

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #__
ON JULY 6, 2021

DATE OF REPORT: AUGUST 4, 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," "the parent," or the "the complainant."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the parent on July 13, 2021. On July 15 and 28, 2021, the investigator spoke via telephone conference call with Dr. _____, Superintendent of USD #__, and with Dr. _____, Assistant Superintendent/Director of Special Education for the district.

The parent identified three individuals whom she believed had knowledge of facts related to the issue specified in her complaint. Before speaking to these individuals, the investigator obtained the written consent of the parent to disclose personally identifiable information with each and to discuss the issues related to this complaint. On July 20, 2021, the investigator spoke by telephone with _____, district preschool teacher. On July 20 and 23, 2021, the investigator spoke with _____, Instructional Coach for the district. The investigator spoke by telephone with _____, brother of the parent, on July 23, 2021.

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

- Audio recording of a May 18, 2021 eligibility team meeting
- Determination of Complaint July 4, 2021 written by the district superintendent

- Email dated June 28, 2021 from the parent to the assistant superintendent
- Email dated June 28, 2021 from the parent to the assistant superintendent
- Screen shot of a custody document provided by the parent

Background Information

This investigation involves a nine-year-old boy who will attend the fourth grade in his neighborhood school in USD ___ for the 2021-22 school year. According to the student's mother, the student was diagnosed by Children's Mercy Hospital with Tourette Syndrome at the end of kindergarten after having initially been determined to have a transient tic. Children's Mercy subsequently diagnosed Anxiety, Attention Deficit Hyperactivity Disorder (ADHD), and Developmental Dyslexia. The student participates in Cognitive Behavioral Therapy with a private, licensed psychologist.

The student's parents are divorced and share joint custody of the student. According to their custody agreement, both parents "have equal rights and responsibilities" with regard to decisions about their children's education.

Issue

In her complaint, the student's mother alleged that the district disclosed the student's personally identifiable information without her consent to individuals who were not part of the student's evaluation team.

In her complaint, the parent also alleged what she referred to as "bullying." In a letter to the parties dated July 6, 2021, Mark Ward, an attorney with Special Education and Title Services (SETS) for the Kansas State Department of Education (KSDE), stated that because "special education laws and regulations do not address bullying," the investigation of this complaint will be limited to the allegation regarding the confidentiality requirements of special education regulations.

Applicable Statutes and Regulations

Confidentiality of personally identifiable information (PII) in education records is a basic right shared by all students in public schools and their parents. These

fundamental rights are described in the Family Educational Rights and Privacy Act (FERPA) of 1974, as amended. In addition, Kansas regulations implementing the Kansas Special Education for Exceptional Children Act at K.A.R. 91-40-50 have adopted by reference provisions in 34 C.F.R. 300.612 through 300.624 (federal regulations implementing the Individuals with Disabilities Education Act (IDEA)), regarding parental access to education records and confidentiality of personally identifiable information.

All school personnel (including contracted employees) are governed by confidentiality requirements of FERPA and the IDEA, both of which apply to students with disabilities.

FERPA and the IDEA require educational agencies to obtain parent consent prior to disclosing PII from education records to unauthorized parties unless certain exceptions apply (34 C.F.R. 99.30; 34 C.F.R. 300.622). FERPA regulations, at 34 C.F.R. 99.3, state that the term PII “includes, but is not limited to the student’s name; the name of the student’s parent or other family members; the address of the student or student’s family; a personal identifier, such as the student’s social security number, student number, or biometric record; other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Federal regulations implementing the IDEA, at 34 C.F.R. 300.610 ensure “the protection of the confidentiality of *any* (emphasis added) personally identifiable data, information, and records collected or maintained...”

While FERPA protects the confidentiality of students’ PII contained “in education records” (34 C.F.R. 99.30(a)), the IDEA protects the confidentiality of students’ PII whether or not the PII is contained in education records (34 C.F.R. 300.610, 300.622(a)). The Office of Special Education Programs within the U.S. Department of Education stated in its November 23, 2015 *Letter to Weatherly* (67 IDELR 71, 19 FAB 24), that PII does not have to appear in an education record in order for it to be subject to the IDEA's confidentiality rules. The regulations implementing IDEA protect *all* personally identifiable information collected or

maintained pursuant to the IDEA, regardless of whether it is in an education record, with the caveat, that if the information is in an education record, then relevant FERPA exceptions would apply.

The regulations implementing IDEA, at 34 C.F.R. 300.622(a), state that parental consent must be obtained before personally identifiable information is disclosed to parties. FERPA regulations provide several exceptions to the requirement to obtain parent consent before releasing PII contained in education records (34 C.F.R. 99.31). All of these exceptions also apply to the confidentiality requirements in the IDEA regulations (34 C.F.R. 300.622(a)). For example, FERPA allows the school to release PII contained in education records to school officials, including teachers, at the school where the student attends, whom the school has determined to have a "legitimate educational interest" (34 C.F.R. 99.31(a)(1)(i)(A)). The IDEA also allows districts to release PII to officials of participating agencies without first obtaining parental consent if that release is done for the purpose of meeting a requirement of special education laws and regulations (34 C.F.R. 300.622(b)(1)). "Participating agency" is defined at 34 C.F.R. 300.611(c) as "any agency or institution that collects, maintains, or uses PII, or from which information is obtained, under Part B of the Act [IDEA]."

Parent's Position

The parent asserts that the assistant superintendent spoke to a preschool teacher who was not a part of the evaluation team for the student and disclosed PII regarding the student and his parents.

It is also the position of the student's mother that someone who attended the May 18, 2021 evaluation team meeting is responsible for the disclosure of confidential information to a "coach" who was not part of the evaluation team. The parent contends that the coach subsequently shared this information with the parent's brother. According to the parent, her brother told her that he had heard that because of the student's "IEP meeting," the parent had "the ability to form a lawsuit against the district."

District's Position

The district contends that the assistant superintendent's disclosure of PII regarding the student to a district preschool teacher was related to the district's effort to include the student's father in the evaluation process.

The district concedes that the name of the parent was disclosed to a staff member who was not a part of the evaluation team but contends that no additional PII nor any information regarding a “lawsuit” was disclosed.

Investigative Findings

The student’s mother referred the student for evaluation to determine his eligibility for special education services and gave her written consent for the evaluation to be conducted on February 22, 2021. The evaluation was initiated, and a meeting was scheduled for May 18, 2021 for the purpose of reviewing the results of the evaluation and determining whether or not the student was eligible for special education services.

As the May 18, 2021 meeting date approached, the student’s father had not yet returned some of the documents sent to him by the evaluation team. The assistant superintendent contacted the principal of the student’s elementary school to obtain information regarding how best to communicate with and ensure the participation of both of the student’s parents. The principal suggested that the assistant superintendent speak with the preschool teacher whose classroom was in the building. The principal told the assistant superintendent that the student’s sister was currently enrolled in the preschool classroom and noted that the preschool teacher had routinely communicated with both of the student’s parents. The assistant superintendent then contacted the preschool teacher.

The investigator spoke in separate telephone conversations with the preschool teacher and with the assistant superintendent regarding this aspect of this issue. Both parties recalled that they spoke in the weeks before the student’s May 18, 2021 evaluation/eligibility meeting, though neither could remember the exact date of their conversation. Both parties acknowledge that their conversation included the names of the student and his parents and referenced the evaluation process. Both parties stated that they briefly talked about the best way for the evaluation team to engage the student’s father in the evaluation process. According to both the preschool teacher and the assistant superintendent, the preschool teacher suggested that the student’s father might be more responsive to contact by telephone rather than by email. The assistant superintendent stated that he then passed that information on to members of the evaluation team who henceforth communicated with the student’s father by telephone regarding assessment information. Following that

contact, the student's father returned documents which had previously been sent to him by members of the evaluation team.

In a telephone interview with the investigator, the preschool teacher stated that in addition to having been the teacher of the student's sister, she is also a friend of the student's father and has on occasion served as a babysitter for the student and his sister. The preschool teacher said that through her contact with the student's father, she had been made aware that the student was being evaluated by the district to determine his eligibility for special education services.

The investigator spoke in separate telephone conversations with the assistant superintendent, the parent's brother and a district "instructional coach" – the "coach" identified by the parent as being the person who shared confidential information with her brother. According to both the instructional coach and the assistant superintendent, they had a very brief conversation with each other regarding a parent who was reported to be upset about a recent meeting. Neither could recall exactly when their conversation took place. Both the assistant superintendent and the instructional coach stated that the assistant superintendent identified the complainant by name during their conversation, but neither party reported that any PII beyond the parent's name was disclosed.

The instructional coach stated that he was aware through previous conversations with the parent's brother that the student has special needs and assumed that the situation involved a special education action because the assistant superintendent is also the director of special education. However, the instructional coach stated that he did not recall being told of any special education action regarding the student and could not recall any mention of a "lawsuit."

When the instructional coach next saw the parent's brother, who is a personal friend, the instructional coach mentioned that he had heard that the parent was angry with the district. Both parties confirmed that a conversation about the parent ensued. Neither party could recall the exact date of that conversation, but both believed that it took place in the period shortly before May 26, 2021. Neither the instructional coach nor the parent's brother could provide the investigator with a detailed recollection of their conversation, but both characterized the instructional coach's comments about the parent as an "offhand" reference to the parent being "upset."

The parent's brother told the investigator that when he next saw the parent, he mentioned to her that he had heard that there was "activity" at school related to her being upset with the district. The parent's brother stated that has no specific memory of telling his sister about a "lawsuit." The parent's brother told the investigator that he may have "misconstrued" the instructional coach's comments and drawn conclusions based on his personal knowledge of the parent's interactions with the district but stated that he was glad that his sister had an avenue to voice her complaints regarding the district.

Summary and Conclusions

When speaking with the preschool teacher, the assistant superintendent did share the student's PII with the teacher. However, because the assistant superintendent was attempting to meet a requirement of special education laws and regulations – specifically the participation of the parents in the evaluation process – an exception to the requirement regarding the confidentiality of PII applies and parental consent for the disclosure of PII was not required. As stated above, 34 C.F.R. 300.622(b)(1) provides that parental consent is not required before PII is released to officials of participating agencies for purposes of meeting a requirement of special education statutes and regulations. A violation of special education statutes and regulations **is not** substantiated on this aspect of this issue.

No exceptions apply to the assistant superintendent's sharing of PII with the instructional coach. The district did not provide any information during the investigation indicating that this staff member had a "need to know" of the assistant superintendent's interactions with the parent. The district also did not provide any information during the investigation that would indicate sharing this information was done in an attempt to meet any requirement of special education statutes and regulations.

No evidence was found to show that any PII other than the name of the parent was disclosed to the instructional coach. Nonetheless, the sharing of the name of the parent and the fact that she was upset with the district set the stage for subsequent conversations between the instructional coach and the parent's brother and between the parent and her brother. At each step beyond the initial disclosure of the parent's name by the assistant superintendent, the parties to these subsequent conversations made assumptions based on their

personal knowledge of the situation that resulted in the parent's reporting that "because of [the student's] IEP meeting, [she could] form a lawsuit against the district..."

Because there is evidence to support the parent's contention that PII – specifically the name of the parent – was disclosed without her consent to an unauthorized party (the instructional coach), a violation of special education statutes and regulations is substantiated on this aspect of this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on the issue presented in this complaint. Specifically, a violation was substantiated with regard to 34 C.F.R. 300.622(a) which requires parental consent for the disclosure of personally identifiable information (PII).

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

- 1) Submit to Special Education and Title Services (SETS), within 40 calendar days of the date of this report, a written statement of assurance stating that it will comply with 34 C.F.R. 300.622(a) by obtaining parental consent before disclosing PII to unauthorized parties.
- 2) a) Within 40 calendar days of the date of this report, USD #___ shall develop and submit to SETS for approval, a plan for the implementation of training for all special education staff including special education office staff as well as all district paraeducators and instructional coaches regarding the legal requirements identified as violated in this report and confidentiality of PII.

b) Once the training plan described above under Item a) has been approved by SETS, USD #___ must implement that plan within 20 school days after SETS approval.

c) Upon completion of training of identified staff, USD #___ shall submit to SETS a record showing the dates of training and an attendance log signed by all staff who participated in the training.

- 3) No later than 5 school days before implementing the approved training plan described in item 2)b) above, the administration of USD # ___ shall complete and submit to SETS a pre-training administrator survey. No later than 5 school days after implementing the training plan described in item 2)b) above, the administration of USD #___ shall complete and submit to SETS a post-training administrator survey. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the USD #___ Superintendent.
- 4) No later than 5 school days after implementing the approved training plan described in item 2)b) above, every staff member who participated in the training shall complete and submit to SETS a post-training staff survey. The SETS Dispute Resolution Coordinator will provide the survey and instructions in a follow-up communication with the USD #___ Superintendent.
- 5) 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 or conclusions 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 either be emailed to 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)