

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #__
ON JULY 12, 2021

DATE OF REPORT: AUGUST 11, 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 complainant," or "the parent."

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 investigator spoke in a separate telephone call on August 10, 2021 with the assistant superintendent.

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

- Email dated January 27, 2021 from the parent to district staff
- Email dated March 2, 2021 from the parent to the school psychologist
- Email dated March 16, 2021 from the parent to the school psychologist
- Email dated April 5, 2021 from the parent to the school psychologist
- Email dated April 5, 2021 from the assistant superintendent to the building principal and school psychologist
- Email dated May 11, 2021 from the assistant superintendent to the parent
- Email dated May 13, 2021 from the assistant superintendent to the parent
- Email dated May 14, 2021 from the school psychologist to the parent
- Team Evaluation Eligibility/Identification Report dated May 18, 2021

- Staffing Record dated May 18, 2021
- Email dated May 19, from the parent to the school psychologist, building principal, and classroom teacher
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated May 18, 2021
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated May 28, 2021
- Email dated June 25, 2021 from the parent to the assistant superintendent
- Criteria and Procedures for Independent Educational Evaluation for the district
- Criteria and Procedures for Contract Educational Evaluation for the district
- Audio recordings of the May 18, 2021 evaluation/eligibility team meeting provided by the district and the parent
- Written statements provided by evaluation/eligibility team members regarding the two team meetings held prior to May 18, 2021 and the parent's allegation of predetermination

Background Information

This investigation involves a nine-year-old boy who will attend the fourth grade in his neighborhood school for the 2021-22 school year. According to the parent, 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. Diagnoses of Anxiety, Attention Deficit Hyperactivity Disorder (ADHD), and Developmental Dyslexia were subsequently diagnosed. The student participates in Cognitive Behavioral Therapy with a private, licensed psychologist.

In March of 2020, because of the COVID-19 Pandemic, the governor of the state of Kansas ordered the closure of all public school buildings for the remainder of the 2019-20 school year. At the beginning of the 2020-21 school year, instruction for this student was delivered under a remote learning model through his neighborhood elementary school. In October 2020, the student

was assigned to a new teacher at a different school and continued his instruction under the remote learning model. The student moved to in-person instruction at his neighborhood school on January 25, 2021. Title I Reading services were initiated in early February of 2021.

Issue

In her complaint, the parent raises three issues.

Issue One: The district predetermined the student's eligibility prior to the evaluation/eligibility team meeting and violated IDEA by depriving the student's parents the opportunity to meaningfully participate, thereby depriving the student of a free appropriate public education (FAPE).

Applicable Statutes and Regulations

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 (34 C.F.R. 300.304(b)(1)-(2); K.S.A. 72-3428(b)(1)-(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) as defined in federal and state special education law; and (2) by reason thereof, has a need for special education and related services [K.A.R. 91-40-1(k)(1) and (w) and K.A.R. 91-40-10(a)(1)(A); 34 C.F.R. 300.8(a)(1) and 300.306(a)(1)].

The law permits school staff 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) and K.A.R. 91-40-25(e)(1)-(2)]. In *T.W. by McCullough and Wilson v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 136 F. App'x 122, 43 IDELR 187 (10th 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 (4th 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 table with an open mind. But this does not mean they should come to the 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 (4th Cir. Oct. 31, 1994).

The team should try to reach consensus about the eligibility decision. However, if the team cannot reach agreement, the final decision rests with the person who serves as the Local Education Agency (LEA) representative at the eligibility determination meeting [see U.S. Department of Education Office of Special Education Programs *Letter to Richards* (January 7, 2010); Federal Register, Vol. 64, Appendix A to 34 CFR Part 300, Question 9, pp. 12473-12474, March 12, 1999]. If the parents disagree with that decision, they may then challenge the eligibility determination via the due process procedures in the IDEA.

Parent's Position

It is the position of the parent that the school team had, at the time of the eligibility meeting, already determined that the student was not eligible for special education services under an IEP. The parent provided excerpts from a May 16, 2021 evaluation/eligibility team meeting as support for her contention that the team had held previous meetings regarding the student's eligibility. The parent also asserts that the fact that the assistant superintendent signed the Eligibility/Identification Report indicating his agreement with the district's decision regarding the student's eligibility is proof that the decision was predetermined because the assistant superintendent was no longer present at the meeting when eligibility was discussed.

District's Position

The district asserts that district staff worked hard to assemble all the information necessary for the team to make a decision regarding the student's eligibility, and the team's final decision was not predetermined prior to the meeting. The district states that both in-house meetings prior to the eligibility

meeting were conducted to ensure that all data had been collected, and to clarify individuals' roles for the meeting. It is the district's position that parents and the outside evaluator were given ample opportunity to provide additional information at the evaluation/eligibility team meeting. When it became evident that differing opinions existed among team members, the building principal as the LEA representative made the final determination regarding eligibility based on all of the information collected throughout the evaluation process and presented during the evaluation/eligibility team meeting.

Investigative Findings

On January 27, 2021, the parent sent an email to the building principal, the assistant superintendent for the district, and the student's classroom teacher expressing continuing concerns regarding the student's performance. The parent wrote that the student was scheduled to have a full battery of tests at Children's Mercy Hospital on February 15, 2021. The parent stated that "depending on [the findings of the evaluation], we may need to reconvene for the 504 and possibly pursuing the need to escalate to an IEP to allow for additional support from special education services. We will see what happens, but I didn't want you to be blindsided by a possible request in the future."

The parent provided written consent for the district to conduct an initial evaluation on February 26, 2021.

On March 16, 2021, the parent sent an email to the school psychologist which included a copy of the report of the student's February 2021 evaluation at Children's Mercy. The parent also notified the school psychologist that an appointment was scheduled with the evaluating neurologist for March 30, 2021 for the purpose of reviewing the report and determining whether additional testing would be needed.

The parent sent the school psychologist an email on April 5, 2021 asking that the psychologist confirm receipt of the Children's Mercy report and provide an update on the testing being done or planned by the psychologist. The parent copied the student's neuropsychologist at Children's Mercy on her message, noting that he would be attending the eligibility meeting at the request of the parents.

On May 11, 2021, the assistant superintendent sent an email to the parent in which he stated:

the purpose of [a meeting scheduled for May 18, 2021] would be to determine [the student's] eligibility for special education rather than [an IEP team meeting]...The focus of this meeting will be the evaluation report. It summarizes all of the information collected through the evaluation process. This includes parent concerns, the provided medical records, new assessment data, parent/student/teacher questionnaires, and classroom information. After reviewing all of the information the team has to answer two questions. The short version of both questions is below:

- 1) Does he have an exceptionality as defined by state and federal law?
- 2) Does he need specialized instruction?

If the team answers yes to both of those questions, the team would proceed to develop an IEP that outlines goals for him and the services/supports to meet those goals. If the team does not determine that he is eligible, there should be a lot of quality information from this process to improve the 504 that he has in place.

On May 11, 2021, the school psychologist called an in-house staff meeting so that the team could ensure that a draft report of the team's evaluation was prepared and ready to send to the parents prior to the upcoming evaluation/eligibility team meeting. At the staff meeting, the team discussed administering additional tests to better inform their decision-making. The team also talked about what to do to encourage the student's father to return documents sent to him as part of the evaluation process.

On May 11, 2021, the parent sent an email to the members of the evaluation team proposing a 1-hour agenda for the upcoming evaluation/eligibility team meeting. The proposed agenda allowed 10 minutes for the review of testing results and 10 minutes for discussion of the student's eligibility for special education services which included a discussion of "what category[s] serves [the student's] educational needs best." The parent's proposed agenda allocated 25 minutes for a discussion of "how does [the student] learn best, programs and placement, goals, related services, other – curriculum, methodology, etc."

The assistant superintendent sent the parent an email on May 13, 2021 stating that “the primary focus [for the May 19, 2021 meeting] is reviewing all of the information that has been collected over the past few months in an effort to determine whether [the student] is eligible for special education services. [The school psychologist and the building principal] will provide a copy of the evaluation report tomorrow.”

On May 14, 2021, the school psychologist emailed the student’s mother and father a copy of a draft report of the district’s evaluation. The portion of the report related to the “Basis for Eligibility Determination” was left incomplete.

A second in-house staff meeting was held on May 17, 2021. Additional information had been received from the student’s father and was entered into a revised draft of the evaluation report. There was additional discussion regarding the facilitation of the upcoming May 18, 2021 meeting.

An eligibility meeting was held on May 18, 2021. Those present included the student’s parents, the building principal, the student’s classroom teacher, a special education teacher, a speech/language pathologist, an occupational therapist, a school psychologist, and a social worker. The hospital-based neuropsychologist who had evaluated the student at the request of the parents participated electronically for a portion of the meeting.

The audio recordings of the meeting provided by both the parent and the district show that the parents actively participated in the meeting. The complainant read two statements to the team and actively engaged in discussion about the needs of the student. The student’s father asked questions of the neuropsychologist.

The Evaluation/Identification Report shows that the parent completed a questionnaire submitted to her by the team. Statements from the parent in response to the questionnaire were included in the “Parent Input” section of the report and reviewed at the evaluation/eligibility team meeting. Both of the student’s parents completed elements of the Behavior Assessment System for Children 3rd Edition (BASC-3) which were also incorporated into the report. The parent was the “Home Rater” for the Behavior Evaluation System – Fourth Edition (BES-4) included in the report.

After the results of the evaluation had been reviewed, the school psychologist led the team through a discussion about eligibility, noting that there appeared to be no disagreement regarding the student's designation as exceptional (prong 1 of the eligibility determination). The school psychologist walked the team through indicators of need for service established by the Kansas State Department of Education and stated that a "need" for special education services had not been established. Other team members were offered the opportunity to speak in opposition to that statement, but none did except the parent. The parent objected to the recommendation that the student not be provided special education services under an IEP. When it became apparent that the team would not reach consensus, the LEA representative – the building principal – made the decision for the district, providing the parent with her reasons for determination.

In response to a request from the superintendent who was conducting an internal investigation of the parent's complaint, six members of the evaluation/eligibility team submitted written statements regarding the parent's allegation of predetermination.

The occupational therapist stated:

The school team met on 5/11/2021 to review findings to date. It was decided at this meeting that the team desired additional educational testing (academic and executive function measures) to be completed by the school psychologist. The school team met again on 5/17/2021 to discuss these findings and concluded that appropriate testing had been completed and sufficient data was available for eligibility consideration at the meeting with parents scheduled for 5/18/2021. A proposed agenda was also reviewed and a meeting facilitator was identified at this time.

I did not participate in procedural violations that prevented [the student] from receiving an appropriate education. In fact, not only did I not participate in predetermination, I left the meeting on 5/18/2021 unsure if I agreed with the proposal. For that reason, I chose not to immediately sign the eligibility report. I took additional time to carefully consider the discussion, the concerns, and totality of the data presented. At a later date, and after this additional time to reflect on this student's strengths and needs, I did agree with the

evaluation findings. While I recognize the presence of a disability, I agree that [the student] does not require specially designed instruction beyond what can be provided through general education.

In her statement, the student's classroom teacher wrote:

... the team came together during the [evaluation/eligibility team] meeting to make a decision based on data from every team member. My contribution was data collected from daily work. Even after the meeting, standardized test scores proved my determination of saying no to an IEP as they were above grade level, district, and state standards.

An in-house meeting occurred on Tuesday, May 11th, from 11:00-11:30 in the conference room at Sunflower. All testing facilitators (OT, SPED, Speech, Psych) discussed the tests that were given to see if more extensive testing needed to be given. Scores were not given at that point. Items discussed were about tests that had a timer and were there alternatives to use since we know that child doesn't perform well against a timer. The BASC did not identify a need for services therefore other testing options were discussed to see another angle.

A second in house meeting was held on Monday, May 17th, from 11:00-11:30 in the conference room at Sunflower. The two prongs were discussed so each team member knew how to respond based on their data.

Both meetings were formalities so the team knew items were covered. No predeterminations were made; simply data talk occurred. As the classroom teacher, I felt every area was thoroughly covered to get the best data gathering possible.

The school psychologist wrote:

Each special education evaluation is conducted on an individual basis. Students are brought into the evaluation process with no predetermination of whether the student will meet special education requirements. All efforts are made to ensure that the

student's rights, along with parental rights are protected. Special education determination is not made simply at the request of a member of the evaluation team but needs to meet strict legal requirements. This is done not only to ensure access to education by all disabled students but to prevent discriminatory behavior that would place a student in Special Education incorrectly... The team members, including myself, made decisions based on the data collected throughout the evaluation. We considered parental input and outside information during the evaluation process.

Additionally, the school psychologist wrote that it was her opinion that:

[This] student, like many others, [is a student] whose needs can be met in the General education setting. It is my belief that he is, and will continue to, make gains in the General Education classroom with his peers, if given the opportunity to participate with them... He has made great gains with this support. These gains are documented and included in the evaluation.

2 In-house meetings were held to discuss findings and plan for the initial evaluation meeting.

The first meeting was to review our assessment data, verify that there weren't any discrepancies in the data and confirm that we as a team were not missing anything in the evaluation process. Once the first meeting was completed and the data reviewed, it was determined that some additional information should be collected to complete the evaluation. This included assessment and observation which were included in the draft evaluation.

The second in-house involved planning on the part of the team members as to the flow of the meeting to keep the meeting moving in a way that would allow for presentation of all information. The goal was to ensure the meeting would go smoothly and involve all team members, including parents.

The special education teacher wrote:

[In addition to the academic testing she had administered, she] had also reviewed his MAP and Fastbridge data. Although [the student's]

scores had dipped during his winter testing, his fall testing was on grade level even after our extended time off due to Covid-19 and his spring data that he had completed had shown improvements.

I feel that our team followed protocol and even with the information provided by parents and doctors were correct in determining that [the student] did not qualify for an IEP. I believe [the student] would benefit from an updated 504 with the accommodations recommended from the family's doctor and any other additional recommendations from the [evaluation/eligibility] team.

The speech and language pathologist wrote:

...what ultimately led to my decision of him not being eligible was the fact that his reading test scores were going up. If at any point he had plateaued, I think I would have had a different answer. Classroom teacher was not concerned with his performance, and for special education, we have to show a need for special services in the classroom and we have to show that the interventions that were in place were no longer working. He was receiving TITL services and he was improving. He also had a 504 in place that could have been updated based on what his doctor was recommending.

For special education, we also have to keep in mind that students need to be in the least restrictive environment. There are many factors that go into determining eligibility and we can't look at one single test or score. Based on all of the information, results and clinical judgement, I did not think [the student] needed special education services.

This student's eligibility was not predetermined. We had an in-house meeting on 5/11/21 as we often do to discuss results of our individual testing as well as go over any other data such as MAP scores, classroom performance etc. In fact, our last meeting led us to do further testing prior to the eligibility meeting because we wanted to cover more areas and look further into reading which is why [the school psychologist] and I discussed giving the GORT [Gray Oral Reading Tests]. Initially, I had planned on giving it to see if we could find an area of weakness, but then it was decided that it may be better if she gives it as I do not typically work on reading in the

school setting. As a team, we also decided to give the Behavior Rating Inventory of Executive Function (BRIEF) because mom was concerned with executive functioning and his doctor who spoke at the eval meeting had stated that it could be an area of concern in the future due to his current diagnosis of Tourette's Syndrome.

The physical therapist stated:

I did participate in meetings related to [the student] prior to our [evaluation/eligibility team] meeting, but we were not moving towards a predetermined outcome. We did discuss which tests were being administered, if results warranted additional testing which may reveal more information, and times that individuals were pulling him for coordination purposes.

The assistant superintendent was present for the first 2 hours of the evaluation/eligibility team meeting during which time the majority of the results of the evaluation were reviewed. During the remaining twenty minutes of the meeting, the team wrapped up the review of assessment data and moved on to determining eligibility.

In a telephone conversation with the investigator, the assistant superintendent stated that while he left the evaluation/eligibility team meeting at the request of the parent, he remained in the school building and spoke with district team members after the meeting. According to the assistant superintendent, the team reviewed with him the discussion of the prongs of eligibility which had been covered during the meeting while parents were present. Following that discussion, the assistant superintendent signed the Eligibility/Identification Report to show that he agreed with the team's decision.

Summary and Conclusions

Two planning meetings were convened by the district prior to the evaluation/eligibility team meeting on May 18, 2021. These meetings were held so that the staff members on the team could determine whether any additional testing information was needed in order to complete the initial evaluation and prepare a draft of the Evaluation/Identification Report that would be shared with the parents prior to the May 18, 2021 evaluation/eligibility determination meeting. At the second planning meeting, there was additional discussion with

regard to the facilitation of that upcoming eligibility meeting and to plan the best way to present the evaluation data. The investigation uncovered no evidence to substantiate that the district team discussed the student's eligibility during these meetings. In separate written statements, team members asserted that they did not predetermine eligibility for the student prior to the May 18, 2021 meeting.

Prior to May 18, 2021, both the assistant superintendent and the school psychologist sent emails to the parent stating that the purpose of the upcoming evaluation/eligibility meeting was to determine whether or not the student met the criteria for designation as an exceptional child and needed special education services.

The parent contributed information to the evaluation, responding to questionnaires provided by the district and completing "home" portions of two of the assessments included in the Evaluation/Identification Report. The student's father also provided his input with regard to one of these assessments.

At the May 18, 2021 evaluation/eligibility team meeting, both parents were active contributors. Additionally, the neuropsychologist who evaluated the student at parent request in February 2021 spoke to the team and answered questions from the district and the student's father.

The parent anticipated that the district's evaluation of the student would lead to his being determined eligible for and in need of special education services, but team members from the district did not determine that the student *needed* special education – the second prong of eligibility determination. When it became clear that the parent and the district did not agree about the student's eligibility for special education services, the LEA representative made the final decision for the district. The school psychologist completed a prior written notice document reflecting the district's decision and provided that document to the parent.

After the meeting, the assistant superintendent met with district staff to review the eligibility discussion that had occurred after he left the meeting. Following that discussion, both the assistant superintendent and the occupational therapist signed the Eligibility/Identification Report and indicated that they agreed with the conclusions reached by the team.

Evidence shows that both parents provided input into the district's initial evaluation of the student and contributed actively during the evaluation/eligibility team meeting. Additionally, the outside evaluator hired by the parent to complete an evaluation of the student was given the opportunity to speak to the team. The parents and the district asked questions of that evaluator during the meeting. While the district did hold two planning meetings prior to May 18, 2021, there is no evidence that district team members predetermined the student's placement prior to the evaluation/eligibility team meeting. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Additional Investigative Findings

Evaluation Report:

As noted above under Issue One, 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. 300.306(a)(2) and 300.311(a)]. Each school staff member of the evaluation team must certify in writing whether the report reflects that 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 and the documentation of determination of eligibility [K.A.R. 91-40-10(b); 34 C.F.R. 300.306(a)(2)].

The evaluation report serves as the documentation of the child's eligibility. There are specific requirements for reporting the eligibility determination [K.A.R. 91-40-10(a)(1), (e); 34 C.F.R. 300.306(a)(2) and 300.311(a)]. The evaluation report must include the following statements:

- a) The determination of whether the child has an exceptionality;
- b) the basis for making the determination, including an assurance that the determination was made in accordance with applicable laws and regulations;
- c) the relevant behavior noted during the observation of the child;
- d) the relationship of that behavior to the child's academic functioning
- e) the educationally relevant medical findings, if any;
- f) for a child suspected of having a **specific learning disability**, the report must also include documentation of the following:
 - i) an indication of whether the child does not achieve adequately for the child's age or meet State-approved grade-level standards; **AND**

- ii) an indication of whether the child does not make sufficient progress to meet age or State-approved grade-level standards **OR** the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development; **AND**
- iii) the determination of the team concerning the effect of the following factors on the child’s achievement level:
 - A visual, hearing, or motor disability;
 - intellectual disability;
 - emotional disturbance;
 - cultural factors;
 - environmental or economic disadvantage; or
 - limited English proficiency.

At approximately the 2-hour and 8-minute point in the audio recording of the May 18, 2021 evaluation/eligibility team meeting, the school psychologist, as the facilitator of the meeting, began a review of the “Basis for Eligibility Determination” portion of the report, addressing “the two prongs of exceptionality.” Question 1 of the report asks, “Does the child exhibit an exceptionality?” The school psychologist states, “I don’t think there’s any argument with that first prong, that we are meeting that, and I think that the team would agree with that.”

Question 2 of the report asks, “Does the child need special education?” In response to this question, the school psychologist addressed six of the eight “Indicators” outlined under the category of “Other Health Impairment” (OHI) in the “Eligibility Indicators” guidance document issued by the Special Education and Title Services (SETS) section of the Kansas State Department of Education (KSDE).

While the team considered the student for eligibility under the category of Specific Learning Disability (SLD) in addition to OHI, the team did not review the six indicators under the category “Specific Learning Disability” included by KSDE in the Eligibility Indicators document during the meeting.

In the course of this investigation, the investigator determined that the parent was given copies of the Eligibility/Identification Report completed by the district. However, the “Basis for Eligibility Determination” portion of the report was not completed on any copy of the report – either the draft or final versions – that

were maintained by the district or provided to the parent. The evaluation report failed to address the following required elements:

- documentation of whether or not the student has an exceptionality;
- a statement of the basis for making the determination;
- eligibility factors related to specific learning disability; and
- what the report labels “exclusionary factors” (limited English proficiency and a lack of instruction in reading or mathematics) required for determining eligibility.

The district stipulates that the parent was not provided with a completed evaluation report.

Because the district failed to provide a completed evaluation report to the parent which contained required elements related to eligibility determination, a violation of special education statutes and regulations has been identified.

Prior Written Notice

Prior Written Notice (PWN) must be provided to the parent when a district refuses a parent's request to initiate or change the identification, evaluation, educational placement, or provision of special education and related services (FAPE) to the child [K.S.A. 72-3430(b)(2)(B); 34 C.F.R. 300.503(a)(2)].

The PWN provided to parents for each proposed or refused special education action must contain all of the following specific information:

- a description of the action proposed or refused; and
- an explanation of why the school proposes or refuses to take the action; and
- a description of each evaluation procedure, assessment, record, or report the school used as basis for proposed or refused action; and
- a description of the other options the agency or IEP team considered and reasons why they were rejected; and
- a description of any other factors relevant to the proposal or refusal; and
- a statement that the parents have parental rights under special education law; and
- sources for parents to contact to assist in understanding special education law. [K.S.A. 72-3432; 34 C.F.R. 300.503(b)]

The PWN is to be written in language understandable to the general public [K.A.R. 91- 40-26(b); 34 C.F.R. 300.503(c)(1)(i)].

On May 18,2021, the district provided the parent with a PWN that the student was not eligible for special education, stating that “special education services are not necessary to enable your child to receive educational benefits in accordance with his/her abilities or capabilities.” The PWN form also stated that “Special Education is not initiated at this time,” because “this action is proposed to align with Special Education Law.” As stated on the PWN form, “it was considered to initiate Special Education, this was rejected due to Eligibility Criteria.”

While the audio recording of the May 18, 2021 evaluation/eligibility team meeting shows there was discussion of the student’s eligibility for special education, the basis for the decision to deem the student ineligible was not – as described above - documented in the Eligibility/Identification Report provided to the parent. Further, the PWN form did not provide an explanation for the district’s decision beyond a reference to “law” or “eligibility criteria” that are not commonly understood by the general public. The terms used by the district in the PWN form fail to provide the parent with a clear explanation for its actions. Under these circumstances, a violation of special education statutes and regulations is identified.

Issue Two: The evaluation/eligibility team purposefully ignored the findings of the independent educational evaluation obtained at parent expense despite the IDEA requirement that the results of such an evaluation be considered when making decisions regarding the provision of a FAPE.

Parent’s Position

The parent asserts that the evaluation/eligibility team failed to consider data provided by an outside educational psychologist when making decisions regarding the student’s eligibility for special education services. It is the opinion of the parent that the district “ignored all of his findings and recommendations.” The parent contends that the district was not willing to address the explanations of the neuropsychologist and the parent that the student would benefit from special education services and failed to address the opinion of the neuropsychologist regarding assessment measures used by the district.

District’s Position

The district asserts that the input of the neuropsychologist was considered by the evaluation/eligibility team. While not in agreement with the neuropsychologist's opinion regarding the provision of an IEP for the student, the district states that input from the neuropsychologist will be shared with the student's 504 team for their use in revising the student's 504 Accommodation Plan.

Applicable Statutes and Regulations

If the parent provides the school district with an independent educational evaluation (IEE) that meets the district's criteria for an IEE, the results of the IEE shall be considered by the district in any decision made with respect to the provision of FAPE to the child [K.A.R. 91-40-12(e); 34 C.F.R. 300.502(c)(1)]. However, courts have consistently held that, although the school district must *consider* the results of an IEE, there is no obligation to adopt the evaluator's recommendations or conclusions [See for example *G.D. v. Westmoreland Sch. Dist.*, 17 IDELR 751, 930 F.2d 942 (1st Cir. 1991); *T.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889, 10 F.3d 87 (2nd Cir. 1993); *R.Z.C. v. North Shore School District*, 73 IDELR 139, 755 F. App'x 658 (9th Cir. 2018)].

Investigative Findings

Prior to giving her written consent (on February 26, 2021) for the school district to evaluate the student, the parent obtained an independent educational evaluation for the student on February 15, 2021, which was conducted by a pediatric neuropsychologist at Children's Mercy Hospital. Upon completion of that evaluation, the neuropsychologist provided the parent with a report of his findings which the parent subsequently shared with the district.

When developing the Evaluation/Identification Report reviewed with the parent at a May 18, 2021 evaluation/eligibility meeting, the team cited several of the tests administered by the neuropsychologist including:

- the Vineland Adaptive Behavior Scales, 3rd Edition (Vineland-3);
- the Behavior Assessment System for Children, 3rd Edition (BASC-3);
- the Differential Ability Scales, 2nd Edition (DAS-II);
- the Wechsler Intelligence Scale for Children, 4th Edition (WISC-IV); and
- the Kaufman Test of Educational Achievement, 3rd Edition (KTEA-3).

The results of each of these assessments were included in the school district's evaluation/eligibility report.

The pediatric neuropsychologist participated via Zoom in a portion of the May 18, 2021 evaluation/eligibility team meeting. The audio recording of that meeting shows that the team adjusted the meeting schedule to facilitate the participation of the neuropsychologist, pausing the meeting to allow for his input when he became available. The neuropsychologist shared information related to his evaluation and answered questions from the district for more than twenty minutes. District staff sought the input of the neuropsychologist regarding executive function and fluency issues and the necessity for accommodations and modifications. The student's parents also interacted with the neuropsychologist, asking him to share additional information with the group.

Various staff members referenced the neuropsychologist's findings at subsequent points throughout the meeting.

Summary and Conclusions

The evaluation/eligibility team included data from the February 15, 2021 IEE in their Evaluation/Eligibility Report. Additionally, the neuropsychologist participated in the May 18, 2021 evaluation/eligibility team meeting and responded to questions from staff and parents. Because there is evidence to show that the team considered the results of the outside evaluation obtained by the parent, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Three: The parent is requesting that all costs related to the independent educational evaluation of the student at public expense (IEE) – including mileage and lost opportunity costs – be paid for by the district.

Parent's Position

The parent asserts in the complaint that she has and will incur costs beyond the actual billed charge for each of three assessments as part of an IEE scheduled to occur between July 26 and September 30, 2021. Specifically, the parent contends that the district should compensate the parent as follows:

- \$525.00 for 7.5 hours for time spent researching independent evaluators that meet the district's established criteria, communicating with those evaluators, scheduling appointments, obtaining necessary referrals;
- \$804.00 for the loss of three day's work for the parent to take the student to three IEE appointments; and
- \$184.24 for mileage reimbursement for the parent to transport the student to his IEE appointments.

The parent alleges that the district has refused to respond to a June 25, 2021 email referencing these additional costs. To resolve this issue, the parent proposed in her complaint that the district send her a certified check for a total of \$1,513.24 by no later than October 1, 2021.

District's Position

The district contends that, prior to receipt of this complaint, it was unaware that the parent was specifically requesting the school district to reimburse her for mileage and lost opportunity costs.

Applicable Statutes and Regulations

After a school district completes an evaluation, the parents have the right to ask for an independent educational evaluation at public expense if they disagree with the school district's evaluation [K.A.R. 91-40-12(a)(1); 34 C.F.R. 300.502(b)(1)]. Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the district responsible for the education of the child in question [K.A.R. 91-40-1(ff); 34 C.F.R. 300.502(a)(3)(i)]. Public expense means that the district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent [K.A.R. 91-40-12(b)(2)(B)(i); 34 C.F.R. 300.502(a)(3)(ii)].

If the parent requests an independent educational evaluation, the school must provide information to the parent about where an IEE may be obtained and the school district's criteria applicable for IEEs [K.A.R. 91-40-12(b)(2)(A); 34 C.F.R. 300.502(a)(2)]. In addition, if a parent disagrees with the school district's evaluation and requests an IEE at public expense, the school district must, without unnecessary delay, either file a due process complaint to request a

hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense [K.A.R. 91-40-12(b); 34 C.F.R. 300.502(b)(2)(i)-(ii)].

If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the school uses when it initiates an evaluation. These criteria may include the location of the evaluation and the qualifications of the examiner. The credentials of the independent evaluator or evaluators must be comparable to the school's evaluators. The school may set reasonable limitations on the costs for which it will be responsible. The school may have to exceed those costs if necessary to ensure that the independent educational evaluation meets the child's unique needs. [K.A.R. 91-40-12(g); 34 C.F.R. 300.502(e)].

A parent is entitled to only one independent education evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees [K.A.R. 91-40-12(a)(2); 34 C.F.R. 300.502(b)(5)].

The special education formal complaint process is one of the parent rights (procedural safeguards) afforded under federal and state special education law [K.A.R. 91-40-51; 34 C.F.R. 300.151 through 153]. When filing a complaint, a complainant must include a statement alleging that within the past year, a violation of federal or state special education laws has occurred [K.A.R. 91-40-51(a)(1), (b)(1); 34 C.F.R. 300.153(b)(1), (c)].

Investigative Findings

On May 19, 2021, the parent sent an email to the school psychologist, classroom teacher and building principal stating, "I am formally requesting an independent evaluation at the school's expense without delay. Per the Kansas State Special Education: When the parents ask for an independent evaluation at school expense, the school must provide it or begin a due process hearing to show that its evaluation is appropriate."

On May 27, 2021, the assistant superintendent sent an email to the parent stating that the school psychologist would be following up with a PWN regarding the request for an IEE.

The district provided the parent with a PWN dated May 28, 2021 informing the parent that her request for an IEE had been accepted. The parent was also provided with information regarding the district's criteria and procedures for

contract educational evaluations as well as its criteria and procedures for independent educational evaluations.

On June 25, 2021, the parent sent an email covering a number of topics to the assistant superintendent. Included in that email was the following statement:

We are now forced to seek further independent testing at district expense because of the district's denial of a necessary IEP. Additionally, this doesn't come without further expense to [the student's] family in the way of time off of work, gasoline expense, vehicle maintenance, the stress of knowing your child is not receiving an appropriate education despite a clear need, unethical actions by the district, as well as myriad other concerns.

Dr. Bloom of Clinical Psychology and Consulting Services [KC metro] will be completing further testing and will be billing the district...Children's Mercy Hospital [KC metro] will be completing the speech/language evaluation and occupational therapy re-evals and billing the district.

The investigator found no evidence to show that the parent made a specific request prior to the filing of this complaint for district reimbursement of mileage or lost opportunity costs for the parent related to either the scheduling of the IEE or to transporting the student for the evaluation sessions. The email excerpted above references "further expense to [the student's] family" and lists general categories of these expenses, but does not make any demand for reimbursement of these expenses.

The IEE is currently scheduled to be completed as of September 30, 2021.

Summary and Conclusions

The parent made a request for a district-funded IEE for the student on May 19, 2021. On May 28, 2021, the district provided the parent with prior written notice that her request for the IEE had been accepted. On June 25, 2021, the parent sent an email to the assistant superintendent on a variety of topics. In the email, the parent noted that the student's family would incur "further expense" related to the IEE, but no request was made by the parent for the district to cover any of these expenses. It was only when the parent filed this

complaint on July 12, 2021, that the district became aware of the parent's specific desire to have mileage and lost opportunity costs reimbursed related to the IEE which will not be completed until the end of September.

The parent is not alleging that a violation of special education statutes and regulations has already occurred. Rather, the parent is asserting that these costs should be covered by the district as a resolution to her complaint. The district has not yet refused to provide the requested reimbursement. The district must now decide whether it will cover the mileage and lost opportunity costs specified by the parent or whether it will decide to request a due process hearing to object to the IEE.

The filing of a complaint related to the district's responsibility to cover the costs of the IEE is at this point premature because the parent did not make a request to the school district for reimbursement of "further expenses" related to the IEE and thus, the school district has not had the opportunity to decide whether it will pay those extra costs or file for due process. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has identified areas of noncompliance with special education statutes and regulations. Specifically, violations were substantiated with regard to:

- K.A.R. 91-40-10(a)(1) and (e); 34 C.F.R. 300.306(a)(2) and 311(a) which outline specific requirements which must be addressed in the report provided to parents upon completion of an evaluation; and
- K.S.A. 72-3432; K.A.R. 91-40-26(b); 34 C.F.R. 300.503(b) and (c)(1)(i) which require that prior written notice must be provided to a parent whenever the district refuses the parent's request to initiate or change the identification, evaluation, educational placement, or the provision of special education and related services (FAPE) to the child. These laws also require that the PWN must include, among other things, an explanation of why the district refuses to take the action, and it must be written in a language understandable to the general public.

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:
 - K.A.R. 91-40-10(a)(1), (e); 34 C.F.R. 300.306(a)(2), and 311(a) by providing parents with copies of evaluation reports containing all required elements; and
 - K.S.A. 72-3432; K.A.R. 91-40-26(b); 34 C.F.R. 300.503(b) and (c)(1)(i) by providing parents with PWNs that include, among other requirements, an explanation of why the district proposes or refuses to take the action and by writing PWNs in a language that is understandable to the general public.

- 2) Within 40 calendar days of the date of this report, USD #__ shall provide both of the student's parents and SETS with: a) a final Evaluation/Identification Report which includes a completed Basis for Eligibility Determination section, and b) a revised Prior Written Notice of the district's refusal resulting from the May 18, 2021 evaluation/eligibility team meeting. The prior written notice must be written in a language that provides the parent with a clear understanding of the explanation for the district's refusal to find the student eligible.

- 3) 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 regarding the required elements for all evaluation reports and prior written notice for all special education staff in the district responsible for the completion of eligibility determination portions of evaluation/identification reports and prior written notice forms.

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.

- 4) No later than 5 school days before implementing the approved training plan described in item 3)b) above, the assistant superintendent/director of special education 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 3)b) above, the assistant superintendent/director of special education 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.
- 5) No later than 5 school days after implementing the approved training plan described in item 3)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.
- 6) 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)