of a student's IEP Team – including the parent – prior to an annual review so that a draft document can be prepared for the team to consider during the annual review meeting. Any proposed changes to a student's IEP are discussed by IEP Team members at the meeting. Final decisions regarding any proposed changes are made by the entire team at the IEP Team meeting.

The district further asserts that an IEP Team – not a building level SIT – is the appropriate decision-making group for a special education student.

### Applicable Statutes and Regulations:

Special education law has designated the IEP Team as the decision-making body tasked with developing, reviewing, and revising a student's IEP [K.S.A. 72-3429(b)(1) and (f)]. Collaboration among IEP Team members is essential to ensure that each child's educational experience is appropriate and meaningful.

K.S.A. 72-3404(u) defines an "IEP Team" as a group of individuals composed of:

- the parents of a child;
- at least one regular education teacher of the child, if the child is, or may be, participating in the regular education environment;
- at least one special education teacher or, where appropriate, at least one special education provider of the child;
- a representative of the agency directly involved in providing educational services for the child;
- an individual who can interpret the instructional implications of evaluation results; and
- 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.

Kansas statutes, at K.S.A. 72-3429(b)(1) and (f), require districts to ensure that "the IEP team" – not a building-level SIT – review a child's IEP not less than annually. There is no prohibition in statutes and regulations against IEP Team members contacting parents prior to a team meeting to discuss topics to be

covered in an upcoming meeting. Team members may engage in conversation and preparatory activities prior to the IEP Team meeting for planning purposes [K.A.R. 91-40-25(e)], though special education laws do not specify either the membership or structure of such planning meetings and do not mandate that they occur. Draft IEPs may be developed and shared before any IEP Team meeting, but the IEP may not be finalized before the team meeting.

Investigative Findings:

According to the complainant, the building-level SIT (or “Child Study Team” as it is sometimes called) is composed of three different groups. For students in grades Kindergarten through second (K-2), the team consists of K-2 teachers, the principal, and the Title I teacher. Prior to this school year, the team also included the school psychologist and special education teacher. For students in grades third through fifth, the team is composed of grade level teachers and support personnel. The composition of the team for students in grades sixth through eighth is the same, with grade-level teachers and support personnel involved.

By report of the complainant, the SIT meets three to four times a year. In August, the team meets to review data so that students can be placed in “Tiers.” Schedules and services are put in place. Accommodations specified in students’ IEPs or other learning plans are put in place. The SIT meets again after all fall testing to determine if any referrals are needed or if a change in services such as dismissals or amendments are warranted. After winter and spring testing the SIT meets again to determine needs for any amendments to tiers/services.

The complainant reports that if a student's interventions are not working or a dyslexia screening has been done to determine the need for a referral, a special SIT meeting is called. In previous years, the school psychologist and special education teacher were included in SIT meetings any time that a referral or IEP amendment was being considered.

In the opinion of the complainant, the special education teacher acted inappropriately by reaching out to the parents of two students to discuss a possible change in service without first consulting with either the students’ general education teachers or the building SIT.

The district provided the investigator with email documentation reflecting attempts made by the special education teacher to solicit input from general

education teachers relating to possible changes to special education services. Email evidence provided by the district also shows that the special education teacher was responsive to feedback regarding such changes. In a telephone call on April 7, 2021, the complainant acknowledged, however, that no changes have been made to the IEPs of special education students outside of an IEP Team process.

Summary and Conclusions:

The IEP Team is the group charged with the responsibility to review and revise a student's IEP. While there is no prohibition against IEP Team members engaging in conversations and preparatory activities in advance of an IEP Team meeting to plan and for an upcoming IEP Team meeting, the building-level SIT described by the complainant is not an IEP Team and should not be making decisions regarding the IEPs of students with exceptionalities. The SIT does not include any agency representative or a parent. By requesting that the special education teacher come to the SIT team before proposing any change to the IEPs of her students, the complainant would insert individuals into the decision-making process who are not members of the student's IEP Team while excluding key IEP Team members.

While final decisions regarding a student's IEP can only be made by an IEP Team, special education statutes and regulations do not prohibit a special education service provider from reaching out to another IEP team member in preparation for a team meeting. Emails provided by the district show that the special education teacher contacted general education teachers and, in some cases, parents in preparation for annual review meetings. However, no changes to special education services in the IEPs of students at the private school were made outside of the IEP Team setting.

Under the circumstances described above, a violation of special education statutes and regulations is not substantiated on this aspect of this issue.

Issue Two: The district did not include a regular education teacher of the child as a member of the IEP Team when reviewing and revising the IEPs of special education students enrolled in the private school.

Complainant's Position

The complainant contends that the special education teacher sent a Google form to classroom teachers asking them to respond to questions regarding the performance of special education students in their classrooms. The complainant asserts that the special education teacher solicited no additional input from the teachers in order to revise the students' IEPs. Further, it is the position of the complainant that she repeatedly requested that the special education teacher meet with the SIT for further discussion of student needs in preparation for the annual review, but the special education teacher did not comply with those requests.

### **District's Position**

The district contends that general education teachers participated in the annual IEP review meeting for all of the students served by the special education teacher. Additionally, the special education teacher created a Google form which she sent to general education teachers in order to solicit their input prior to IEP annual review meetings, and teacher input was incorporated into IEPs.

### **Applicable Statutes and Regulations**

A meeting to develop, review, and revise a student's IEP must include all of the participants required for an initial IEP team meeting, including at least one general education teacher of the child (if the child is or may be participating in the general education environment).

Kansas statute, at K.S.A. 72-3429 (e), states that the regular education teacher of the child shall participate in the development of the IEP of the child, as a member of the IEP team, including the determination of appropriate positive behavioral interventions, supports, and other strategies and the determination of supplementary aids and services, program modifications, and support for school personnel. The general education teacher in the private school would meet the requirement for a general education teacher.

### **Investigative Findings**

Nine students at the private parochial school are receiving special education services from the special education teacher currently assigned to the school by the district. During the 2020-21 school year, an annual IEP review had been conducted for eight of these nine students at the time this complaint was filed.

In preparation for the annual IEP review for four students, the special education teacher sent emails to the students' general education teachers asking for input regarding classroom performance. According to the special education teacher, she did not receive many responses to her requests.

The complainant and the district state that the complainant did not want the special education teacher to solicit teacher input via email. According to the complainant, she wanted the special education teacher to meet with the SIT to plan for annual reviews. However, it was the position of the district – the employer of the special education teacher – that confidential IEP information should not be shared with staff members who were not a part of the student's IEP Team.

The director and assistant director of the cooperative met with the complainant to discuss how best to solicit teacher input, and the decision was made to have the special education teacher create a form for the purpose. The parties agreed that a Google Forms document could be used.

Beginning in January 2021, in preparation for the annual IEP review for five students, the special education teacher began implementing the Google Forms document. The form sent to general education teachers included the following questions:

- How do you feel this student is doing in your class?
- What are his/her strengths?
- What areas of weakness do you notice?
- Do you have any additional concerns you'd like to share?
- How is the student responding to the accommodations and modifications they are receiving?
- Are there specific accommodations that you feel the student is no longer in need of?
- Does he/she get along well with his peers?
- Do you have any behavioral concerns?

Input from general education teachers for each of the nine students served by the special education teacher follows:

Student #1: An IEP Team meeting for the student was held on December 3, 2020. The section of the IEP developed at that meeting entitled "IEP Meeting Participants" shows that a general education teacher participated in person in the meeting. The "Current Performance" portion of the "Present Levels of Academic Achievement and Functional Performance" section of the IEP includes the following statements:

- His classroom teacher states that he is able to keep up with the work in ELA class but he does need more guidance than the other students. He is able to keep up in Social Studies if she chunks the assignments for him.
- His classroom teacher states that he often has difficulty completing assignments but is doing better with the para in the classroom to help him stay focused and review the concepts with him.

Student #2: Email evidence provided by the district shows that the special education teacher reached out to the student's general education teacher in preparation for the upcoming annual IEP review and was responsive to the teacher's suggestion for an in-person meeting.

An IEP Team meeting for the student was held on December 14, 2020. The section of that IEP developed at that meeting entitled "IEP Meeting Participants" shows that a general education teacher participated "in person" in the meeting. The "Present Levels of Academic Achievement and Functional Performance" section of the IEP includes the following statements:

- (The) classroom teacher stated that he has shown great improvement in his reading skills and is becoming a more independent reader.
- (The) classroom teacher feels he is becoming more confident in his reading ability.
- (The) classroom teacher reported that he is doing well in his other subject areas and showed improvement on his Fast Bridge assessment since the beginning of the year.

Student #3: Each of three general education teachers for this student completed a Student Information Form providing input on the student's classroom performance in preparation for the annual IEP review.

An IEP Team meeting for the student was held on January 7, 2021. The section of the IEP developed at that meeting entitled "IEP Meeting Participants" shows that a general education teacher participated virtually in the meeting. The

“Present Levels of Academic Achievement and Functional Performance” section of the IEP includes the following statement:

- Her Art teacher expressed that (the student) is doing well in class overall and asks questions when needed. However, she can be inconsistent in her performance. She completed her last project in class exceeding the standards, but she is struggling with her current research project. Her Technology teacher expressed that she is doing well for the most part but sometimes lacks focus becoming talkative and can be inconsistent with her performance. Her Social Studies/Religion teacher expressed that she is doing well and asks questions when needed.

Student #4: An IEP Team meeting for the student was held on September 28, 2020. The section of that IEP developed at that meeting entitled “IEP Meeting Participants” shows that two general education teachers participated virtually in the meeting. The section of the IEP entitled “Student Strengths” contains the following statement:

- His teacher reported that (the student) is very good with his hands and likes to fix things. He enjoys working with his hands-on materials in the classroom to help him learn. He likes structure, order and routine in the classroom. Whenever a volunteer is needed, (the student) is the first to volunteer, he loves to help and please adults. (The student) has really good verbal skills and tries really hard every day.

The “Social/Emotional” portion of the IEP states that the student’s teacher “completed the Behavioral Assessment for Children, 3<sup>rd</sup> Edition (BASC-3) in September of 2020.”

Student #5: Two general education teachers of the student completed Student Information forms in preparation for an annual review of the student’s IEP.

An IEP Team meeting for the student was held on February 16, 2021. The section of the IEP developed at that meeting entitled “IEP Meeting Participants” shows that a general education teacher participated virtually in the meeting. The “Current Performance” portion of the “Present Levels of Academic Achievement and Functional Performance” section of the IEP includes the following statement:

His teacher stated that he does grasp things well if he can stay focused and has shown improvement this year. Some days, he can count to 20 with no prompting, and other days he doesn't want to try. His classroom teacher stated that he struggles with one-to-one correspondence when counting for her. She also stated that he has difficulty blending sounds together. He is unable to generate words that begin with a targeted letter sound but he can tell you what sound a word begins with. He is beginning to learn his sight words, and has passed the first group of 10 words. His sentences are still a bit choppy and difficult to understand when he speaks. His struggles with correct letter formation which leads to frustration.

Student #6: Four of the student's teachers completed the Student Information Form in preparation for an annual review of the student's IEP.

An IEP Team meeting for the student was held on January 25, 2021. The section of the IEP developed at that meeting entitled "IEP Meeting Participants" shows that two classroom teachers participated virtually in the meeting. The "Student Strengths" section of the IEP includes a statement reflecting that "his classroom teacher reported that he is motivated to learn and has good listening comprehension skills." The "Present Levels of Academic Achievement and Functional Performance" section of the IEP includes the following statements:

- His classroom teachers reported that he is motivated to learn and has good listening comprehension skills as well as good vocabulary skills.
- (The student's) teachers reported that he appears to be performing at his best level in class. He complies with classroom rules and participates [sometimes reluctantly] in class. (The student) enjoys hands-on learning, tries hard, and follows through on tasks. He shows pride in his successes. (The student) lacks confidence and struggles with comprehension and fluency.

Student #7: An IEP Team meeting for the student was held on December 16, 2020. The section of the IEP developed at that meeting entitled "IEP Meeting Participants" shows that two classroom teachers participated in person in the meeting. The "Present Levels of Academic Achievement and Functional Performance" section of the IEP includes the following statement:

Her General Education teachers reported that she is also doing well in Science and Social Studies at her grade level with the accommodations

she has been receiving including have the text read aloud and directions rephrased for her.

Student #8: Five general education teachers completed the Student Information Form in preparation for the annual review of the student's IEP. An IEP Team meeting for the student was held on March 23, 2021. The section of the IEP developed at that meeting entitled "IEP Meeting Participants" shows that two "classroom teachers" participated in person in the meeting. The student's "general education teacher" also participated in the meeting in person. The "Present Levels of Academic Achievement and Functional Performance" section of the IEP includes the following statement:

In Science, her teacher states that she does well when the teacher reads longer sections aloud and breaks things down for her into more manageable chunks.

The district provided numerous emails from the special education teacher to general education teachers wherein the special education teacher solicited input in preparation for upcoming annual IEP review meetings.

Student #9: Two general education teachers completed the Student Information Form in preparation for the annual review of the student's IEP.

The annual IEP review meeting for this student had not been conducted at the time this complaint was filed.

### **Summary and Conclusions**

Between the start of the 2020-21 school year and date this complaint was filed on April 1, 2021, at least one general education teacher was present at the annual IEP review for each of eight special education students served by the special education teacher assigned to the private school. Evidence was provided by the district to show that input from general education teachers was solicited by the special education teacher prior to each of these annual IEP reviews. Prior to the beginning of the second semester, emails were sent to general education teachers asking for feedback on student performance. Beginning in January 2021, a form was distributed to general education teachers using a Google Doc format. Each IEP reviewed between the start of the school

year and April 1, 2021 contains elements specifically attributed to general education teachers.

While the complainant preferred that the SIT forum be used to plan and prepare for IEP annual reviews, there is no requirement in special education statutes and regulations for the special education teacher to do so. On the contrary, the IEP Team is the group with designated responsibility for the planning and development of a student's IEP, not a SIT.

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

### Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

### Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). The written notice of appeal may be emailed to [formalcomplaints@ksde.org](mailto:formalcomplaints@ksde.org) or may be mailed to the address below. Such notice of appeal must be delivered to KSDE within 10 calendar days from the date of this report.

Dispute Resolution Coordinator  
Kansas State Department of Education  
Special Education & Title Services  
900 SW Jackson St., Suite 602

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



Diana Durkin  
Complaint Investigator

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

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

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

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
\_\_\_\_\_ PUBLIC SCHOOLS, USD #\_\_\_\_  
ON APRIL 23, 2021

DATE OF REPORT: MAY 21, 2021

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Tammy Somogye, Counsel for the district, on May 4, 2021. On May 11 and 12, 2021, the investigator spoke by telephone with the parent. The investigator spoke by telephone with \_\_\_\_\_, Director of Special Services for the district, on May 14, 2021. On May 18, 2021, the investigator spoke in separate telephone calls with the following people:

- \_\_\_\_\_, Speech and Language Pathologist;
- \_\_\_\_\_, the student's classroom teacher; and
- \_\_\_\_\_, special education teacher.

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

- Email dated October 28, 2020 from the parent to the student's classroom teacher and the building principal
- Email exchange dated November 2, 2020 between the parent and the speech and language pathologist
- Email exchange dated November 4, 2020 between the parent and the building principal
- Email dated November 6, 2020 from the parent to the student's classroom teacher

- Email dated November 11, 2020 from the student's classroom teacher to the parent
- Email exchange dated November 12 and 13, 2020 between the parent and the classroom teacher
- Email dated December 10, 2020 from the speech and language pathologist to the parent
- Report of an evaluation by Children's Therapy Services conducted on December 10 and 15, 2020
- Email dated January 3, 2021 from the parent to the school counselor, school psychologist, building principal, and the student's classroom teacher
- Email dated January 4, 2021 from the school psychologist to the parent
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated January 4, 2021
- Email exchange dated January 6, 2021 between the parent and the student's classroom teacher
- Report of an Academic Language-Reading Evaluation through Children's Mercy dated March 4, 2021
- Notice of Meeting dated March 22, 2021
- Evaluation/Eligibility Report dated April 6, 2021
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated April 6, 2021
- Email dated April 7, 2021 from the parent to the building principal, school counselor, and the student's classroom teacher
- Email exchange dated April 7 and 8, 2021 between the parent and the speech and language pathologist
- Email dated April 13, 2021 from the parent to the school counselor
- Receipt for 504 Notice of Parent and Student Rights dated April 13, 2021
- Notice to Conduct a 504 Evaluation dated April 13, 2021
- 504 Staffing Notes dated April 13, 2021
- IEP Minority Report dated April 15, 2021
- Meeting notes dated April 15, 2021
- Email exchange dated April 22, 2021 between the parent and the superintendent
- 2020-21 Grade Report for the student

### Background Information

This investigation involves a 7-year-old student who is enrolled in the 2nd grade in her neighborhood elementary school.

In August of 2020, the student began weekly 60-minute sessions with a private reading tutor hired by the student's parents. Beginning in December 2020, the parents scheduled twice weekly private sessions at Children's Therapy Services. One session is devoted to reading instruction and the second session focuses on the student's speech skills.

According to the parent, the move to Kansas was the first for the student, and the stress of the move was compounded by changes in the daily routine related to the coronavirus. In January of 2021, the student was referred by her parents for a psychological evaluation because of anxiety. She was diagnosed with Adjustment Disorder on January 19, 2021.

The family will be transferring to Maryland at the end of June 2021. The parent reports that the student is excited about a return to familiar surroundings.

### Issue

In her complaint, the parent raised the following issue:

**Issue One: The district denied an IEP for the student despite two outside diagnoses (dyslexia and phonological articulation disorder) and delays in speech that are impacting her reading.**

### Parent's Position

The parent asserts that by using grade level standards as the basis for refusal to provide special education services to the student under an IEP, the district failed to consider other critical factors. The parent contends that the student is successfully progressing through the general education curriculum only because she is receiving significant support outside the school day through private tutoring in reading and speech and because the parent herself spends considerable time working with the student on reading and spelling skills. It is the position of the parent that while the student is currently able to counteract the impact of stealth dyslexia by relying on strong compensatory skills, dyslexia is keeping her from "working up to her full potential."

In a telephone conversation with the investigator on May 11, 2021, the parent stated that she is currently most concerned that because speech-related Tier 2 interventions have been discontinued, the student's speech delays are no longer being addressed.

The parent contends that the district has failed to recognize the severity of the student's articulation deficits and the impact of those deficits on the student's classroom performance.

#### District's Position

The district asserts that staff timely responded to the parent's requests, considered the outside evaluation reports provided by the parent, and conducted a legally compliant initial evaluation of the student to determine the student's eligibility and need for special education services.

It is the position of the district that the law does not require that a school district maximize a student's potential and that medical diagnoses do not guarantee eligibility for special education services.

#### Applicable Statutes and Regulations

Child find in Kansas involves a screening process for children from birth to age 5, and a general education intervention process for children from age 5 through age 21 (K.A.R. 91-40-7(b)(1) and (2)). Schools in conjunction with parents use these processes to locate, evaluate, and identify children who may need special education and related services.

In Kansas, a school district may refer a child for an evaluation if the implementation of general education interventions (GEI) indicate that an evaluation is appropriate or if data indicates that GEI would be inadequate to address the areas of concern for the child (K.A.R. 91-40-7(c)(1)-(2)). The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into evaluation for special education. This GEI process is not required before conducting an evaluation if the parent requests and gives written consent for an evaluation and the school district agrees that an evaluation of the child is appropriate (K.A.R. 91-40-7(c)(3)).

Kansas encourages schools to use a school-wide, multi-tiered model of support for all children. In Kansas, this is supported through the Multi-Tier System of Supports (MTSS) which includes both academic and behavior supports. The following briefly explains the multi-tiered aspect of the school-wide approach:

Tier 1: All children receive a core instructional program that uses a scientifically validated curriculum that is provided for all students. Schools choose curricula that have evidence of producing adequate levels of achievement (i.e., research-based), and instruction is differentiated within the core to meet a broad range of student needs. Therefore, interventions are provided via the general curriculum. Universal screening of all children to monitor progress and to identify children who may need additional support is conducted. Approximately eighty percent of children in the school will be successful in the general curriculum.

Tier 2: Those children who do not respond to the core instructional procedures will receive targeted group interventions in addition to core instruction. More frequent measures of progress monitoring are used to collect child progress data. Approximately fifteen percent of children in the school will need targeted (supplemental) support.

Tier 3: A few children receive intensive, individualized interventions. These may be in addition to, or instead of, the supports provided in Tier 1 and Tier 2 depending on the needs of the child. Interventions will be more intensive and delivered in more substantial blocks of time. Approximately five percent of children in the school will need this kind of intensive support.

Within a MTSS depicted above, children will receive GEI as a part of the system in place for all students. Data collected at each tier should guide school personnel as to the next steps to take based on the child's response to interventions tried.

When a parent requests the school district to evaluate their child for special education eligibility, the school district must provide the parent with a Prior Written Notice (PWN) either proposing to conduct the evaluation or refusing to conduct the evaluation (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.503(a)(1)-(2)). If the school district refuses to conduct the evaluation, the PWN must explain, among other things, why the school district refuses to conduct the evaluation and the information that was used as the basis to make that decision (K.A.R. 91-40-26(a); 34 C.F.R. 300.503(b)); 71 Federal Register, Aug. 14, 2006, p.46636). If the school district proposes to conduct the evaluation, the PWN must describe, among other things, any evaluation procedures the school proposes to conduct (K.S.A. 72-3428(b); 34 C.F.R. 300.304(a)). Before conducting the initial evaluation, the district must first obtain the informed written consent of the parent(s) (K.S.A. 72-3428(a)(5); K.A.R. 91-40-27(a)(1) and K.A.R. 91-40-1(l); 34 C.F.R. 300.300(a)(1)(i) and 34 C.F.R. 300.9).

The Office of Special Education Programs (OSEP), which is the office within the United States Department that writes and implements the federal IDEA regulations, has stated the following regarding the requirement to provide the parent a PWN when a request for evaluation is made:

If a request for an evaluation has been made, the LEA [school district] must respond to the request through prior written notice, which includes among other content, an explanation of why the agency proposes or refuses to take the action. If the LEA believes an evaluation is not necessary because the child is not suspected of having a disability, it must issue written notice to the parent explaining why it is refusing to evaluate the child.... [R]eferring a child for screening after a request for an evaluation has been made ... does not alleviate the public agency's responsibility to issue a prior written notice. Letter to Mills, 74 IDELR 205, (OSEP 2019).

As part of the evaluation, if appropriate, the team of individuals responsible for conducting the initial evaluation shall review existing evaluation data, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers' observations (K.S.A. 72-3428(i); K.A.R. 91-40-8(c); 34 C.F.R. 300.305(a)(1)).

The evaluation team for a child suspected of having a specific learning disability (which includes dyslexia) would include:

- the parents of the child;
- not less than one regular education teacher of the child;
- not less than one special education teacher or special education service provider;
- a representative of the district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of the district's resources;
- an individual who can interpret the instructional implications of evaluation results;
- at least one person qualified to conduct individual diagnostic examinations of children, including a school psychologist, speech-language pathologist, or remedial reading teacher; and
- at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child (K.S.A. 72-3404(u); K.A.R. 91-40-11(a); 34 C.F.R. 300.321; 34 C.F.R. 300.308).

Kansas has established a 60 school-day timeline within which the initial evaluation must be completed (K.A.R. 91-40-8(f)). The timeline for conducting the initial evaluation starts upon receipt of written parental consent to conduct the evaluation and ends with the implementation of an IEP if the child is found eligible for special education services, or completion of the evaluation report if the child is not found eligible for special education services (K.A.R. 91-40-8(f)).

An initial evaluation involves the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to assist in determining if the child is eligible for special education. The team shall not use any single measure or assessment as the sole criterion for determining whether a child is an exceptional child (K.S.A. 72-3428(b)(2)).

At the time the evaluation is completed and information is compiled, the team must make the determination of special education eligibility for the student using a two-pronged test: (1) whether the child is a child with an exceptionality (disability or giftedness); and (2) by reason thereof, has a need for special education and related services (K.A.R. 91-40-1(k) and (w) and K.A.R. 91-40-10(a); 34 C.F.R. 300.306(a)).

K.A.R. 91-40-1(ooo) and 34 C.F.R. 300.8(c)(11) define a speech or language impairment as “a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child’s educational performance.” In a guidance document entitled Kansas State Department of Education (KSDE) Eligibility Indicators (most recently updated in December, 2020), the department provides guidance to evaluation teams as they seek to address eligibility decisions regarding a student’s need for special education services. The section of the document labeled “Speech or Language Impairment” states that in determining whether or not a student has a speech/language exceptionality, an evaluation team must determine that:

- 1) the student’s voice, fluency, speech sounds, or language skills are not commensurate with age appropriate expectations, **and**
- 2) that the student exhibits stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects educational performance.

In a case where a specific learning disability is being considered, K.A.R. 91-40-11 and 34 C.F.R. 300.309 require that the evaluation team may only determine that the child has a specific learning disability if all of the following are met:

- 1) the student is not achieving adequately for the student's age or at a level wherein he/she meets State-approved grade-level standards when provided with appropriate learning experiences and instruction; **and**
- 2) (a) the student is not making sufficient progress to meet age or State-approved grade-level standards when using a process based on the student's response to scientific, research-based intervention; **or**  
 (b) the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development; **and**
- 3) The determinate factor for why the student does not achieve adequately for his/her age or does not make sufficient progress to meet age or State-approved grade level standards, or exhibits a pattern of strengths and weaknesses, is not primarily the result of:
  - a visual, hearing, or motor disability;
  - intellectual disability;
  - emotional disturbance;
  - cultural factors;
  - environmental or economic disadvantage; or
  - limited English proficiency.

K.S.A. 72-3428(b)(4) states that "in determining whether a child has a specific learning disability, [the district shall] not be required to take into consideration whether the child has a severe discrepancy between achievement and intellectual ability, and may use a process that determines if the child responds to scientific, research-based intervention as part of the child's evaluation." Also see 34 C.F.R. 300.307(a).

The presence of a disability, such as dyslexia, does not in and of itself qualify a student for special education. In the absence of evidence to demonstrate the disability results in a need for specially designed instruction in order to make appropriate progress in the general education program, the student is not eligible for special education under the Individuals with Disabilities Education Act (IDEA) (See M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016); also see L.J. v. Pittsburgh Unified Sch. Dist., 850 F.3d 996 (9th Cir. 2017), and Legriz v. Capistrano Unified Sch. Dist., 77 IDELR 289 (C.D. Cal. 2020)).

A written report of the findings of the evaluation team must be developed (K.A.R. 91-40-10(a)(1) and (e); 34 C.F.R. 306(a)(2) and 300.311(a)). Each member of the evaluation team must certify in writing whether the report reflects that member's conclusion. If the report does not reflect that member's conclusion, the team member shall submit a

separate statement presenting the member's conclusion (K.A.R. 91-40-10(a)(2); 34 C.F.R. 300.311(b)). The district must provide the parent with a copy of the evaluation report (K.A.R. 91-40-10(b); 34 C.F.R. 300.306(a)(2)).

### Investigative Findings

#### Chronology:

On October 28, 2020 – the day before scheduled parent teacher conferences – the parent sent an email to the student's classroom teacher and the building principal asking that they "initiate a referral for a special education screening/evaluation" for the student. In her email, the parent states:

[The student] is continuing to struggle in school, especially with reading and writing. Her Star tests were low last year and I believe they are still low this year. Her older sister...has a phonological awareness disorder. [The student] is exhibiting similar signs, i.e. writing certain letters and numbers backward, difficulty with rhyming, not wanting to read longer stories, guessing words by using pictures but getting it wrong, etc. I recognize how critical 2<sup>nd</sup> grade is for a student, and I want to make sure [the student] is getting the help she needs now. Please let me know the next steps.

The parent and classroom teacher discussed the parent's request the following day during their conference. The classroom teacher agreed to refer the student for a speech and language screening and to have the student retake her STARS test.

The speech and language pathologist and the parent exchanged emails on November 2, 2020. According to the parent's email, she "signed the document giving approval for [the speech and language pathologist] to evaluate [the student]." The speech and language pathologist responded that she had received a "consent to screen" form that would allow the pathologist to look at the student's "articulation and overall language. Following the screener, interventions will be provided. If [the student] isn't making progress in communication with those interventions, then a formal communication evaluation will be made."

In the November 2, 2020 email, the speech and language pathologist told the parent that she expected to conduct the screening "by the end of next week." She asked the parent to identify her primary concerns. The parent responded that she was "more worried about [the student's] vocabulary, not her articulation. She struggles with figuring out words that she should know...She also struggles with writing...I have also

seen her read numbers incorrectly...I don't necessarily see issues with her articulation. However, with her mask on it can be hard to understand her because she speaks fast."

On November 4, 2020, the building principal called the parent to discuss the parent's request for evaluation. In that conversation, the parent agreed with the principal's proposal to move ahead with the speech/language screening as well as the referral of the student to the building Student Intervention Team (SIT). Following their telephone conversation, the principal sent an email to the parent to confirm that:

...you are no longer requesting a comprehensive special education evaluation. You are asking that [the classroom teacher] bring [the student] up to our Student Intervention Team [SIT] to discuss possible interventions for [the student]. You have also signed consent for a communication screener to be conducted by our speech pathologist.

The parent responded via email on November 4, 2020 stating that she was "happy with the plan for [the student] to be evaluated by [the speech and language pathologist] and for her to be brought to SIT."

The parent was not provided with prior written notice that the district would not be moving ahead with the evaluation.

The parent sent an email to the student's classroom teacher on November 6, 2020 asking, in part, whether the teacher could share with her the results of the student's STAR reading test.

On November 11, 2020, the classroom teacher sent an email to the parent regarding the referral of the student to the SIT stating:

The team has met and discussed her progress as well as her Star test scores. At this time, we will keep the current classroom accommodations in place and will continue to monitor her. Please let me know if you have any questions.

In an email dated November 12, 2020, the parent acknowledged that she was aware that the student would not be "getting anything else from SIT at this time. However, is [the speech and language pathologist] going to still do the speech evaluation?" The classroom teacher responded on November 13, 2020, writing "Yes ma'am."

On December 10, 2020, the speech and language pathologist sent an email to the parent regarding interventions she would be providing to the student. According to the email, the pathologist would work with the student and a classmate on the “/th/” and “/s/” sounds for 15 minutes on Tuesdays and Thursdays from 12:15 to 12:30. Tier 2 intervention sessions were to begin the week of December 14, 2020 and continue after the district’s winter break. The pathologist also wrote that she had invited the student to her Google classroom and would “add things for her to work on.”

On December 10 and 15, 2020, the parent took the student for private speech evaluation at Children’s Therapy Services. While reporting a number of assessment results within normal limits, the evaluators reported that significant difference between the student’s receptive vocabulary and her phonological processing and word recognition scores were consistent with “stealth dyslexia, a condition where individuals manage to acquire WNL [within normal limits] phonological awareness and orthographic awareness that is nonetheless not up to their learning potential.” The evaluators also stated that the student could be “twice exceptional (2e), indicating above average learning ability with concomitant relative weaknesses in phonological awareness and literacy...” The evaluators reported that this designation was “best diagnosed by a child/educational psychologist or psychiatrist to fully evaluate [the student’s] learning strengths and weaknesses as well as her potential for ADHD.”

On January 3, 2021, the parent sent an email to the school counselor, school psychologist, building principal, and the student’s classroom teacher providing a copy of the report from the outside evaluation. The parent again requested a referral for “special education screening/evaluation.”

The school psychologist sent an email to the parent on January 4, 2021 stating that the “SIT process will continue to support [the classroom teacher] with accommodations to help [the student] during our official evaluation. I will reach out to you over the phone to review the consent for evaluation paperwork and process later today.” The school psychologist subsequently contacted the parent by telephone on January 4, 2021.

On January 4, 2021, the parent provided written consent for the district to conduct its evaluation. However, as the parent stated in her complaint, she felt that the school psychologist did not believe the school would “find anything,” so the parent scheduled an evaluation of the student at a hospital clinic.

The parent sent an email to the classroom teacher on January 6, 2021, informing the teacher that she and the student’s father had “concerns about [the student’s]

emotional behavior at home for a while. Certain concerning behaviors have started to manifest more over the last few months. Based on our concerns, we are taking [the student] to see a children's behavior psychologist." The parent asked the teacher to complete a form that the parents would take to the doctor. The parent also asked the teacher for information regarding the classroom interventions being provided to the student.

The classroom teacher responded to the parent's request on January 6, 2021, stating that she would have the paperwork completed for the student to take home on January 11, 2021. The teacher also provided a list of the accommodations being provided to the student. Those accommodations included:

- preferred seating;
- extra time;
- wait time;
- check-ins (check for understanding);
- direct instruction (one-to-one help when needed);
- reading aloud any/all work, quizzes, and tests;
- leveled readers;
- work on sight words and fluency;
- interventions from the speech and language pathologist (beginning in December 2020).

In the January 6, 2021 email, the classroom teacher stated that she also planned to work on consonant diagraphs and "CVCC" and "CCVC" words beginning on January 11, 2021.

The parent-initiated "Academic Language-Reading Evaluation" of the student by the hospital clinic was conducted on March 4, 2021. The evaluation report included the following "Impressions:"

- Oral Structure & Function: Adequate for speech
- Voice: Within normal limits
- Fluency: Within normal limits
  - Comments Regarding Fluency: It was observed that the student is a fast talker and is encouraged to reduce her rate of speech in order to improve her communication with others
- Resonance: Within normal limits
- Articulation/Phonology Impression: Mild-moderate disorder

- Comments for Articulation/Phonology: Informal observation revealed articulation errors: voiceless th/s, voiced th/z, f/voiceless th, v/voiced th. stimulable for correct production of sounds in isolation, syllables and words
- Recommendation: Continue speech therapy as determined by the treating speech-language pathologist
- Receptive Language: Above normal limits
- Expressive Language: Above normal limits
- Pragmatic Language: Within normal limits
- Phonological Processing: Mild phonological memory deficit
  - Phonological Processing Comments: Results were provided through testing conducted at [a private agency] in December 2020
- Reading: Given findings from this evaluation, a diagnosis of dyslexia is appropriate
- Reading Areas Identified as at Risk: Phonological awareness, phonological memory, sight word reading, phonemic decoding, word reading accuracy, word reading rate, spelling regular words, spelling irregular words

The student was given diagnoses of dyslexia and mild-moderate articulation disorder. The evaluation report stated:

“...it is recommended that the school district review these test results and recommendations to assist in determining if the student meets the criteria for eligibility for an IEP with accommodations or a 504 Plan for services to improve her literacy, handwriting, and articulation skills...The family was counseled that in order for these services to be provided through the school district that their child needs to qualify based on the state guidelines and that the determination for these services is done through the school district.”

The district completed its evaluation of the student and, on March 22, 2021, gave the parent written notice that a meeting would be held via Zoom on April 6, 2021 to review the results of that evaluation. All required participants were present. The parent participated in the meeting as did the student’s classroom teacher, a special education teacher, a school psychologist, an occupational therapist, a speech and language pathologist, the building principal, a parent advocate from Families Together, Inc., and a military Exceptional Family Member Program (EFMP) representative.

During the April 6, 2021 evaluation/eligibility meeting, the parent asked whether the district would be willing to provide the student with a 504 Accommodation Plan. The building principal told the parent that she would need to submit a written request for a 504 plan. The parent submitted her written request via email to the building principal, the school counselor, and the student's classroom teacher on April 7, 2021.

At the conclusion of the evaluation team meeting, the parent was provided with prior written notice that the district would not be finding the student eligible for special education and related services under an IEP. The parent was also provided with a copy of the Evaluation/Eligibility Report.

On April 7, 2021, the parent sent an email to the speech and language pathologist asking follow-up questions about the pathologist's interventions with the student and the progress made by the student during the time the interventions had been in place. The speech and language pathologist responded via email on April 8, 2021, writing that she had been working with the student since late November 2020, "providing [Tier II] interventions one to two days a week."

According to the April 8, 2021 email, the classroom teacher had reported that the student did not correctly produce the sounds of "/s/" and "/th/" while reading. Screening results collected by the pathologist in November 2020 confirmed that the student did have "some difficulties" with the production of these sounds. The speech and language pathologist wrote:

The interventions that I was providing would help to improve those productions during oral reading tasks as well as conversational speech. The interventions were Tier 2 interventions, where [the student] and another classmate received 10-15 minutes of help for their articulation. I continued to provide those interventions during her comprehensive evaluation, I also used some of her intervention days to complete her communication assessment.

The pathologist reported that she had seen progress when she worked with the student "on drill and practice," giving the student targeted sounds in a sentence which the student was to repeat five times. In these settings, the student was able to produce the "/th/" sound with 96% accuracy in the initial position of words at the sentence level and 87% accuracy in the final position of words at the sentence level. The pathologist wrote:

In determining whether [the student] would be eligible for speech therapy, the team must look at educational need. Although [the student] scored below normal limits on portions of her assessment, the data showed that the articulation errors were not impacting her in the classroom. Peers and staff members are able to understand [the student's] needs and wants; they are able to have a conversation with [the student] with no difficulty understanding her. At times articulation errors have been noted during her oral reading. However, the team must look at her overall performance including academic work samples and intelligibility (i.e., during class discussions, group projects, etc.). The data did not support an educational need for direct specialized instruction for school speech therapy.

[The student's] rate of speech can impact her intelligibility when she speaks too quickly. When she slows down she does have the ability to produce the correct speech sounds. As we discussed in the eligibility meeting, I can provide [the student] with a visual aid that [the classroom teacher] can help her use to slow down her speech rate in class. She is performing on level with her peers and I am proud of the progress [she] has made.

A meeting was held to discuss the parent's request on April 13, 2021. At the meeting, the parent was told that a 504 evaluation would be required. The parent was provided with documents related to the 504 evaluation. Notes from the meeting reflect that the parent "expressed that [the student] is performing on grade level now but may not be able to compensate in the future." The parent presented accommodations that she wanted for the student.

On the evening of April 13, 2021, the parent sent an email to the school counselor, copying the superintendent of schools, the building principal, the classroom teacher, and the director for special education stating that she had provided consent for the 504 evaluation. In her email, the parent commented on the notes of the earlier 504 meeting and attached a list of accommodations she wanted to see in a 504 plan for the student. The parent also reiterated her disagreement with the district's decision not to provide special education services to the student under an IEP.

On April 15, 2021, the parent submitted to the district a document entitled "IEP Minority Report." The document outlined areas of disagreement with the special education evaluation report developed by the district. In her complaint, the parent stated that "even though [the parent understood that the student] is meeting grade standards, grades are not the only measure of educational impact. Educational impact

should include academics, social, emotional, and functional influences of the school day.”

A Zoom meeting was held on April 15, 2021. Participants included the superintendent, the parent, and the EFMP representative who had previously participated in the April 6, 2021 evaluation/eligibility meeting. According to notes from that meeting taken by the EFMP representative, the superintendent told the parent that he would ask the Director of Special Services to look into the parent’s concerns.

On April 22, 2021, the parent sent an email to the superintendent inquiring about the status of the director’s investigation regarding the parent’s concerns. The superintendent responded that the director had been reviewing the evaluation report and notes from the eligibility team meeting and would be setting up a Zoom meeting to share her thoughts and answer questions the parent might have related to special education and 504 plans. That meeting was held on April 29, 2021.

#### Evaluation: Areas assessed, participants, and assessment instrument

The Evaluation/Eligibility Report shows that the team considered the following areas:

- Health, Physical/Motor;
- Social/Emotional;
- General Intelligence;
- Academic Performance; and
- Communication.

The following assessment tools were specified in the evaluation report:

- Woodcock-Johnson IV Cognitive Abilities Test;
- District STAR Progress Monitoring in Reading and Math;
- Woodcock-Johnson Tests of Achievement, 4<sup>th</sup> Edition;
- Test of Word Reading Efficiency, 2<sup>nd</sup> Edition;
- Word Identification and Spelling Test;
- The Gray Oral Reading Tests, 5<sup>th</sup> Edition;
- The Oral and Written Language Scales, Second Edition;
- easyCBM;
- CORE Reading Assessment;
- San Diego Quick Assessment;
- Goldman-Fristoe Test of Articulation, 3<sup>rd</sup> Edition;

- Peabody Picture Vocabulary Test, 4<sup>th</sup> Edition;
- Comprehensive Test of Phonological Processing, 2<sup>nd</sup> Edition;
- Clinical Evaluation of Language Fundamentals, 5<sup>th</sup> Edition;
- Arizona Articulation and Phonology Scale, Fourth Edition; and
- Speech Sound Production Severity Rating Scale.

Assessments were conducted by the following individuals:

- district Occupational Therapist;
- district School Psychologist;
- three outside agency Speech and Language Pathologist;
- district Special Education teacher;
- district Speech and Language Pathologist; and
- the student's classroom teacher.

The parents were interviewed and provided additional input.

Evaluation: Health, Physical, Motor

The student passed screenings for hearing and vision (with glasses). No significant health problems were noted.

The Occupational Therapist (OT) who screened the student found that when given a mechanical pencil and a pencil grip for writing tasks, the student used those tools successfully. The OT determined that while the student demonstrated some irregularities in letter formation, her "overall written work output is functional for the classroom setting."

Evaluation: Social/Emotional

The parents reported that while the student was making "A's" in all subjects, the student:

struggles to read at home...quickly gives up and refuses to read the page...loses focus when reading a lot of content or if the subject is not in her interest." The parents also reported that the student struggles to "write beyond basis [sic] sentences and has a hard time figuring out what to write when asked questions related to certain passages...is not motivated, cannot control her anger, seems stressed/on edge, worries a lot, doesn't

finish things...refuses to talk about problems, can't seem to concentrate or make decisions...has low self-esteem.

The student's teacher reported that at school the student "has typical peer relationships...is well-liked...plays well with others...[and] actively participates in daily lessons." The teacher noted that "self-confidence is sometimes of concern, but she is eager to learn."

#### Evaluation: General Intelligence

The student demonstrated high average intelligence.

#### Evaluation: Academic Performance

On the district, computer-adaptive STAR test in the area of reading, the student scored at the 47th percentile on the fall 2020 assessment and at the 62nd percentile on the winter 2021 assessment. On STAR math measures, the student scored at the 81st percentile in the fall and at the 82nd percentile on the winter assessment.

The student's grades at the time of the evaluation team meeting were "A-" in reading, "A" in math, and "B" in writing.

According to the W-J IV Tests of Achievement, the student performed in the average range in the area of "broad reading" with a Standard Score (SS) of 98, in the average range on "broad math" with a SS of 106, and in the average range in "broad written language" with a SS of 101.

The student's score on the Written Language portion of the Oral and Written Language Scales, Second Edition (OWLS-II) was in the average range with a SS of 96. The student's writing was observed as being "legible, but notably sloppy."

For the winter easyCBM assessment designed to measure benchmark progress in reading and math in the second-grade curriculum, all of the student's scores were in the average or above average range. The student scored at the 70th percentile on the winter benchmark CCSS Math assessment. Her score on the CCSS Reading assessment was at the 92nd percentile. Her score on Word Reading was at the 37th percentile. On the Winter benchmark for Passage Reading Fluency, her score was at the 55th percentile. She scored at the 64th percentile on the Winter benchmark Vocabulary assessment and at the 55th percentile on the Winter benchmark Passage Reading Fluency assessment. In the area of Writing, the student's three CCSS samples also fell in the average range for students in the middle of second grade.

According to the student's classroom teacher, the student had been given Star assessments, computer-adapted tests that measure reading, math, and early literacy skills. The teacher reported that the student scored at the 82nd percentile in math and at the 62nd percentile in reading. As compared to her class peers, the student performed on grade level in reading, spelling, social studies, and science and was above grade level in writing and math. The classroom teacher reported that the student completed classwork in a timely manner and completed and returned homework on time.

The student was given the CORE Reading Assessment designed to assess specific skills critical to being successful in reading.

On the San Diego Quick Assessment related to high frequency words at various grade levels, the student scored as independent for levels Pre-primer through grade 2 and instructional for grade 3.

The Test of Word Reading Efficiency-2 was administered by an outside evaluator in December 2020. That test measures how accurately and fluently sight words and phonemically regular nonwords can be read. Skills related to both sight words and phonemic decoding were determined to be within normal limits. Using a "discrimination model" between test scores, the evaluator determined that the student demonstrated characteristics consistent with "stealth dyslexia."

The Word Identification and Spelling Test was administered by an outside evaluator in March 2021 to assess fundamental literacy skills. The student's performance on this measure fell below expected levels for students in second grade.

In March 2021, the student was given the Gray Oral Reading Tests, 5<sup>th</sup> Edition, by an outside evaluator and performed in the average range on all areas.

The student's classroom teacher reported that, when general education accommodations are provided, the student is successful. Those accommodations include seating near instruction, checking for understanding, permission to read aloud to herself, reading aloud to the student, reading tracker/transparency, preferred seating, extra time for work completion, additional wait time, and direct instruction/intervention (one-on-one help) when needed. The student completes classwork in a timely manner and completes and returns homework on time. Her teacher rates the student's performance as "on grade level" in Reading, Spelling, Social Studies, and Science as compared to class peers. The student performs above grade level in

Writing and Math. According to the teacher, the student appears happy at school, follows the daily class routine.

#### Evaluation: Communication (Articulation)

The student's classroom teacher stated that she has no concerns about the student's receptive language. However, the teacher reported that the student's speech sound production errors appear to have an impact on her reading and spelling but notes that "when she slows down to sound things out, [the student] has more success with spelling."

In December 2020, an outside evaluator administered the Goldman Fristoe Test of Articulation, 3<sup>rd</sup> Edition. The student scored at the 2<sup>nd</sup> percentile, "below normal standards." According to the outside evaluator, the student was considered to exhibit "developmental speech errors" with minimal stimulability for correcting those errors. In March of 2021, a different outside evaluator called the student's articulation disorder "mild-moderate" and noted that the student was stimulable for correct production of sounds in isolation, syllables and words.

The Arizona Articulation and Phonology Scale, Fourth Edition, administered by the district speech and language pathologist, assessed the student's articulatory proficiency. Only the word articulation subtest of this assessment was administered. The student scored at the 3<sup>rd</sup> percentile and demonstrated distortion or substitution errors on the following phonemes:

- distortion of /sh/ and /s/ in the initial position of words; and
- substitution of /th/ (voiceless) in initial and final positions of words; /z/ in initial and final positions of words; /s/ and /z/ blends in initial and final positions of words.

For example, the student responded "fum" for thumb, "mouf" for mouth, "thipper" for zipper, "houth" for house, "th-teps" for steps, and "book-th" for books. The student's articulation is characterized by having not only a frontal lisp but also a lateral lisp. Distortion errors in connected speech sound "slushy" or "fuzzy" and often occur in the production of /s/ and /sh/. The student's overall articulation is below normal limits and commensurate with a moderate delay. However, the intelligibility of the student's connected speech was judged to be good to an untrained listener.

The district speech and language pathologist also administered an informal rubric designed to determine the level of speech impairment in the general education classroom. The student's score on the district's Speech Sound Production Severity

Rating Scale placed her 18 months below developmental norms. However, intelligibility in connected speech was judged to be between 94 and 100% accurate. When assessing the educational impact of her articulation errors, the student was meeting all grade level and State standards, with Tier 2 support. The student does not avoid verbal communication in the general education setting. While the student is observed by her teacher to make numerous speech sound errors throughout the school day, her speech is understood with little effort. An occasional request for repetition is required. The results of this assessment reflect a mild severity rating with no documented evidence of adverse effects of speech sound production on overall educational performance.

At the time of the evaluation team meeting, the student was receiving Tier 2 interventions from the district speech and language pathologist for misarticulation of /th/ for "f." The student was able to produce /th/in all positions at the sentence level with 96% accuracy.

#### Evaluation: Communication (Language Development)

The student's score on the Peabody Picture Vocabulary Test, 4<sup>th</sup> Edition, administered by an outside evaluator in December 2020 placed the student in an above average range.

All subtest scores of the Clinical Evaluation of Language Fundamentals, 5<sup>th</sup> Edition, administered by the district speech and language pathologist on February 19, 2021 fell within normal limits. This assessment provided an overall assessment of the student's communication, looking at receptive and expressive language modalities as well as language content and structure. This test was re-administered by an outside evaluator on March 4, 2021 and scored at a higher level though the increase could be attributed to the student's familiarity with the test. Results were considered to be within normal limits as compared to age-matched peers.

#### Evaluation: Communication (Phonology)

The student was assessed by outside evaluators in December 2020 using the Comprehensive Test of Phonological Processing-2, a measure designed to identify children with phonological processing deficits. In December 2020, the student's composite scores on that instrument were in the low average to high average range.

#### Evaluation: Eligibility Determination:

After reviewing all the information specified in the evaluation report, the evaluation team determined that the student had a disability, noting that the student "has been

diagnosed with Dyslexia, which is considered a Specific Learning Disability per the Kansas Administrative Regulations 91-40-1.” However, the team determined that the student did not “need special education and/or related services” because, “according to multiple measures including classroom progress monitoring, [the student] is performing within the Average range in all academic areas.” Therefore, the team determined that the student was not eligible for special education.

Additional Comments:

As a part of this investigation, the investigator spoke with the student’s classroom teacher as well as the speech and language pathologist and special education teacher who participated in the evaluation of the student.

The student’s classroom teacher stated that she did not feel that the student needed special education in order to access the general education curriculum. Fourth quarter grades for the student are “A” in math and writing and “B+” in reading. According to the teacher, the student has made good progress throughout the year in the regular second-grade curriculum with no modifications. The teacher reports that the student has responded well to visual, verbal and physical cues to slow her rate of speaking. Charts on the student’s desk and on the board have been used to reinforce an appropriate speech rate. While the student does make some spelling errors that mirror her articulation errors, the student has improved in her ability to self-correct those errors, and they have not impacted the readability of written work for either the teacher or the student. The student demonstrates no hesitancy in speaking in the classroom. She is often observed to select the longest section of text when volunteering to read aloud. She recently had the role of narrator in a class play, a part that had more lines than the parts played by many of her classmates. The student is successful socially and was recently selected as “class president” in a writing activity for the class.

The speech and language pathologist stated that she did not believe that the student needed special education services to be successful in the classroom. During the time that Tier 2 Interventions were provided, the student was observed to make gains in the correct production of the /th/ sound. According to the speech and language pathologist, the student’s articulation errors were not impacting her progress or performance.

When asked about the student’s scores on CORE reading assessments conducted during the student’s initial evaluation, the special education teacher stressed that these tests assess mastery of skills that are expected to be in place by the end of the

second-grade year. While the student's scores indicated that she had not mastered a number of skills in January 2021, the special education teacher stated that she did not believe that the student's miscues were impacting her day-to-day classroom performance. The special education teacher has had continued opportunity to observe the student while in the classroom working with other students. According to the special education teacher, the student is showing growth in areas that were of concern during the period of time that the CORE assessments were completed. The special education teacher states that, as would be expected, the student has gained skills that were not in place in January 2021.

### Summary and Conclusions

The district responded in a timely fashion to the parent's initial request in October 2020 that the student be evaluated to determine eligibility for special education services. The parent and the district agreed to table the request for evaluation and to refer the student to the building-level SIT. The building principal sent the parent an email summarizing the discussion he and the parent had regarding the parent's request but the district did not provide the parent with legally compliant prior written notice (PWN) in response to the evaluation request. The district put general education accommodations in place, and initiated Tier 2 speech and language interventions. When, after having the student evaluated by an outside agency, the parent requested that the district move ahead with an evaluation, the district again responded in a timely fashion and, after obtaining the written consent of the parent, conducted the evaluation.

The district's evaluation was multi-sourced and included input from the parent, classroom teacher, school psychologist, occupational therapist, and special education teacher. Input from three outside evaluators was considered. A variety of assessment tools and strategies were utilized to gather relevant functional, developmental, and academic information. The student's grades and classroom performance were considered as was the student's response to Tier 2 interventions.

The evaluation was completed within mandated timelines, and a meeting was held to review the results of the evaluation. All required participants were present. The team determined that the student had a disability because she had been diagnosed with dyslexia - listed under K.A.R. 91-40-1(mmm) and 34 C.F.R. 300.8(c)(10) as a "Specific Learning Disability." However, the team found no indication that either the student's dyslexia or her articulation delays resulted in a need for specialized instruction in order for the student to access and make progress in the general education curriculum. The

team determined that the student was progressing in the general education curriculum and achieving State-approved grade level standards. The student was earning good grades, responding well to general education interventions, participating actively in classroom discussions, and interacting very successfully with classmates.

The district provided the parent with a copy of the evaluation report and provided written notice that the student did not meet both of the two-pronged requirements in K.A.R. 91-40-1(k) and 34 C.F.R. 300.308(a)(1) needed for the team to establish that the she was eligible for special education.

Under the circumstances described above, a violation of special education statutes and regulations is not substantiated with regard to the determination by the district that the student was not eligible for special education and related services under an IEP. However, because the district did not respond to the parent with prior written notice regarding the decision not to move ahead with for a special education evaluation of the student when the parent made her initial request for evaluation in October 2020, a violation has been identified.

### Corrective Action

Information gathered in the course of this investigation has established noncompliance with special education statutes and regulations. Specifically, a violation has been identified with regard to K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a)(1)-(2) which require the district to provide a parent who has requested a special education evaluation of his/her child prior written notice either proposing or refusing to conduct that evaluation.

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

- 1) Submit to Special Education and Title Services (SETS), within 40 days of the date of this report, a written statement of assurance stating that it will comply with K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a)(1)-(2) by providing to a parent who has requested a special education evaluation of his/her child prior written notice of the district's proposal or refusal to conduct the evaluation.
- 2) a) Within 40 days of the date of this report, the principal of the student's school shall contact Tiffany Hester, Dispute Resolution Coordinator for SETS at [thester@ksde.org](mailto:thester@ksde.org), to obtain training materials regarding the requirement to

provide PWN in response to a parental request for a special education evaluation.

b) Within 45 days of the date of this report, the principal of the student's school shall submit to SETS a signed attestation stating that he has reviewed these training materials. The attestation shall include the date the materials were reviewed.

3) Within 45 days of the date of this report, the principal of the student's school shall complete and submit to SETS a post-training survey after he reviews the training as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the principal.

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

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

### Right to Appeal

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

*Diana Durkin*

Diana Durkin, Complaint Investigator

Appeals:

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

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

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

(A) The issuance of an accreditation deficiency advisement;

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

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

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_  
\_\_\_\_\_ Public Schools: 21FC\_\_-001

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced with the filing of a complaint on April 23, 2021, by \_\_\_\_\_, on behalf of her daughter, \_\_\_\_\_. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on May 21, 2021. That Complaint Report concluded that a violation of special education statutes and regulations was not substantiated with regard to the school district's evaluation and determination that the student was not eligible for special education and related services under an Individualized Education Program (IEP). Through the course of the investigation, the complaint investigator did find a procedural violation because the school district failed to provide the parent with a Prior Written Notice (PWN) when it refused the parent's first request to conduct an evaluation of the student.

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the district's evaluation/eligibility report and the two outside evaluation reports, the investigator's Complaint Report, the notice of appeal, and the district's response to the parent's notice of appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

### PRELIMINARY MATTER

Scope of Review on Appeal: Kansas Administrative Regulation (K.A.R.) 91-40-51(f)(1) provides, "An 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.... Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Thus, the Appeal Committee limits its inquiry to the issues investigated in the Complaint Report and challenged in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report issued on May 21, 2021. The Appeal Committee

does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions made in the Complaint Report.

### DISCUSSION OF ISSUE ON APPEAL

ISSUE: The district denied an IEP for the student despite two outside diagnoses (dyslexia and phonological articulation disorder) and delays in speech that are impacting her reading.

The Complaint Report, dated May 21, 2021, addressed one issue, above, raised by the parent in her complaint, and the investigator did not substantiate violations of special education laws with regard to that issue. However, as stated in the background section above, the complaint investigator uncovered a procedural violation for failure to provide a PWN in response to the parent's request. On appeal, the parent does not address the PWN violation, but disputes the Complaint Report's conclusion that a violation of special education statutes and regulations was not substantiated with regard to the school district's evaluation and determination that the student was not eligible for special education and related services under an IEP. The Appeal Committee will address only those findings and conclusions in the Complaint Report that the parent disputes, the findings and conclusions not in dispute are sustained.

The parent presents three arguments as a basis for alleging the Complaint Report's findings and conclusions are incorrect. The Appeal Committee considers each argument in turn below:

#### *1. The investigator did not fully investigate the complaint.*

First, the parent states that her "appeal is based on the investigator not fully looking into the complaint. She only interviewed three people at [the school]. She didn't speak with the school principal [ ], or school psychologist [ ], both of which were team members on [the student's] IEP evaluation. Additionally, the investigator didn't speak with the two outside professionals (Children's Therapy Services and Children's Mercy Hospital) who evaluated [the student]. If the investigator would have spoken with Kaitlin White, [the student's] outside SLP at Children's Therapy Serviced [*sic*], Ms. White would have provided a different opinion." [Notice of Appeal, page 1].

Kansas Administrative Regulation (K.A.R.) 91-40-51(c) states that "Upon receipt of a complaint, an investigation shall be initiated. At a minimum, each investigation shall include the following: (1) A discussion with the complainant during which additional information may be gathered and specific allegations of noncompliance identified,

verified, and recorded; (2) contact with the agency against which the complaint is filed to allow the agency to respond to the complaint with facts and information supporting its position, offer a proposal to resolve the complaint, or offer to engage in mediation to resolve the complaint....”

The investigator had a discussion with the complainant (the parent) on May 11 and 12 [Complaint Report, page 1]. The investigator contacted the school district in multiple ways: a phone call on May 4 with the district’s counsel on May 4; a phone call on May 14 with the district’s Special Education Director; and a phone call on May 18 with the district’s speech language pathologist, general education teacher, and special education teacher who were part of the evaluation and eligibility team for the student [Complaint Report, page 1]. The Appeal Committee finds that nothing in K.A.R. 91-40-15(c) dictates which school staff the investigator must contact, nor does it require the investigator to contact outside parties other than the complainant and the agency against which the complaint is filed.

Further, the Appeal Committee finds that conversations with the principal, school psychologist, and the two outside providers were not necessary in order for the investigator to gather information about their opinions and conclusions on the student’s eligibility, nor would these conversations have changed the findings and conclusions in the Complaint Report. The investigator reviewed the school district’s evaluation report, the Children’s Mercy (CM) evaluation report, and the Children’s Therapy Services (CTS) report – each of which contained input from the people who were not interviewed. The district’s evaluation report has a signature page that includes the principal’s and school psychologist’s signatures indicating that they agree that the student is not eligible because she does not need special education. A second signature page in the district’s evaluation report indicates “by signing, participants acknowledge their participation in the discussion, as specified above, for the [ ] student...” Both the principal and school psychologist also signed this page. The two outside evaluations provided the investigator with the opinions of those evaluators, including Kaitlin White who signed the CTS evaluation report.

For the foregoing reasons, the Appeal Committee concludes that the investigator followed the proper procedures required by K.A.R. 91-40-15(c) in conducting the investigation.

*2. The eligibility determination is biased because the school psychologist “prejudged the outcome of the evaluation.”*

Second, the parent states that the Complaint Report is inaccurate where it states on page 11, “as the parent stated in her complaint, she felt that the school psychologist

did not believe the school would ‘find anything,’ so the parent scheduled an evaluation of the student at a hospital clinic.” On appeal, the parent argues:

I didn’t “feel that.” [The school psychologist] actually said she didn’t think they would find anything in the evaluation. She said they would do the evaluation just because I asked for it. As I wrote in my complaint, during that Jan. 4 phone call with [the school psychologist], “she asked me if I was receiving services from Children’s Therapy Services. When I said yes, she inferred the only reason they gave me the diagnosis was because I was sending [the student] there for therapy.” [The school psychologist], who oversaw the entire evaluation, prejudged the outcome of the evaluation from the start; thus, biasing the findings. [Notice of Appeal, page 1]

Even assuming the school psychologist made these statements, the Appeal Committee finds no evidence that the alleged statements impacted the eligibility determination or the findings and conclusions in the Complaint Report; nor is there any evidence that the school psychologist exerted any bias or pressure in the eligibility meeting. The Appeal Committee finds no evidence in the Complaint Report or the evaluation report itself that the results of the assessments administered by the school psychologist were impacted by these alleged statements made prior to the evaluation. Further, the school psychologist was one of seven people who made up the group of individuals that determined eligibility. All of their views were represented in the school district’s evaluation/eligibility report, and all of the school staff members in the group signed to indicate agreement with the conclusions specified in the report. In addition to the evaluation/eligibility documentation, further evidence described in the Complaint Report reflects the views of other group members. The Complaint Report quotes an April 8, 2021 email (which was two days after the eligibility determination) from the district’s speech and language pathologist (SLP) to the parent that states:

In determining whether [the student] would be eligible for speech therapy, the team must look at educational need. Although [the student] scored below normal limits on portions of her assessment, the data showed that the articulation errors were not impacting her in the classroom. Peers and staff members are able to understand [the student’s] needs and wants; they are able to have a conversation with [the student] with no difficulty understanding her. At times articulation errors have been noted during her oral reading. However, the team must look at her overall performance including academic work samples and intelligibility (i.e., during class discussions, group projects, etc.). The data did not support an educational need for direct specialized instruction for school speech therapy... She is

performing on level with her peers and I am proud of the progress [she] has made. [Complaint Report, page 15]

The Complaint Report also describes an interview that the investigator conducted with the student's classroom teacher, the SLP, and the special education teacher who all participated in the evaluation and eligibility determination. Each of these individuals in turn explained the reasons why they did not believe that the student needs special education [see Complaint Report, pages 22-23].

Further, the Appeal Committee notes that, again assuming the school psychologist made the aforementioned alleged statements, the law permits members of teams formed for the purpose of making evaluation and eligibility decisions, as well as IEP decisions, to engage in preparatory activities to develop or respond to a proposal that will be discussed later at a meeting [see 34 C.F.R. 300.501(b)(3)]. In *T.W. by McCullough and Wilson v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 136 F. App'x 122, 43 IDELR 187 (10<sup>th</sup> Cir. 2005), the Tenth Circuit Court of Appeals stated:

Certainly, it is improper for an IEP team to predetermine a child's placement, and then develop an IEP to justify that decision. See *Spielberg ex rel. Speilberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4<sup>th</sup> Cir. 1988). This does not mean, however, that district personnel should arrive at the IEP meeting pretending to have no idea whatsoever of what an appropriate placement might be. "Spielberg makes clear that **school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind.**" *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd*, No. 92-2313, 1994 WL 592686 (4<sup>th</sup> Cir. Oct. 31, 1994). [*Emphasis added.*]

For the foregoing reasons, the Appeal Committee concludes that even if the school psychologist made the statements alleged, those statements were opinions expressed as part of lawful preparatory activities and there is no evidence to suggest that the statements biased the eligibility determination.

*3. The investigator failed to address contradictory statements in the district's evaluation report about the student's speech/language challenges and their impact on her reading, writing and spelling.*

Third, the parent highlighted several excerpts from the district's evaluation report to argue that the report included "contradictory statements" and "inconsistencies." [Notice of Appeal, pages 1-3]. These highlighted excerpts focused on the speech and language portions of the evaluation report. The parent then concluded, "Based on this data, it is apparent that [the student] should have been given an IEP from [the elementary school]." [Notice of Appeal, page 3]. In a June 1 email sent to the Dispute

Resolution Coordinator for the Kansas State Department of Education (KSDE) after the Notice of Appeal was filed, the parent stated, "I am not sure if I was clear in my appeal letter, but I am most concerned that [the student] needs an IEP to provide speech services. I believe her dyslexia can be addressed for now with accommodations in the IEP."

In essence the parent argues that the investigator should have concluded - based on these "contradictory statements" and "inconsistencies" in the district's evaluation report - that the district improperly determined that the student did not need special education speech services (prong two of the eligibility test).

The parent argues on appeal that certain contradictory and inconsistent statements in the district's evaluation report indicate that the student has articulation errors that impact her reading, writing and spelling. [Notice of Appeal, page 1-3]. In response, the district points out that the two private evaluations also contained contradictory statements and argues:

It is not abnormal for various assessments, observations and interviews to generate conflicting information. Many factors influence assessment results.... Ultimately, all of the information must be examined to determine whether there is an educational need [emphasis in original]. That is, whether the student currently needs special education services to access the general education curriculum.... The IEP Team's decision and [the investigator's] conclusions about the IEP team's decision are supported by the evidence.... The results of the assessment reflected a mild severity rating with no documented evidence of adverse effects of speech sound production on overall educational performance [emphasis in original]. Without educational impact, no special education services can be provided. [District Response to Notice of Appeal, pages 3-4].

The district is correct that all of the information collected during the evaluation must be examined to determine need for special education services. The regulation that sets forth the procedures for determining eligibility and educational need requires, "In interpreting evaluation data for the purpose of determining if a child is a child with a disability and the educational needs of the child, each public agency must draw upon information from a variety of sources... and ensure that information obtained from all of these sources is documented and carefully considered." [34 C.F.R. 300.306(c)(1)(i)-(ii)]. Determining that a child needs special education services based on only certain statements in an evaluation report and ignoring the rest would not meet this standard.

The Appeal Committee follows the guidance of the Office of Special Education Programs (OSEP) within the United States Department of Education, which is that in reviewing a complaint challenging an eligibility determination, a State Education Agency (KSDE) should determine whether the eligibility team reached a determination that is consistent with the requirements of law and “reasonably supported” by the evaluation data. [*Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSEP July 23, 2013)].

The law requires that in order for a child to be eligible for an IEP, the child 1) must be evaluated as having one or more of the thirteen disabilities listed in the Individuals with Disabilities Education Act (IDEA) AND 2) must, by reason of the aforementioned disability, need special education services. If the child does not meet both of these requirements (prongs), then the child is not considered to be a “child with a disability” under the IDEA and is not entitled to receive special education and related services under an IEP. [34 C.F.R. 300.8(a)].

In this case, there is no dispute among the parties that the student has one of the thirteen disabilities listed in the IDEA (prong 1 of the eligibility test). At issue here is whether by reason of the disability the student needs special education services (prong 2 of the eligibility test). The IDEA statute and the regulations implementing the statute do not explain how to determine whether a child “needs special education services”; thus, this specific issue has been litigated at length in the courts. Case law provides the following standards for what it means to need special education [boldface added for emphasis]:

- *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69 (1<sup>st</sup> Cir. 2016): “[A] **child who needs only accommodations or services that are not part of special education** to fulfill the objective of the need inquiry **does not ‘need’ special education.**”
- *William V. v. Copperas Cove Indep. Sch. Dist.*, 774 F. App’x 253, 74 IDELR 277 (5<sup>th</sup> Cir. 2019): “[W]here **a child** is being educated in the **regular classrooms** of a public school **with only minor accommodations** and is **making educational progress**, the child **does not ‘need’ special education** within the meaning of the IDEA. [citing the Supreme Court in *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)]
- *D.L. by J.L. and A.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App’x 733, 70 IDELR 32 (5<sup>th</sup> Cir. 2017): “[W]e consider whether there was a **present need** for special education services.... **A fear that a student may experience problems in the future is not by itself a valid basis for IDEA eligibility.**” [Reiterated in *Lisa M. ex rel. J.M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 74 IDELR 124 (5<sup>th</sup> Cir. 2019)].
- *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 107 LRP 26108 (9<sup>th</sup> Cir. 2007): “...[I]t is appropriate for courts to **determine if a child classified as non-disabled**

is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard [from *Rowley*]... [The parents] assert that the law guarantees a learning-disabled child of superior ability enough individualized attention and services to elicit **optimum performance** from the child, when **clearly no such requirement exists** for children without disabilities, gifted or not.” [Reaffirmed in *C.M. by Jodi M. v. Department of Educ., State of Hawaii*, 476 App’x 674, 58 IDELR 151 (9<sup>th</sup> Cir. 2012); also see *L.J. by Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 117 LRP 6572 (9<sup>th</sup> Cir. 2017) stating “Even if a child has such a disability, he or she **does not qualify for special education services if support provided through the regular school program is sufficient.**”]

- *Dubrow v. Cobb County Sch. Dist.*, 887 F.3d 1182, 72 IDELR 1, (11 Cir. 2018): “The purpose of a FAPE, in part, is to ensure access to the general curriculum so that the child can meet educational standards. 34 C.F.R. 300.39(b)(3)(ii). A student is therefore **unlikely to need special education if**, inter alia: (1) the **student meets academic standards**; (2) **teachers do not recommend special education** for the student; (3) the student **does not exhibit unusual or alarming conduct** warranting special education; and (4) the student demonstrates the **capacity to comprehend course material.**”

With these requirements of law in mind, the Appeal Committee finds upon review of the evidence and the Complaint Report that the eligibility team, and the investigator, reached a determination that is reasonably supported by the comprehensive evaluation data and based on the correct legal standard. While evaluation data certainly indicate that the student has deficits in articulation, and that some of those deficits impact her reading, writing, and spelling, these facts do not translate to a need for special education services. Children are not qualified to receive services under the IDEA simply because they have some deficits that impact educational performance. Nor are special education services used for the purpose of maximizing potential or preventing problems that may or may not occur in the future. When evaluation data show a child has a communication disorder that adversely affects educational performance, that is indicative that the child may have a “speech or language impairment” as that term is defined in the IDEA, and thus meets the first prong of the eligibility test [see 34 C.F.R. 300.8(a), (b)(11); Kansas State Department of Education Eligibility Indicators, Version 5.5, page 45]. However, the analysis does not stop there. Eligibility teams must then determine, as the eligibility team did here, whether the educational impact caused by the speech or language impairment is so great that the child cannot access and make **appropriate progress** in the general curriculum without the support of special education services. To put it another way, the evaluation data

must show that despite implementing general education interventions and accommodations, the impact of the child's speech or language impairment is still so great that the child's rate of learning, performance and development is significantly less than peers. [See Kansas State Department of Education Eligibility Indicators, Version 5.5, pages 4-5 and 46]. This is the second prong of the eligibility test.

In this case, the Appeal Committee finds that the totality of the evaluation data reasonably support a conclusion that the student has articulation errors that impact her educational performance (prong 1), but this impact is not so severe that it is interfering with or disrupting her ability to be included at school, to be socially and emotionally supported at school, to have good peer relationships at school, or to make adequate progress in the classroom with the support of general education interventions and accommodations (prong 2).

As stated in the Complaint Report:

[T]he team found no indication that either the student's dyslexia or her articulation delays resulted in a need for specialized instruction in order for the student to access and make progress in the general education curriculum. The team determined that the student was progressing in the general education curriculum and achieving State-approved grade level standards. The student was earning good grades, responding well to general education interventions, participating actively in classroom discussions, and interacting very successfully with classmates. [Complaint Report, pages 23-24].

These are all proper indicators which reasonably support the district's determination that the student does not need special education services at this time.

### CONCLUSION

The Appeal Committee concludes that the Complaint Report should be and is sustained. This is the final decision on this matter. There is no further appeal.

This Appeal Decision is issued this 22nd day of June, 2021.

APPEAL COMMITTEE:

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Brian Dempsey

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Laura Jurgensen

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Bert Moore

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Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON MAY 3, 2021

DATE OF REPORT JUNE 2, 2021

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Public Schools). In the remainder of the report, USD #\_\_ may be referred to as the "school," the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on May 3, 2021. The KSDE allows for a 30-day timeline to investigate the child complaint, which ends on June 2, 2021.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on May 5 and May 7, 2021 as part of the investigation; however, it is noted that the parent did not respond to a request for an additional interview on May 17, 2021. On May 18, 2021, USD #\_\_ made the following persons available to participate in an interview:

- \_\_\_\_ \_\_\_\_\_, Assistant Director of Special Education
- \_\_\_\_ \_\_\_\_\_, Principal of \_\_\_\_ \_\_\_\_\_ Elementary School
- \_\_\_\_ \_\_\_\_\_, Special Education Coordinator
- \_\_\_\_ \_\_\_\_\_, School Psychologist
- \_\_\_\_ \_\_\_\_\_, Case Manager for the student and Special Education Teacher

In completing this investigation, the Complaint Investigator reviewed documentation provided by both the parent and the LEA. The following materials were used as the basis of the findings and conclusions of the investigation:

- Initial Evaluation / Eligibility Report dated May 22, 2012
- Individualized Education Program (IEP) dated February 13, 2020
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent (PWN) dated February 13, 2020
- IEP Amendment dated September 18, 2020
- PWN dated September 18, 2020
- Notice of Meeting dated January 12, 2021 for an IEP team meeting on February 11, 2021 at 2:00 p.m. via Zoom
- PWN dated February 10, 2021
- IEP dated February 11, 2021
- Email exchange dated February 26, 2021 between the parent and Ms. \_\_\_\_\_ [case manager and SPED teacher]
- Screenshots of text messages between Ms. \_\_\_\_\_ [case manager and SPED teacher] and the parent dated between March 22, 2021 and April 26, 2021
- 2020-21 School District Calendar for USD #\_\_
- Enrollment History for the student during the 2020-21 school year
- The student's weekly schedule showing arrival at 8:40 a.m. and dismissal at 3:55 p.m.
- Speech-Language Attendance Summary for the 2020-21 school year
- Logs for \_\_\_\_\_, Physical Therapist, dated between August 28, 2020 and May 14, 2021
- Response Records for Cortical Visual Impairment: Advance Principals dated between September 17, 2020 and May 6, 2021
- Occupational Therapy (OT) Daily Progress Notes dated between February 16, 2021 and May 11, 2021
- Email dated May 19, 2021 from \_\_\_\_\_, School Nurse, to Dr. \_\_\_\_\_ [Asst. Dir. of SPED]
- Email dated May 19, 2021 from \_\_\_\_\_, Certified Orientation and Mobility Specialist, to Dr. \_\_\_\_\_ [Asst. Dir. of SPED]

- Email dated May 19 2021 from \_\_\_\_\_, Teacher of Students with Visual Impairments, to Dr. \_\_\_\_\_ [Asst. Dir. of SPED]
- Parent Allegations dated April 30, 2021 and received by KSDE on May 3, 2021
- USD #\_\_ Response to the Allegations dated May 13, 2021
- Written statement from Ms. \_\_\_\_\_ [case manager and SPED teacher] dated May 18, 2021
- Email dated May 19, 2021 from Dr. \_\_\_\_\_ [Asst. Dir. of SPED] to the investigator
- Email response dated May 27, 2021 from Ms. \_\_\_\_\_ [case manager and SPED teacher] to the investigator

### **Background Information**

This investigation involves an eleven-year-old male student who is enrolled in the sixth grade at the \_\_\_\_\_ Elementary School in USD #\_\_. The student has multiple disabilities including hemiplegic cerebral palsy, cortical visual impairments, developmental delays, traumatic brain injury, and emotional/behavioral disorders. The student received early intervention services and was initially evaluated by USD #\_\_ at the age of three for early childhood special education services. The most recent reevaluation of the student was conducted on February 11, 2021 and the multidisciplinary team determined that the student continued to be eligible for special education and related services under the exceptionality category of Multiple Disabilities. Interviews and documentation showed the student has continuously received special education and related services at \_\_\_\_\_ Elementary School in USD #\_\_ since kindergarten.

### **Issues**

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance with special education laws that occurred not more than one year from the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-51(b)(1)). In this case, KSDE received the mother's written complaint on May 3, 2021 and the investigation will cover the one-year time frame beginning on May 3, 2020 and ending on May 3, 2021.

Based upon the written complaint and an interview, the mother raised two issues that were investigated.

**ISSUE ONE:** USD #\_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the in-seat special education services during the 2020-21 school year.

### **Positions of the Parties**

The parent alleges the student's placement and services were changed when USD #\_\_\_ moved the student from the Life Skills special education classroom to the teacher's office on April 26, 2021. The parent believes USD #\_\_\_ was failing to provide the appropriate special education services which increased the student's inappropriate behaviors in the school setting as the student was transitioning back to in-person instruction after almost a year of remote learning. The parent reported that no behavior interventions or functional behavioral analysis (FBA) were attempted prior to the student being removed from his life skills classroom.

The parent indicated the result of the change in placement and services meant the student would be "sitting in a teacher's office down the hall from the life skills classroom all day until the end of the school year." She was concerned that while the student would still get his therapy services, he would spend his day under the supervision of two paraprofessionals. The parent stated, "The two paras that are to sit with him while he is in the teacher's office, are not going to educate him, because they are NOT certified credited educators. So all they will be doing is babysitting my son. This is not going to help him at all. He will be isolated from people and treated like he is not welcomed in the PUBLIC SCHOOL."

The parent acknowledged that she selected the remote learning option for school attendance at the beginning of the 2020-21 school year and reported no concerns with the provision of the student's special education and related services during remote learning. However, once the student transferred back to in-person learning on March 22, 2021, the parent believes the student's inappropriate behavior frustrated

school staff who responded by isolating him from his peers after just five weeks at school.

USD #\_\_ indicated that special education and related services were provided to the student during the 2020-21 school year as described in the September 25, 2020 IEP amendment and the February 11, 2021 IEP due to the family selecting remote learning for their instructional delivery model. School staff indicated the services changed when the parent decided to move the student to in-person instruction beginning on March 22, 2021.

At that time, the student was provided special education and related services as described in both the current February 11, 2021 IEP and the February 13, 2020 IEP. Ms. \_\_\_\_\_'s [case manager and SPED teacher] email dated May 27, 2021 explained:

With the student's return to school happening after writing the new IEP, we used this IEP [February 11, 2021 IEP] as much as possible but it was written with his transition to middle school in mind and because of this, we used the 20-21 IEP [February 13, 2020] for some of the elementary level minutes. Had the student been in person while the new IEP was being written, those minutes and services would have remained the same.

These services continued until April 26, 2021 when the parent returned the student to remote learning for the remainder of the school year.

### **Findings of the Investigation**

Documentation and interviews show the parent chose the remote learning option for school attendance beginning on August 26, 2020.

Documentation and interviews found two IEPs in effect during the 2020-21 school year. The IEP dated February 13, 2020 was in effect at the beginning of the 2020-21 school year. This IEP required 1,385 minutes per week of specialized instruction in the special education setting, 90 minutes per week of specialized instruction in the general education setting, 30 minutes every other week of orientation and mobility services, 25 minutes per week of physical therapy (PT), 10 minutes per week of nursing services, 20 minutes twice per week of speech therapy, 20 minutes per week of vision instruction,

90 minutes per week of adapted physical education (APE), 75 minutes per day of attendant care, and 10 minutes per week of occupational therapy (OT) consult services.

The February 13, 2020 IEP was amended without an IEP team meeting on September 18, 2020. The IEP amendment and PWN are both dated September 18, 2020 and propose a change of services due to the parent's choice of remote learning as the instructional delivery model for the 2020-21 school year. The services required were 30 minutes of speech therapy twice per week; 120 minutes per week of direct special education instruction; 15 minutes per week of OT; and 15 minutes per week of vision instruction. All of the services were to be provided remotely. Both the IEP amendment and the PWN state:

The change in services and supports outlined for the child's participation in this model are temporary and will apply only until such time the child leaves the alternative option. When the child leaves the alternative option, the original set of services and supports in the IEP developed prior to the child's participation in the alternative option will resume automatically without any action of the IEP team and without any additional notice or parent consent.

The student's IEP team developed the most recent IEP on February 11, 2021. This IEP requires direct instruction delivered remotely for 120 minutes per week; OT consult services for 10 minutes per month; PT services delivered remotely for 30 minutes weekly; speech/language services delivered remotely for 30 minutes twice per week; and vision instruction delivered remotely for 20 minutes per week for the remainder of the sixth grade during the 2020-21 school year. In addition, this IEP describes the special education and related services to be provided to the student during the 2021-22 school year when he transitions to the middle school using the in-person instructional model.

The PWN describing the proposed services stated in the February 11, 2021 IEP is dated February 10, 2021. Dr. \_\_\_\_\_ [Asst. Dir. of SPED] indicated that this PWN was prepared the day before the IEP team meeting as the school team's proposal to the parent for services and placement. The "Explanation of Why the Action is Proposed" section of the PWN states:

The team considered in-person /brick-mortar educational placement, and recommend in-person services. Parents refused in-person and chose services to be delivered remotely. If at any time parents wish for the student to return to the building for services, amendments will be made to reflect services that he qualifies for.

The parent expressed her intention to return the student to in-person learning on February 26, 2021 via email communication with Ms. \_\_\_\_\_ [case manager and SPED teacher]. Ms. \_\_\_\_\_ [case manager and SPED teacher] responded to the parent's email stating, "I know for sure that the student is able to come back. We would just need time to secure a para and get things ready to meet his needs." Interviews and documentation show the student transferred to in-person learning on March 22, 2021.

Ms. \_\_\_\_\_ [case manager and SPED teacher] and the parent exchanged text messages on March 22, March 30, April 6, April 7, April 8, April 12, April 14, April 20, and April 23 regarding the student's inappropriate behavior in the classroom as he transitioned to in-person learning. These text messages document parental input in determining behavior intervention strategies to be used in the classroom to modify the student's behavior.

The parent reported and documentation shows that she received a text message from the student's special education teacher, Ms. \_\_\_\_\_ [case manager and SPED teacher], on April 26, 2021 which stated:

I wanted to let you know the plan for the student that has started today. Per my supervisor and the special education admin, the student will be in my office space for the time being. With ongoing/increasing behaviors, it has been suggested to have him in that space until we can get those behaviors minimized. We will still provide all therapies and specials in this space. He will go out to PE in the gym and will take breaks outside as well as recess. He will have two paraeducators at all times. I will also be in when possible and in accordance with my Zoom schedule and my other in-person student's schedules. This is the plan that has been given to me for now. I will let you know if/when any changes are made.

On April 26, 2021, the student’s enrollment status was changed to “returning to remote for remainder of year.”

The school district provided documentation from therapy logs, therapy schedules, and classroom schedules showing the following services were either provided or available to the student during the five weeks between March 22, 2021 and April 26, 2021 while the student was enrolled at USD #\_\_ for in-person instruction. School staff noted that the student received one-to-one direct instruction from the special education teacher for 60 minutes each day with paraeducators providing supplemental instruction and supervision under the direction of the special education teacher for the remainder of the school day. Related services were provided to the student weekly per the therapy schedule.

The elementary level minutes from the February 13, 2020 IEP were used as the basis of the services to be provided during this timeframe as district interviews indicated these were the required services to be provided to the student during in-person learning.

Special Education Service	Amount of Services Required by February 13, 2020 IEP	Amount of Services Provided	Amount of Services Not Provided
Specialized instruction in the special education setting	1,385 minutes per week	The student’s weekly schedule shows 1,595 minutes per week of specialized instruction (420 minutes per day x 5 days per week = 2,175; minus 370 minutes per week of recess/meals and 210 minutes per week of	None

		therapies/services in gen ed setting 2,175-580=1,595)	
Adaptive physical education (APE)	90 minutes per week	Student's schedule shows APE schedule between 1:30-2:00 p.m. on Mondays and Wednesdays for a total of 60 minutes per week	150 minutes (30 minutes per week for five weeks)
Specialized instruction in the general education setting	90 minutes per week	Staff reported Music and PE were provided in the general education setting as follows: PE = 2:15-2:45 on Mondays and 9:15 – 9:45 on Fridays Music = 3:00–3:45 and 9:15-9:45 on Thursdays  However, the student's schedule shows the student is provided access to these classes as follows: Music = 10:30-11 on Wednesdays and 1:45-2:15 on Thursdays	150 minutes (30 minutes per week for five weeks)

		PE=None as PE on Mondays and Wednesdays is reported to be the adaptive PE services with the life skills classroom students	
Orientation and mobility services	30 minutes every other week	30 minutes provided on 3/30 and 4/13	None
PT	25 minutes per week	25 minutes provided on 3/26, 4/2, 4/9, 4/16, and 4/23	None
Nursing services	10 minutes per week	10 minutes provided on 4/12	40 minutes
Speech therapy	20 minutes twice per week	20 minutes provided on 3/22, 3/24, 3/29, 3/31, 4/7, 4/9, 4/12, 4/15, 4/19, 4/21, and 4/26	None
Vision instruction	20 minutes per week	20 minutes provided on 3/25, 4/8, 4/15, and 4/22	20 minutes
Attendant care	60 minutes per day of non-instructional paraeducator  15 minutes per day of stretching, movement / extended practice of PT skills from non-instructional paraeducator	No documentation was provided showing the provision of attendant care Services during the in-person timeframe;	None

		however, documentation was provided that the student was supervised by two paraeducators throughout the school day who were providing supplemental instruction and supervision.	
OT consult services	10 minutes per week	10 minutes provided on 3/23, 3/30, 4/6, 4/13, and 4/20	None

**Applicable Regulations and Conclusions**

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP. In addition, Kansas regulations at K.A.R. 91-40-19(a) require each school district, teacher, and related services provider to provide special education and related services to the child in accordance with the child’s IEP.

In addition, federal regulations at 34 C.F.R. 300.324(b)(1)(ii)(D-E) require public agencies to revise the IEP, as appropriate, to address the student’s anticipated needs or other matters. These revisions may be made after the annual IEP Team meeting either by the IEP Team at another IEP Team meeting or by agreement with the parent to amend the IEP without a meeting (34 C.F.R. 300.324(a)(6)).

In this case, the parent’s allegation related to the special education and related services provided during in-person learning between the dates of March 22 and April 26, 2021. The parent initially notified school personnel of her decision to transfer the

student from the remote instructional model to the in-person instructional model on February 26, 2021. School staff acknowledged this request and indicated, “We would just need time to secure a para and get things ready to meet his needs.”

It appears that the February 13, 2020 IEP describes the special education and related services that were to be provided using the in-person instructional model in fifth and sixth grades. The September 18, 2020 amendment to the February 13, 2020 IEP describes the special education and related services that were to be provided using the remote instructional model during the sixth grade. The February 11, 2021 IEP describes the special education and related services to be provided using the remote instructional model for the remainder of sixth grade and the special education and related services to be provided in-person during seventh grade at the middle school in the 2021-22 school year.

The February 11, 2021 IEP was in effect on February 26, 2021 when the parent notified the district of her intention to return the student to in-person learning. This IEP included special education and related services based on the parent’s choice for the student to attend school remotely for the remainder of the 2020-21 school year while the student was in sixth grade at \_\_\_\_\_ Elementary School as well as the special education and related services to be provided when the student transitioned to the middle school setting using an in-person instructional model in the 2021-22 school year. The PWN for this IEP stated:

The team considered in-person /brick-mortar educational placement, and recommend in-person services. Parents refused in-person and chose services to be delivered remotely. If at any time parents wish for the student to return to the building for services, amendments will be made to reflect services that he qualifies for.

However, documentation and interviews found that when the student returned to the in-person instructional model per the parent’s request on March 22, 2021, the current IEP had not been amended or reviewed/revised to reflect in-person special education and related services.

Instead, school staff reported that the in-person services described in the February 13, 2020 were provided to the student because this IEP included a description of “the elementary level minutes”. Staff indicated that if the student had been attending school in-person when the February 11, 2021 IEP had been developed, “those minutes and services would have remained the same.”

It is noted that both the September 18, 2020 amendment to the February 13, 2020 IEP and the PWN dated September 18, 2020 state:

The change in services and supports outlined for the child’s participation in this model are temporary and will apply only until such time the child leaves the alternative option. When the child leaves the alternative option, the original set of services and supports in the IEP developed prior to the child’s participation in the alternative option will resume automatically without any action of the IEP team and without any additional notice or parent consent.

Because the parent consented to the September 18, 2020 amendment to the February 13, 2020 IEP, the parent continued to be in agreement with the level of special education and related services required for the in-person elementary level minutes as described in the February 13, 2020 IEP despite the fact that the February 11, 2021 IEP was not reviewed/revised nor amended when the student switched from remote to in-person learning. It is noted that the parent concerns in the allegation were related to services not being provided rather than to the amount and type of services provided to the student. For this reason the services in the February 13, 2020 IEP were used as the required special education and related services to be provided to the student between March 22 and April 26, 2021 for this investigation.

Documentation provided by the district showed that the student did not receive the required special education and related services described in the February 13, 2020 IEP as follows during the five weeks of in-person instruction between March 22 and April 26, 2021: 150 minutes of APE; 150 minutes of specialized instruction in the general education setting; 40 minutes of nursing services; and 20 minutes of vision instruction.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP during the period of in-person learning, specifically by not providing the required amounts of special education and related services as specified in the February 13, 2020 IEP. In addition, a violation of special education statutes and regulations is substantiated for failing to revise the IEP, as appropriate, to address the student's anticipated needs or other matters when the student transferred from the remote instructional model to the in-person instructional model during the 2020-21 school year.

Federal regulations at C.F.R. 300.156(b)(2)(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of the IDEA to be used to assist in the provision of special education and related services under this part to children with disabilities. Kansas regulations at K.A.R. 91-40-1(kkk)(2) defines "special education" as including paraeducator services, speech/language pathology services, and any other related services, if it consists of specially designed instruction to meet the unique needs of a child with a disability. The Kansas Special Education Process Handbook, Chapter 5, Section K states, "Paraeducators (paras) cannot be given responsibility for designing or be the primary person in charge of delivering classroom content."

In this case, documentation and interviews show the special education teacher was designing the specialized instruction and supervising its delivery to the student between March 22 and April 26, 2021. Based on the foregoing, a violation of special education statutes and regulations is not substantiated regarding the use of paraprofessionals for this student

**ISSUE TWO:** USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures to participate in the IEP team meeting to discuss any proposed changes and failed to provide the parent with appropriate prior written notice of proposed changes to the student's IEP.

#### **Positions of the Parties**

The parent reported that USD #\_\_ did not include her in the decision nor provide her with any prior written notice of the decision to change the student's placement from

the life skills classroom to Ms. \_\_\_\_\_'s [case manager and SPED teacher] office. She reported that she first learned of this change via a text message on April 26, 2021 which informed her of the decision of the "supervisor and special education admin".

USD #\_\_ indicated moving the student from the Life Skills classroom to the area known as Ms. \_\_\_\_\_'s [case manager and SPED teacher] office was not a change in placement but rather a change in the location of services. Ms. \_\_\_\_\_ [case manager and SPED teacher] stated:

This year there were three life skills teachers/case managers. To begin the year the three of us, along with the paraeducators and students, were all in the same rooms. We had two classrooms that we utilized regularly. All students were in both rooms throughout the day. As Covid rates began to rise, we were asked to separate the students/case managers. My teaching partners took on my in-person kids and I took on their remote learners and became the life skills remote teacher. At this point, each of my partners had a classroom with students full time. I was given classroom space that was referred to as my office because I hosted my Zoom meetings in there. As we moved through the year, I would help in both classrooms as well as host Zoom sessions with my online kiddos. I would have students from other caseloads in my classroom/office from time to time and this space was used as needed.

At the same time the student was returning to school, we got another student and this student was also added to my caseload. At this point, I had two in-person students and the rest I met with on Zoom. My situation was unique and we set up desks/areas for my in-person kiddos in the classroom (Room 116) with \_\_\_\_ \_\_\_\_ [special education teacher]. I still needed space that was quiet in order to host Zoom sessions so this worked perfectly as the kiddos were able to join \_\_\_\_'s [special education teacher] kids in the classroom throughout the day. We did use my classroom as a place for direct instruction and decompression/break time. This was a space that all of the adults and students were familiar with. The student used this space daily beginning on March 22, 2021. This room was scheduled into the student's day and the student was able to ask to go to

this room when he wanted/needed for a quieter setting and the ability to turn the light down (to help his vision and sensory needs).

### Findings of the Investigation

The findings of Issue One are incorporated herein by reference.

The student's weekly schedule documents the student regularly received special education services in different special education spaces at \_\_\_\_\_ Elementary School including "Ms. \_\_\_\_\_'s [case manager and SPED teacher] Office".

### Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.501(b)(1)(i) and (ii) require school districts to provide parents with the opportunity to participate in meetings with respect to the educational placement and the provision of a free appropriate public education (FAPE) to the student.

The Office of Special Education Programs (OSEP) clarified the difference between the terms "placement" and "location" in the *Letter to Trigg* dated November 30, 2007. This IDEA guidance letter also makes it clear that school district officials have the authority to assign and change the location where special education and related services are provided to a student with a disability so long as the placement remains consistent with the student's IEP. The letter states:

Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability and "location" as the physical surrounding, such as the classroom in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

In this case, the student received the special education and related services described in the February 13, 2020 IEP in the special education setting for the majority of his school day. Based upon interviews and documentation, it appears that the unilateral decision to change the student's classroom assignment to the space known as "Ms. \_\_\_\_\_'s [case manager and SPED teacher] Office" did not result in a change of services or placement based upon the February 13, 2020 IEP. This space is a special education setting that was regularly used by students and staff in the life skills program.

However, interviews and documentation show that the parent was not provided with the opportunity to participate in any meeting to determine the provision of FAPE when the student returned to in-person learning on March 22, 2021. As noted in Issue One, the parent informed the district of her decision to return the student to in-person learning on February 26, 2021; however, the current IEP dated February 11, 2021 was not amended nor reviewed/revised to determine the special education and related services which would provide FAPE to the student in this instructional learning model. Instead, USD #\_\_ made a unilateral decision to implement the prior IEP's "elementary level" services as the means for providing FAPE despite the PWN dated February 10, 2021 which stated, "If at any time parents wish for the student to return to the building for services, amendments will be made to reflect services that he qualifies for."

In addition, documentation shows that USD #\_\_ pre-determined the special education and related services to be offered to the student as a result of the February 11, 2021 IEP team meeting. As noted previously, Dr. \_\_\_\_\_ [Asst. Dir. of SPED] indicated that PWN dated February 10, 2021 was prepared the day before the IEP team meeting as the school team's proposal to the parent for services and placement. The "Explanation of Why the Action is Proposed" section of the February 10, 2021 PWN states:

The team considered in-person /brick-mortar educational placement, and recommend in-person services. Parents refused in-person and chose services to be delivered remotely. If at any time parents wish for the student to return to the building for services, amendments will be made to reflect services that he qualifies for.

It is noted that it is impossible for the IEP team, including the parent, to have considered and recommended in-person services and for the parent to have refused

those services prior the IEP team meeting actually taking place and those discussions happening on February 11, 2021.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parent with the opportunity to participate in meetings with respect to the provision of FAPE to the student during the 2020-21 school year.

### Corrective Action

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

- A. Federal regulations at 34 C.F.R. 300.323(c)(2) and Kansas regulations at K.A.R. 91-40-19(a) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, interviews and documentation provided by the district showed that the student did not receive the required special education and related services described in the February 13, 2020 IEP as follows during the five weeks of in-person instruction between March 22 and April 26, 2021: 150 minutes of APE; 150 minutes of specialized instruction in the general education setting; 40 minutes of nursing services; and 20 minutes of vision instruction.

- B. Federal regulations at 34 C.F.R. 300.324(b)(1)(ii)(D-E) which require public agencies to revise the IEP, as appropriate, to address the student's anticipated needs or other matters

In this case, interviews and documentation show USD #\_\_ failed to revise the student's February 11, 2021 IEP to reflect in-person special education and related services to be provided during the 2020-21 school year. The February 10, 2021 PWN stated, "If at any time parents wish for the student to return to the building for services, amendments will be made to reflect services that he qualifies for." The parent notified school district staff of her decision to return the student to in-person learning on February 26, 2021

and USD #\_\_ acknowledged this request on that same date. However, 24 calendar days later, the student's IEP had not been amended nor reviewed and revised through an IEP team meeting prior to the student returning to in-person instruction on March 22, 2021. Instead, USD #\_\_ made a unilateral decision to provide "elementary level" services based on the student's previous IEP.

- C. Federal regulations at 34 C.F.R. 300.501(b)(1)(ii) which require school districts to provide parents with the opportunity to participate in meetings with respect to the provision of a free appropriate public education (FAPE) to the student.

In this case, the parent informed the district of her decision to return the student to in-person learning on February 26, 2021; however, the current IEP dated February 11, 2021 was not amended by agreement with the parent nor reviewed/revise in a meeting by the IEP team, including the parent, to determine the special education and related services which would provide FAPE to the student in this instructional learning model. Instead, USD #\_\_ made a unilateral decision to implement the prior IEP's "elementary level" services as the means for providing FAPE to the student.

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

1. Within 40 calendar days of the date of this report, USD #\_\_ shall submit a written statement of assurances to KSDE Special Education and Title Services (SETS) stating that it will:
  - a. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) and state regulations at K.A.R. 91-40-19(a) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.
  - b. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.324(b)(1)(ii)(D-E) which require public agencies to revise the IEP, as appropriate, to address the student's anticipated needs or other matters

- c. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.501(b)(1)(ii) which require school districts to provide parents with the opportunity to participate in meetings with respect to the provision of a free appropriate public education (FAPE) to the student.
2. No later than August 31, 2021, USD #\_\_ will provide training for all staff members who provide special education and related services and supports to the student including special education teachers, related services providers, school psychologists, and LEA representatives working in the Life Skills program at \_\_\_\_\_ Elementary School on the topics of IEP implementation, IEP team meetings, and the development and revision of the IEP. USD #\_\_ must ensure this training specifically addresses the requirements for which noncompliance was identified through this investigation. No later than September 10, 2021, USD #\_\_ will provide documentation to SETS of the date of the training, the name and credentials of the trainer, the content of the training, and an attendance record with names, positions, and signatures of all staff who attended the training.
3. No later than August 20, 2021, the administration of USD #\_\_ shall complete and submit to SETS a pre-training survey for administrators before the staff are trained as ordered in Corrective Action 2. No later than September 10, 2021, the administration of USD #\_\_ shall complete and submit to SETS a post-training survey of the training as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of Special Education at USD #\_\_.
4. No later than September 10, 2021, every staff member who participated in the training ordered by Corrective Action 2 shall complete and submit to SETS a post-training survey for staff after the staff are trained as ordered in Corrective Action 2. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the Director of Special Education at USD #\_\_.

5. Because the services proposed for in-person learning at the Middle School were pre-determined prior to the February 11, 2021 IEP team meeting, no later than the first day of the 2021-22 school year, USD #\_\_\_ shall either amend the student's IEP without a meeting if the parent agrees or reconvene the student's IEP team in a meeting, including the parent, to determine the types, amounts, frequency, and duration of the special education and related services required to provide FAPE to the student during the in-person instruction provided in the seventh grade at middle school. USD #\_\_\_ must provide the parent with appropriate PWN for any changes in services or placement that are made as a result of the IEP amendment or IEP team meeting. USD #\_\_\_ must also provide SETS with a copy of the PWN reflecting the proposed changes discussed with the parent either with or without an IEP team meeting.
  
6. No later than August 31, 2021, USD #\_\_\_ shall make a written offer to the parents of compensatory services for no less than 150 minutes of adaptive PE, 150 minutes of specialized instruction in the general education setting, 40 minutes of nursing services, and 20 minutes of vision instruction to address the services that were not provided during the in-person learning phase during the 2020-21 school year. This offer must include a specific schedule for the provision of the compensatory services. The parents will have the choice to accept all, none, or a portion of the offered compensatory services. USD #\_\_\_ shall provide a copy of this written offer, including the schedule to SETS. If the parents accept all or a portion of the offer, USD #\_\_\_ shall notify SETS and the parent in writing when the compensatory services have been completed. If the parents decline the offer of compensatory services, USD #\_\_\_ shall notify SETS of that fact in writing.

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

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

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

### Right to Appeal

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

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and

a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

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

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #\_\_  
ON MAY 11, 2021

DATE OF REPORT JUNE 10, 2021

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

The complaint is against USD #\_\_ (\_\_\_\_\_ Unified Schools). In the remainder of the report, USD #\_\_ may be referred to as the "school," the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on May 11, 2021. The KSDE allows for a 30-day timeline to investigate the child complaint, which ends on June 10, 2021.

### Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent and \_\_\_\_\_, partner/boyfriend, by telephone on May 13 and May 26, 2021 as part of the investigation. On May 28, 2021, USD #\_\_ made the following staff from \_\_\_\_\_ Intermediate School (\_\_) available to participate in an interview:

- \_\_\_\_\_, Principal
- \_\_\_\_\_, Fifth Grade Classroom Teacher
- \_\_\_\_\_, Interventionist / Assistant Principal
- \_\_\_\_\_, Instructional Coach
- \_\_\_\_\_, Social Worker

In addition, the Co-Director of the Kansas Multi-Tier Systems of Support (MTSS) Alignment Project, Linda Wilkerson, and the Kansas State MTSS Trainer, Beth Clavenna-Deane, were interviewed on June 4, 2021 in order to clarify guidance provided to USD #\_\_ through the Kansas Technical Assistance System Network (TASN).

In completing this investigation, the Complaint Investigator reviewed 296 pages of documentation provided by both the parent and the LEA. The following materials were used as the basis of the findings and conclusions of the investigation:

- Fall 2020-21 FastBridge Family Report for Reading
- Fall 2020-21 FastBridge Family Report for Math
- Winter 2020-2021 FastBridge Family Report for Reading
- Winter 2020-21 FastBridge Family Report for Math
- Spring 2020-2021 FastBridge Family Report for Reading
- Spring 2020-2021 FastBridge Family Report for Math
- Curriculum-Based Measurement for Reading (CBMreading)-English Progress Monitoring Report for Fifth Grade
- Curriculum-Based Measurement for Math (CBMmath) Concepts and Applications (CAP) Progress Monitoring Report for Fifth Grade
- Quick Phonics Screener (QPS) dated April 29, 2021
- Individual Benchmark Report: CBMreading-English for school years 2018-19, 2019-20, and 2020-21
- Individual Benchmark Report: Adaptive Math (aMath) for school years 2018-19, 2019-20, and 2020-21
- Individual Benchmark Report: Adaptive Reading (aReading) for school years 2018-19, 2019-20, and 2020-21
- \_\_ Fifth Grade Reading Implementation Protocol
- \_\_ Fifth Grade Math Implementation Protocol
- Emails exchanged between the parent and Ms. \_\_\_\_\_ [social worker] dated August 28, August 31, September 1, September 4, September 9, September 10, 2020 and March 22, 2021 regarding MTSS
- Emails exchanged between the parent and Ms. \_\_\_\_\_ [fifth grade classroom teacher] dated December 15, December 16, and December 18, 2020, and January 11, March 9, and March 22, 2021 regarding MTSS
- Email written by the parent to Ms. \_\_\_\_\_ [social worker] and Ms. \_\_\_\_\_ [fifth grade classroom teacher] dated March 22, 2021 at 3:20 p.m.

- Email written by the parent to Ms. \_\_\_\_\_ [principal] dated March 23, 2021 at 3:10 p.m.
- Email written by Ms. \_\_\_\_\_ [principal] to the parent dated March 23, 2021 at 4:17 p.m.
- Email written by the parent to Ms. \_\_\_\_\_ [principal] dated March 24, 2021 at 10:33 a.m.
- Email written by Ms. \_\_\_\_\_ [interventionist/asst. principal] to the parent dated April 12, 2021 at 5:25 p.m.
- Email written by the parent to Ms. \_\_\_\_\_ [social worker] and Ms. \_\_\_\_\_ [interventionist/asst. principal] dated April 13, 2021 at 4:39 p.m.
- Email written by Ms. \_\_\_\_\_ [principal] to the parent dated April 13, 2021 at 8:40 p.m.
- Email written by Ms. \_\_\_\_\_ [principal] to the parent dated April 20, 2021 at 3:08 p.m.
- Emails exchanged between the parent and Ms. \_\_\_\_\_ [principal], \_\_\_\_\_, Director of Special Education, and \_\_\_\_\_, School Psychologist at \_\_\_\_\_ on April 15, April 27, April 28, and April 29, 2021 regarding the special education evaluation
- Email written by Ms. \_\_\_\_\_ [fifth grade classroom teacher] to Ms. \_\_\_\_\_ [interventionist/asst. principal] dated April 29, 2021 at 10:20 a.m.
- Email written by Ms. \_\_\_\_\_ [instructional coach] to Ms. \_\_\_\_\_ [principal] dated April 29, 2021 at 1:27 p.m.
- Email written by the parent to the Investigator dated May 27, 2021 at 8:56 a.m.
- Email written by the parent to the Investigator dated May 29, 2021 at 10:55 a.m.
- Communication Timeline for the 2019-20 and 2020-21 school years compiled by USD # \_\_\_\_\_
- Timeline of Events / Conversations dated between September 8, 2020 and April 29, 2021 compiled by the parent
- Individual Accommodation Plan (IAP) dated September 8, 2020
- IAP dated April 13, 2021
- Grade Report for Quarters 1-3 of the 2020-21 school year
- Attendance Report for the 2020-21 school year
- Nurse Visits for the 2020-21 school year
- Copy of the \_\_\_\_\_ Master Schedule showing intervention times

- Blank forms for Elementary, Middle School, and High School MTSS process
- 2019-20 Year in Review: Foundational Knowledge – \_\_\_\_\_ USD \_\_\_ (from district website)
- 2020-21 School Year Calendar for USD #\_\_\_
- Process for recommendation for SPED evaluation - \_\_\_
- Response to the Allegations dated May 21, 2021 written by Ms. \_\_\_\_\_, Director of Special Education
- KSDE Fact Sheet: Child Find (June 2020)
- TASN: MTSS Pre K – 12 Reading Structuring Guide
- TASN: MTSS Pre K – 12 Math Structuring Guide
- TASN: MTSS Pre K – 12 Reading Implementation Guide
- TASN: MTSS Pre K – 12 Math Implementation Guide

### **Background Information**

This investigation involves a female student who is enrolled in the fifth grade at the \_\_\_\_\_ Intermediate School (\_\_\_) in USD #\_\_\_. The student was initially evaluated and determined to have a disability under Section 504 of the Rehabilitation Act due to a medical diagnosis of focal epilepsy on September 8, 2020. On that same date, the multidisciplinary team developed an Individual Accommodation Plan (IAP) for fifth grade that required the following classroom accommodations: allow extra time to complete assignments and tests; preferential seating to help with focus and on-task behavior; give breaks when the student is having difficulty completing work; give frequent reminders to stay on task and use time wisely; ask the student what questions does she have instead of “Do you have questions?”; and use visual chunking or check in to help reduce frustration. The IAP was reviewed and revised on April 13, 2021. At that time, all of the accommodations were continued and an accommodation was added to provide paper copies of materials that are viewed on the iPad, especially for math assignments, to assist the student as she transitions to middle school in the 2021-22 school year.

### **Issues**

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance with special education laws that occurred not more than one year from

the date the complaint is received by KSDE (34 C.F.R. 300.153(c); K.A.R. 91-40-51(b)(1)). In this case, KSDE received the mother's written complaint on May 11, 2021 and the investigation will cover the one-year time frame beginning on May 11, 2020 and ending on May 11, 2021.

Based upon the written complaint and an interview, the mother raised one issue that was investigated.

**ISSUE ONE:** USD # \_\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate child find procedures in regards to the student during the 2020-21 school year.

### **Positions of the Parties**

The parent alleges that USD # \_\_\_ did not meet the requirement to conduct child find activities because \_\_\_ failed to follow the Multi-Tiered System of Supports (MTSS) protocols for both reading and math during the 2020-21 school year. Had these protocols been followed, the parent believes the student would have been identified by the school district as needing further evaluation to determine if the student was eligible to receive special education and related services.

The parent reported the student's FastBridge Screening data for fifth grade showed the student was not making adequate academic progress. In reading, the student was rated in the "Some Risk" category for the entire school year. In math, the student was rated in the "Some Risk" category in the fall and winter but had fallen into the "High Risk" category by the spring.

The parent stated that, according to the MTSS information posted on the district website and the fifth grade MTSS protocols for reading and math, when students are "flagged" at-risk, further diagnostic testing should be conducted, then students are grouped into Tier 1, Tier 2, and Tier 3 for each content area and staff then deliver the appropriate targeted interventions. The students are then "progress monitored" and those results are shared quarterly with parents to ensure students are making adequate progress toward grade level expectations.

Based on the FastBridge screenings, the student's scores fell below benchmarks for the entire 2020-21 school year; however, the parent reported that no diagnostic

testing was conducted until the end of April 2021. The parent noted that this assessment, the Quick Phonics Screener (QPS), was only administered to the student because of her request.

The parent indicated that she received very little communication initiated by the \_\_\_ school staff regarding the interventions being provided to the student despite sharing her concerns about the student's reading and math progress with school staff. The parent reported \_\_\_ did not provide her with the quarterly progress monitoring reports showing the impact of any interventions being provided to the student until she requested these documents.

The parent stated that because the student has continued to struggle with both reading and math during fifth grade, she initiated a request for an initial special education evaluation on April 13, 2021. The parent acknowledged that USD #\_\_\_ appropriately responded to her request for a special education evaluation; however, the parent is concerned that the 60-school-day timeline to conduct the special education evaluation means the student's eligibility for any special education services will not be determined until the 2021-22 school year and the provision of any additional services or supports will be delayed causing the student to fall even further behind with her academic skills.

USD #\_\_\_ believes \_\_\_ followed the appropriate child find procedures in regards to the student during the 2020-21 school year through the provision of general education interventions (GEI). \_\_\_ school staff reported that the district is in its fourth year of MTSS with guidance and support from the Kansas Technical Assistance System Network (TASN). School staff indicated that students who are receiving Tier 2 Interventions are typically not referred for a special education evaluation because they have not yet been provided with the more intense, targeted interventions in Tier 3. Ms. \_\_\_\_\_ [director of special education] explained, "As a matter of practice, students usually receive 3-4 months of consistent Tier 2 Intervention before looking at changing to the next level of intervention."

The school staff reported that the student did not present as a child with a specific learning disability based on Tier 2 screening and progress-monitoring on the date the complaint was filed. Instead, the student was identified as a student with a medical disability in September of 2020, and a Section 504 IAP was put into place with

accommodations being required in the general education setting on September 9, 2020. The Section 504 team agreed on an updated IAP on April 13, 2021 to assist with the transition to middle school.

Based on the student's FastBridge scores and classroom performance at the time of the complaint, school staff did not suspect a disability requiring special education or related services due to the student's positive response to the Tier 2 general education interventions. School staff reported that the student was provided appropriate instruction in regular education settings which was delivered by qualified personnel. School staff noted that the student missed out on a "moderately significant" amount of onsite instruction due to illness during second semester which may have impacted her academic progress. In addition, the district stated, "The student did show signs of learning slippage that are concurrent with the COVID 19 Pandemic." \_\_\_ school staff also noted that the IAP was currently in place to address the impact on learning of the student's epileptic seizures.

The student's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of her progress during instruction, and those assessment results were discussed with the parent at two parent/teacher conferences and copies of the three FastBridge Family Reports were provided to the parent per the MTSS protocols.

### **Findings of the Investigation**

USD #\_\_\_ reported it uses school-wide MTSS as the means of providing GEI in the Child Find process as required by the IDEA and Kansas regulations. Interviews and documentation show that the \_\_\_ staff have collaborated with staff from the Kansas Multi-Tier Systems of Support (MTSS) Alignment Project through TASN to develop protocols describing the MTSS process for each grade level.

The \_\_\_ Fifth Grade Reading Implementation Protocol and the \_\_\_ Fifth Grade Math Implementation Protocol document that the FastBridge (FAST) Universal screener will be administered three times per year to all students: in the fall, the winter, and the spring. Screener information from the fall and winter screenings are shared with parents at the October and February/March parent/teacher conferences respectively.

The results of the spring screener are sent to parent via email or paper copy towards the end of the school year.

The \_\_\_ school staff stated that the FastBridge Family Report was provided to all parents at the parent-teacher conference in October 2020 and February/March 2021 regardless of the student tier status. Any student who qualified for Tier 3 interventions received a letter explaining the process and the score that qualified them for targeted intervention with another staff member. A letter was not provided to the parents of any student who qualified for Tier 2 Interventions because those interventions were embedded in the classroom and provided by the classroom teacher so that students and teachers were not unduly exposed to each other more than was necessary due to the pandemic. The spring FastBridge Family Report was sent home to all parents during the week of May 24, 2021 at the end of the school year.

However, the parent reported that she discussed her concerns about both reading and math progress at the October 28, 2020 parent-teacher conference with Ms. \_\_\_\_\_ [fifth grade classroom teacher] but was told the student did not qualify for intervention based on the screening data. The parent indicated she did not receive the fall FastBridge Family Report until November 2, 2020. The parent said that she requested and received copies of the winter FastBridge reports in February 2021. The parent acknowledged that she received the spring FastBridge reports during the week of May 24, 2021.

Documentation shows the parent requested and received copies of the \_\_\_ Fifth Grade Reading Implementation Protocol and the \_\_\_ Fifth Grade Math Implementation Protocol. In addition, the parent received copies of the student's progress monitoring data charts and individual benchmark reports for both reading and math.

\_\_\_ school staff explained that the student was only eligible for the Tier 2 interventions being provided in the classroom by the classroom teacher in the fall not the more intense Tier 3 interventions provided by intervention team members. \_\_\_ school staff acknowledged this may have been misunderstood by the parent and interpreted as the student not being eligible for any interventions.

The MTSS protocols for fifth grade show Tier 1 as core instruction using Wonders for reading instruction and Go Math for math instruction. Tiers 2 and 3 are shown as intervention for both math and reading. The criteria to receive Tier 2 or 3 interventions in reading and/or math is scoring below benchmarks on the FastBridge screener. It is noted that the Tier 2 and Tier 3 intervention information is grouped together in one section of the MTSS protocols for both the reading and math areas.

The FAST screening data for fifth grade showed the student was at the 20<sup>th</sup> percentile and rated as "Some Risk" in the fall; at the 15<sup>th</sup> percentile and rated as "Some Risk" in the winter; and at the 16<sup>th</sup> percentile and rated as "Some Risk" in the spring. In math, the student was at the 21<sup>st</sup> percentile and rated as "Some Risk" in the fall; at the 20<sup>th</sup> percentile and rated as "Some Risk" in the winter; and at the 12<sup>th</sup> percentile and rated as "High Risk" in the spring.

School district staff report that the student began receiving Tier 2 Interventions for both math and reading following the administration of the fall screening because her scores fell into the "Some Risk" category. The student continued to receive the Tier 2 interventions throughout the entire fifth grade school year in the classroom with Ms. \_\_\_\_\_ [fifth grade classroom teacher] because progress monitoring showed the student was responding well to the interventions as evidenced by data points falling at or above the aim line for the majority of the school year.

Documentation shows progress monitoring was conducted for the student in both reading and math beginning on November 9, 2020 through April 12, 2021. The student scored at or above the aim line for reading on six of nine progress monitoring sessions. The student scored at or above the aim line for math on three of five progress monitoring sessions.

The section of the MTSS protocol describing placement into curriculum levels for reading states, "For students who scored below benchmark, the Quick Phonic Screener (QPS) will be given. Students with similar phonics errors will be grouped together." The description of placement into curriculum levels for math states, "For students who scored below benchmark, the Go Math Prerequisites Skills Inventory assessment will be given. Students with similar placement test scores will be grouped together."

The parent reports the FastBridge scores show the student scored at the “Some Risk” level in both the fall and winter assessments. However, no assessments were conducted to determine the curriculum level placement. The district administered the QPS to the student on April 29, 2021 at the parent’s request.

School staff indicated that only students who score in the “High Risk” category are considered to have scored below benchmark and are eligible to receive Tier 3 interventions. Only students in Tier 3 receive curriculum placement level assessment to help group similar students for interventions.

USD #\_\_ reported that this is the reason that further assessment was not conducted with the student to determine a curriculum placement level. The student’s scores for both fall and winter fell in the “Some Risk” category and into the level to receive Tier 2 interventions, not Tier 3 interventions. USD #\_\_ staff acknowledged that this information is not clear on the MTSS protocol form.

The MTSS protocols state that tiered interventions are provided to small groups of no more than 12 students for 30 minutes per day for four days each week during the 2020-21 school year. Tier 2 and Tier 3 Interventions for reading are the Six-Minute Solutions for reading fluency and the 95% Group Phonics Library for phonics / phonemic awareness. Tier 2 and Tier 3 Interventions for math are Go Math Strategic Intervention, Go Math Intensive Intervention, and Go Math Reteach.

The \_\_ Master Schedule for the 2020-21 school year documents fifth grade intervention time for reading was 10:00–10:30 and for math was 1:20-1:50 p.m. on Mondays through Thursdays. Fridays were set aside to conduct progress monitoring with students. The \_\_ school staff reported and documentation shows the student participated in Tier 2 interventions groups throughout the fifth grade school year in smaller groups of no more than 12 students.

The \_\_ staff indicated the fifth day each week was spent progress monitoring students to determine the effectiveness of intervention strategies. The MTSS protocols state that the Curriculum Based Measurement of Reading (CBMReading) and the Adaptive Reading (aReading) will be used to monitor progress and the effectiveness of reading interventions. The Adaptive Math (aMath) and the Curriculum Based Measurement of

Math Concepts and Applications (CBMmath CAP) will be used to monitor progress and the effectiveness of math interventions.

The MTSS protocol states that students receiving Tier 2 interventions are progress monitored every two weeks while students receiving Tier 3 interventions are monitored weekly for reading. For math, students receiving either Tier 2 or Tier 3 interventions are progress monitored at their instructional level every 3-4 weeks. Both the Reading and Math Protocols state, "The Intervention team will send home progress monitoring graphs quarterly."

The parent reported she was not provided with copies of the progress monitoring graphs quarterly and only received this documentation when she made a written request.

The \_\_\_ school staff reported that Tier 2 interventions are provided by the classroom while Tier 3 interventions are provided by the intervention team. Only students who are receiving Tier 3 interventions have progress monitoring graphs sent home quarterly and, because the student was only receiving Tier 2 interventions, these graphs were not regularly sent home to the parent. However, these documents were provided to the parent upon her request. USD #\_\_\_ acknowledged that this information is not clearly explained in the MTSS protocols.

The Kansas MTSS Progress Monitoring Decision Tree indicates that Professional Learning Community (PLC) or Student Intervention Team (SIT) members look at the last three data points in order to make determinations of the effectiveness of an intervention. If the data points all fall above the aim line, the intervention has been successful and the intervention should be continued or the student moved to the next skill level. If the data points all fall below the aim line, the intervention has not been successful and the intervention should be changed. If the data points fall both below and at/above the aim line, the interventions might be working and the intervention should be continued until there are three consecutive data points either at/above or below the aim line.

The \_\_\_ school staff reported that the student's progress monitoring charts for reading never showed three consecutive data points below the aim line in reading. In math, the student had two consecutive data points below the aim

line, but the \_\_\_ school staff reported that the student had missed multiple days of school during this time frame and believed this to be a factor in the student's performance.

### Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.111(a)(c) require school districts to have policies and procedures in effect to ensure that all children with disabilities who need special education and related services are identified, located, and evaluated. This includes children who attend public or private schools, who are homeschooled, who are highly mobile (including migrant and homeless children), or are wards of the state.

In addition, Kansas regulations at K.A.R. 91-40-7 require school districts to use a general education intervention (GEI) process for children in grades kindergarten through age 21. *Section C. General Education Intervention (GEI) for Children from Kindergarten through Age 21 in Chapter 2 Screening and General Education Intervention (Child Find) of the Kansas Special Education Process Handbook* states, "The GEI process should continue until a successful intervention is determined. However, when it is evident that the child's needs requires resources beyond those available in general education, and the team suspects the child is a child with an exceptionality (disability or giftedness), the child must be referred for an initial special education evaluation."

K.A.R. 91-40-7(c)(1) further requires school districts to have data-based documentation that indicates that general education interventions and strategies would be inadequate to address the areas of concern for the child. K.A.R. 91-40-7(c)(2) requires this data-based documentation to show that the child was provided with appropriate instruction from qualified personal in the regular education setting; that the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction; that the results of the assessments were provided to the parent; and that the assessment results indicate an evaluation is appropriate.

In this case, documentation and interviews show that USD #\_\_\_ uses school-wide MTSS as the means of providing GEI in the Child Find process as required by the IDEA and Kansas regulations. The \_\_\_ staff have collaborated with staff from the Kansas Multi-

Tier Systems of Support (MTSS) Alignment Project through TASN to develop protocols describing the MTSS process for each grade level.

It is noted that the MTSS protocols do not clearly delineate the differences between Tier 2 and Tier 3 interventions. While school staff are clear and consistent with their understanding of the MTSS process for these two intervention levels, the lack of specificity caused confusion for the parent of this student. This miscommunication appears to have been exacerbated by not providing notification of Tier 2 status based on the fall FastBridge scores and then providing copies of multiple data reports without clear explanation of the information included in those reports and the implications of this information.

However, documentation and interviews found the \_\_\_ school staff implemented the district's MTSS protocols for both reading and math for the student during the 2020-21 school year. Based on the foregoing, a violation of special education statutes and regulations is not substantiated for the allegation that USD #\_\_\_ failed to follow appropriate child find procedures in regards to the student during the 2020-21 school year.

### **Right to Appeal**

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

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

*Nancy Thomas*

Nancy Thomas, Complaint Investigator

K.A.R. 91-40-5(f) Appeals.

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

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

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

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

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_  
\_\_\_\_\_ Public Schools: 21FC\_\_-001

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced on June 20, 2021, with by \_\_\_\_\_ filing a complaint on behalf of her daughter, \_\_\_\_\_. A complaint investigator undertook an investigation of the complaint on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, the complaint investigator issued a Complaint Report addressing the allegation on June 10, 2021. That Complaint Report concluded that a violation of special education statutes and regulations was not substantiated with regard to the school district's implementation of child find policies and procedures as applied to the student during the 2020-2021 school year.

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the investigator's Complaint Report, the parent's notice of appeal with exhibits, and the district's response to the parent's notice of appeal with appendices. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

### PRELIMINARY MATTERS

Scope of Review on Appeal: Kansas Administrative Regulation (K.A.R.) 91-40-51(f)(1) provides, "An 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.... Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Thus, the Appeal Committee limits its inquiry to the issue investigated in the Complaint Report. The Appeal Committee will not address new issues. The appeal process is a review of the Complaint Report issued on June 10, 2021. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions made in the Complaint Report.

As discussed below, and acknowledged by the parent on page 4 of her appeal, the sole issue in the Complaint Report was whether the district implemented its child find procedures as applied to the student. Therefore, the Appeal Committee will not address the new issue raised by the parent on appeal regarding whether the school district annually provides information to the public about the availability of special education services and its child find activities in compliance with K.A.R. 91-40-7(d). However, the Appeal Committee takes note that in its response to the notice of appeal, the school district submitted ample documentation that it provided such information to the public in a variety of ways during the 2020-2021 school year.

Relevant Regulations: The regulations relevant to determining the issue at hand - whether the district implemented its child find procedures for the student - are K.A.R. 91-40-7(a) and K.A.R. 91-40-7(b). Those regulations require the following:

(a) Each board [school district] shall adopt and implement policies and procedures to identify, locate, and evaluate all children with exceptionalities residing in its jurisdiction...

(b) Each board's policies and procedures under this regulation shall include age-appropriate screening procedures that meet the following requirements: ... (2) for children from ages five through 21, observations, instruments, measures, and techniques that disclose any potential exceptionality and indicate a need for evaluation, including hearing and vision screening as required by state law; and (3) implementation of procedures ensuring the early identification and assessment of disabilities in children.

The requirements in K.A.R. 91-40-7(c) describe conditions that must be met and data that must be documented before a school district may refer a child for a special education evaluation. The opening sentence of K.A.R. 91-40-7(c) states, "Any board may refer a child who is enrolled in a public school for an evaluation if one of the following conditions is met..." If the school district has not referred a child for an evaluation, this regulation simply does not apply. In this case, the district did not refer the student for an evaluation; thus, any and all discussions of K.A.R. 91-40-7(c) in the Complaint Report, the parent's notice of appeal, and the district's response to the notice of appeal are irrelevant to the issue at hand and will not be addressed by the Appeal Committee.

#### DISCUSSION OF ISSUE ON APPEAL

Issue: USD #\_\_, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate child find procedures in regards to the student during the 2020-2021 school year.

*What are the district's child find policies and procedures?*

As explained in the Preliminary Matters section above, school districts are required to adopt and implement child find policies and procedures that include screening with the use of observations, instruments, measures and techniques that disclose any potential exceptionality, indicate a need for evaluation, and ensure early identification and assessment of disabilities [K.A.R. 91-40-7(a) and (b)]. In this case, the district has adopted child find policies and procedures that include a school-wide Multi-Tier System of Support (MTSS) and has developed written protocols describing the MTSS process for each grade level [Complaint Report p. 7, 12]. The relevant district protocols for this student are the \_\_\_\_\_ Intermediate School (\_\_\_\_) Fifth Grade Reading Implementation Protocol and the \_\_\_\_ Fifth Grade Math Implementation Protocol. These are the district's child find policies and procedures that must be implemented for the student.

On appeal the parent argues that the district did not implement various parts of the Kansas MTSS Guides developed by the Kansas MTSS and Alignment project of the Technical Assistance Systems Network. External guidance, such as the Kansas MTSS guides, are neither regulations that the district must follow nor requirements that the district must adopt or implement. Thus, the Appeal Committee will not address any arguments based on the Kansas MTSS Guides.

*Did the district implement the \_\_\_\_ Fifth Grade MTSS Reading and Math Implementation Protocols for the student?*

The investigator concluded, based on documentation and interviews, that \_\_\_\_ school staff implemented the district's fifth grade MTSS protocols for reading and math for the student during the 2020-2021 school year [Complaint Report p. 13]. As stated in the Preliminary Matters section above, the Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report. To fulfill this task, the Appeal Committee follows the standard set forth by the 10th Circuit Court of Appeals which is that when reviewing a decision regarding the IDEA, we must give "due weight" to the investigator's findings and conclusions and "avoid the temptation to substitute our notions of sound educational policy for that of school authorities." [See *Logue v. Unified Sch. Dist. No. 512*, 152 F.3d 272, 28 IDELR 609, (10th Cir. 1998)]. The Appeal Committee further relies on the courts for the standard a school district must meet when implementing requirements of the IDEA. The courts have consistently held that the IDEA does not require perfect implementation and that only material deviations qualify as a violation of the IDEA. [See *E.C. v. U.S.D. 385 Andover*, 18-1106-EFM, 76 IDELR 212 (D. Kan. 2020); *OToole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 28 IDELR 177 (10th Cir. 1998); *Sumter*

*County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 56 IDELR 186 (4th Cir. 2011); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 111 LRP 30885 , 531 U.S. 817 (2000); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3s 1022, 38 IDELR 61 (8th Cir. 2003); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007), *reprinted as amended*, 107 LRP 51958 , 502 F.3d 811 (9th Cir. 2007); and *L.J. v. School Bd. of Broward County, Fla.*, 927 F.3d 1203, 74 IDELR 185 (11th Cir. 2019).]

Based on these standards and for the reasons explained below, the Appeal Committee finds that the weight of the evidence presented to this Committee to substantiate implementation of the district's child find policies and procedures for the student outweighs any evidence to the contrary.

The Appeal Committee has reviewed the entirety of the \_\_\_ Fifth Grade MTSS Reading and Math Implementation Protocols and the relevant evidence submitted by both parties concerning the implementation of these Protocols for the student. Based on this review, the Appeal Committee finds sufficient evidence to support the investigator's conclusion that the district followed the Protocols for the student. Specifically, the Appeal Committee finds the district appropriately utilized the discretion in implementing interventions and the district substantially implemented the protocols for the student.

Prior to referring a student for an evaluation, the Protocols leave room for judgment of school authorities regarding the general education intervention (GEI) and referral process, as well as the flexibility to continue to implement new interventions when existing interventions are not effective. These Child Find decisions, including the decision as to whether to refer a student for an evaluation, are based on individual students who may have unique needs, for which effective interventions are not readily apparent. For these students, there may be a need to assess and implement various strategies in order to find effective interventions. In addition, other factors may affect the rate of a student's progress, such as lack of attendance, identified by the investigator in this situation. Allowing school districts this kind of flexibility as they work through the child find process enables the school district to sufficiently develop the data-based documentation required before the district may refer a child for an evaluation. The Protocols adopted by the district properly provide this kind of flexibility. These Protocols do not require an automatic referral to Tier 3 based on screening scores. The Protocols end saying, "If a student is not making adequate progress" there are three steps. None of these steps require that the child be placed in Tier 3. Rather, Step 1 requires the SIP team to have a discussion about the student. Step 2 involves data sharing, ensuring information is up to date, and performing problem solving activities. Step 3 is to communicate a new plan with families and ask for input from families. This portion of the Protocols indicate that when a student is

not making adequate progress the SIP team needs to reexamine existing interventions and possibly consider alternate interventions. That could involve a referral to Tier 3, but that is not a requirement of the protocol. Therefore, when students are not making adequate progress, the SIP team has a number of options available. A SIP team should take a reasonable approach, and make judgements regarding which interventions to use, based on the individual student's performance and circumstances. These Protocols provide the SIP team with that flexibility. There is nothing in these Protocols automatically triggering a Tier 3 placement based on screening scores. Rather, the Protocols put that decision in the hands of the SIP Team. It is entirely appropriate for a district to develop Protocols that provide flexibility in the Child Find process in order to adequately assess whether general education interventions can be successful and to comply with the data-based documentation requirements of K.A.R. 91-40-7(c) that must be obtained before a district refers a child for a special education evaluation.

#### CONCLUSION

The Appeal Committee concludes that the Complaint Report should be and is sustained. This is the final decision on this matter. There is no further appeal.

This Appeal Decision is issued this 7th day of July, 2021.

APPEAL COMMITTEE:

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Brian Dempsey

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Laura Jurgensen

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Mark Ward