

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #437
ON DECEMBER 7, 2021

DATE OF REPORT JANUARY 13, 2022

This report is in response to a complaint filed with our office on behalf of ____ by ____ and _____. In the remainder of the report, _____ will be referred to as “the student” and ____ and _____ will be referred to as “the foster parents” or “the complainants.”

While the student lives with the foster parents, it is noted that ____ and _____ are the biological parents of the student and retain all legal rights. Thus, they are considered the educational decision makers for the student for the purposes of the IDEA. A signed written consent to share personally identifiable information with the foster parents for the purposes of this investigation was provided by Mr. ____ on January 4, 2022. In the remainder of the report, ____ and _____ will be referred to as the “biological parents” or the “educational decision makers.”

The complaint is against USD #437 (Auburn Washburn Public Schools). In the remainder of the report, USD #437 will be referred to as the “school,” the “district” or the “local education agency (LEA).”

The Kansas State Department of Education (KSDE) allows for a 30-day timeline to investigate a child complaint and a complaint is considered to be filed on the date it is delivered to both the KSDE and to the school district. In this case, the KSDE initially received the complaint on December 7, 2021; however, the district’s holiday break began on December 20, 2021 and school did not resume until January 3, 2022. For this reason, the 30-day timeline to investigate this complaint was extended by seven days and ends on January 13, 2022.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the foster parents by telephone on December 8, 2021 and January 6, 2022.

USD #437 made the following school staff available for a telephone interview on January 5, 2022:

- Kevin Raley, Director of Special Education
- Jamie Callaghan, Executive Director of Learning Services
- Melinda Patterson, Auburn Elementary School Principal
- Michelle South, Special Education Teacher
- Rachel Grieves, Speech/Language Pathologist

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:

- Individualized Education Program (IEP) dated October 15, 2020
- Prior Written Notice (PWN) dated February 3, 2021 regarding comparable services upon in-state transfer into USD #437
- Behavior Intervention Plan dated April 27, 2021
- IEP dated April 30, 2021
- Screenshot of text message between school staff and foster mother dated May 25, 2021 requesting the student be picked up from school due to behavior issues
- Screenshot of text message between school staff and foster mother dated June 24, 2021 requesting the student be picked up from school due to behavior issues
- Behavior Data Sheets for August 12 and 13, 2021
- Behavior Data Sheets for August 16 – 20, 2021
- Student Transportation Log dated between August 17 and December 17, 2021
- PWN dated August 17, 2021 regarding the student's transportation plan
- Speech/Language Therapy Log dated between August 23 and December 15, 2021
- Email dated September 9, 2021 at 3:03 p.m. from Ms. Patterson to the foster mother regarding extending the quarantine due to staff shortage

- Email dated September 10, 2021 at 8:08 a.m. from the foster mother to Ms. Patterson indicating that the student would return to school on September 13, 2021
- Email dated September 10, 2021 at 11:58 a.m. from the foster mother to Scott McWilliams, Superintendent of USD #437 regarding concerns with services during the quarantine
- Email dated September 10, 2021 at 12:44 p.m. from Ms. Patterson to the foster mother requesting a phone conference to discuss concerns
- Screenshot of text messages between the foster mother and Ms. South on September 14, 2021 related to medical diagnosis of loss of bowel control
- Behavior Data Sheets for September 28 – October 1, 2021
- Emergency Safety Intervention (ESI) Report and Parent Notification dated October 6, 2021
- Incident Report dated November 16, 2021 in Campus Portal showing a one day suspension from the bus
- Email dated November 22, 2021 at 10:32 a.m. from Sarah Feldhausen, Aetna Insurance Case Manager, to Ms. South and copied to Erin Bennett, Dean of Behavioral Services regarding the student's continued need for a psychiatric residential treatment facility (PRTF)
- Email dated November 22, 2021 at 4:36 p.m. from Ms. Bennett to Ms. Feldhausen regarding the need for a PRTF and videotaping
- Email dated November 22, 2021 at 6:53 p.m. from the foster mother to Dr. Raley questioning the PRTF recommendation
- Email dated November 29, 2021 at 11:38 a.m. from Dr. Raley to the foster mother responding to her question
- Formal Complaint Request Form completed by the foster parents dated December 6, 2021
- Email dated December 3, 2021 at 10:12 a.m. from Ms. Patterson to the foster mother with notification of close contact with COVID-19 and describing procedures for return to school
- Email dated December 3, 2021 at 10:48 from the foster mother to Ms. Patterson granting consent for the "Test to Learn" program
- Email dated December 3, 2021 at 11:15 from Ms. Patterson to the foster mother regarding concerns with the "Test to Learn" program for the student

- Email dated December 8, 2021 at 2:32 p.m. from Renae Silvers, Special Services Department Secretary, to the foster parent regarding mileage reimbursement
- Behavior Data Sheets for November 30 and December 1, 2021
- Behavior Data Sheets for the week of December 6 – 10, 2021
- ABC Data Sheets for December 15 and 16, 2021
- Purchase Order dated December 15, 2021 for mileage reimbursement to the foster parents
- USD #437 Response to the Allegations dated December 17, 2021
- Email dated January 11, 2022 at 12:05 p.m. written by Dr. Raley to the Complaint Investigator
- IEP Goal Progress Reports for the 2021-22 school year
- Student Activity Log showing bus transportation provided during the 2020-21 school year
- Student Activity Log showing bus transportation provided during the 2021-22 school year
- Three photos of the student's work space showing charts with picture icons
- Three videos of the student working in the special education classroom (elapsed time of 25 seconds; 41 seconds; and 27 seconds)
- USD #437 Elementary School Handbook for the 2021-22 School Year
- USD #437 District Calendar for the 2021-22 School Year
- 2021 Spring and Summer Update: Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic
- Kansas Psychiatric Residential Treatment Facility (PRTF) Medical Necessity Criteria

Background Information

This investigation involves a 12-year-old male student who is eligible for special education and related services under the exceptionality category of autism. The student lives with foster parents through a private placement arrangement with the biological parents. He transferred into USD 437 on January 27, 2021 and is currently in the fifth grade at Auburn Elementary School. The student has received special education and related services since his enrollment into USD #437.

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)).

Based upon the written complaint and an interview, the parent raised four issues that were investigated.

ISSUE ONE: The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically by not providing the required specialized instruction when the student was quarantined during the 2021-22 school year.

Positions of the Parties

The foster parents report that the student was quarantined on four separate occasions during the 2021-22 school year for a total of nine days on September 7, 8, 9, and 10, 2021; September 14 and 15, 2021; November 9 and 10, 2021 and finally on December 3, 2021. The district did not offer or provide the student with any special education or related services during those periods according to the foster parents. They believe the district is quarantining the student because the school staff at Auburn Elementary School believe the student needs a more restrictive setting and do not want to have the student in their school building. The foster parents also allege that the school district does not have the authority to quarantine a student.

USD #437 acknowledged that the student was quarantined on two separate occasions during the 2021-22 school year for a total of five days. The first quarantine period was on September 7, 8, 9, and 10, 2021. School staff report distance learning options including Zoom and home packets were discussed and offered as a means of providing special education services during this period in a phone call made to the foster mother by Michele South, Special Education Teacher, and Melinda Patterson, Elementary Principal. The staff reported that the foster parents declined all services for this time period.

The staff noted that the quarantine period was extended because of a staff shortage in the student's classroom until September 14, 2021; however, because the foster parents were the only family not in agreement with the extension, USD 437 made arrangements to provide services to the student on September 13 and 14, 2021. Unfortunately, the student was sent home sick on September 14, 2021 due to illness. The student returned to school in 24 hours following the district's illness policy on September 15, 2021.

The district noted the student was also sent home for illness on November 9, 2021. Again, per the district's illness policy, the student was allowed to return to school in 24 hours on November 10, 2021.

USD #437 indicated the student was again quarantined on December 3, 2021 due to being a close contact with a COVID-19 case on the school bus. Per school district policy, the student was allowed to return to school to receive his special education and related services through the "Test to Learn" program for the remainder of the quarantine period on December 6, 7, 8, 9, 10, and 13, 2021.

The district believes they are following the state and county public health guidelines in implementing their COVID-19 and illness district policies.

Findings of the Investigation

The following findings are based upon a review of documentation and interviews with the foster parents and LEA staff in USD #437.

The current IEP for the student was developed on April 30, 2021. Both the foster mother and biological father participated in the development of the IEP. This IEP includes five goals and objectives and requires 1905 minutes per week of special education services in the special education setting; 150 minutes of special education services in the general education setting; 45 minutes per week of speech/language therapy; and 15 minutes per month of occupational therapy consultation with the

student's teachers and staff. The IEP also requires access to attendant care by a non-instructional paraeducator and transportation as a related service.

Both the foster parents and USD #437 agree the student was quarantined on September 7, 8, 9, and 10, 2021. While the school staff report that services during the quarantine period were offered in a phone call, the foster parents do not recall that conversation. No documentation such as a phone log, email, text, letter, etc. was provided by USD #437 to show that special education and related services were discussed with or offered and refused by the foster parents during this timeframe. There is also no documentation to show the biological parents were involved in any discussions regarding services to be provided during quarantine.

Ms. Patterson sent an email to the foster parents on September 9, 2021 at 3:03 p.m. stating,

I am reaching out to let you know that we will have to extend your student's quarantine by one more day due to staffing issues. If students were to return on September 14, we would have to staff our room with 6 substitutes. Considering that we are just coming off a quarantine, we didn't think this was the best option for anyone for many reasons. We know our students don't do well with change and we just don't have that many subs who are trained on our programs. In addition, we don't want to bring in 6 people who aren't normally in the school that could potentially trigger another quarantine. If we can avoid this by delaying our start date by one day, we would like to do that. Please respond to this email so we know that you have received this information.

The foster parents were not in agreement with the extension to the quarantine and the foster mother emailed Scott McWilliams, Superintendent of USD #437, on September 10, 2021 regarding concerns with services during the quarantine. The foster mother wrote,

Another issue to address in the Covid quarantine is how the student will be educated during this time and in the future if there is another mandatory quarantine . . . The student has been at home all week, due to the school quarantine, with no IEP education offered or provided by the

school. He is Covid free with no symptoms. We have the test results being negative and had let the nurse know on Sunday of last week that we had planned to send him on Monday of this coming week [September 13, 2021] when his Covid results would come back negative. We were notified yesterday that the school is extending his quarantine to Wednesday [September 15, 2021], which would be 6 days without an education provided, due to lack of teachers . . . Will the student be able to attend school on Monday and have his IEP services implemented?

In response to this email, the foster mother stated,

I also had a lengthy phone call with Melinda [Patterson, Elementary Principal] after this email and she told me if I wanted IEP services/school work for the student during the quarantine, I should have asked for it. During this phone call too, she let me know that she did not appreciate me emailing her boss, the superintendent Mr. McWilliams about the extended quarantine and said he approved of the quarantine extension due to not having enough staff for the autism classroom. She also said she was calling me back instead of the superintendent in reference to the email.

Both the foster parents and USD #437 agree that the student attended school on Monday, September 13, 2021 and received the required special education services on that date.

On September 14, 2021, Ms. South sent a text to the foster mother at 12:31 p.m. letting her know the student had diarrhea and needed to be picked up from school. The foster mother texted back indicating that the student "has loss of bowel control as a diagnosis . . . this is from his chronic constipation . . . and he's on stool softeners." The foster mother reported the school staff refused to let the student stay in school even after she texted them a screen shot of the diagnosis from the student's discharge summary on August 18, 2021.

USD #437 reported that the foster parent had not provided school staff with a copy of the August 18, 2021 discharge summary showing the diagnosis nor informed school

staff that the student had been given a stool softener that day. Kevin Raley, Director of Special Education, stated,

Therefore, out of an abundance of caution - given that diarrhea is a possible symptom of COVID-19 and that the student had just returned from quarantine - the nurse sent the student home on the afternoon of the 14th. The nurse told the foster parents that if the student was evaluated by a physician and received an alternate diagnosis, that would be acceptable, or the student could get a rapid COVID test and return with a negative test. The student tested negative for COVID and was allowed to return to school after 24 hours on September 15th, which is consistent with district policy after vomiting or diarrhea.

The foster parents acknowledge that the student returned to school on September 15, 2021 approximately 24 hours after being sent home with diarrhea.

Both of the parties agree that On November 9th, the student developed a cough and runny nose. Both of these symptoms are associated with COVID-19 and the student was sent home to be evaluated by his primary care physician. After testing negative for COVID-19, he returned to school the following afternoon after 24 hours, which is consistent with district policy.

On December 3, 2021, Ms. Patterson called and left messages for the foster parents and then emailed the foster mother at 10:12 a.m. to inform them that the student had been identified as a close contact to another student on his school bus who had tested positive for COVID-19. In the email, Ms. Patterson stated,

He will need to quarantine for 10 days. We have his 10th day as December 12 and he can come back on the 13th. He can take a PCR test on Day 6 (Wed. Dec. 8) and if it is negative, can come back on day 8 (Fri, Dec. 10)

USD #437 reported that the foster mother then contacted Jaimie Callaghan, Executive Director of Learning Services. During this conversation, the district's "Test to Learn" program was offered which would require the foster parents transport the student to school each day to the Auburn Elementary School for rapid testing and, if negative, be allowed to attend school and ride the bus home after school. Because transportation is a related service on the student's IEP, USD #437 would provide the foster parents

with reimbursement for the days the student was transported to school because of the quarantine.

The foster mother completed the consent form for the student to participate in the “Test to Learn” program and emailed the form to Ms. Patterson at 10:48 a.m. on December 3, 2021.

Ms. Patterson emailed the foster mother on December 3, 20201 at 11:15 a.m. stating, You are correct, our district does have a test to learn option. The reason I didn’t offer this initially was that in order to do this, the student has to wear their mask appropriately all day. In addition, I know the student has been tested previously, but I didn’t know if being tested every day would be too traumatic for him.

Both parties agree that the student was sent home on December 3, 2021 and did not receive all of his special education and related services on that date due to being quarantined. Both parties also agree that the student participated in the “Test to Learn” program and attended school on December 6, 7, 8, 9, 10, and 13, 2021. Both parties agree that USD #437 provided the foster parents with a check for transportation costs on those dates.

The student’s progress towards his IEP goals and objectives as shown on the IEP Goal Progress Reports for the 2021-22 school year are as follows:

Goals / Measurable Objectives	Making Adequate Progress to Meet Annual Goal	Making Inadequate Progress to Meet Annual Goal
Goal 1		First Quarter / Second Quarter
Measurable Objectives		First Quarter / Second Quarter
Goal 2		First Quarter / Second Quarter
Measureable Objectives	Second Quarter	First Quarter
Goal 3		First Quarter / Second Quarter
Measureable Objectives		First Quarter / Second Quarter
Goal 4		First Quarter / Second Quarter
Measureable Objectives		First Quarter / Second Quarter
Goal 5	First Quarter / Second Quarter	
Measureable Objectives	First Quarter / Second Quarter	

In the district's response to the allegations, Kevin Raley, Director of Special Education, stated,

COVID-19 continues to present school districts and parents alike with many challenges pertaining to quarantine guidelines. We are obligated to follow the state and local regulations related to COVID-19, and unfortunately this can result in a great deal of inconvenience for parents and missed schooling for students. That said, the school and district has followed these guidelines to the letter (though not beyond), and we reject any statement or implication from the foster parents that the school has misconstrued or misused COVID-19 guidelines to send the student home unnecessarily as false.

Applicable Regulations and Conclusions

The IDEA does not address public health issues and therefore no investigation or conclusions were made on the allegations related to the district having the authority to quarantine a student due to COVID-19 symptoms or to send a student home due to illness. Concerns related to these issues should be addressed to USD #437 Board of Education who create the school district policy.

However, federal regulations implementing the IDEA at 34 C.F.R. 300.301 require a free appropriate education (FAPE) be provided to students with disabilities who are ages three through 21. Federal regulations implementing the IDEA at 34 C.F.R. 300.17(d) define FAPE as providing the special education and related services in conformity with the IEP.

Federal regulations implementing the IDEA 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, state regulations implementing the Kansas Special Education for Exceptional Children Act 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. 300.322(a) require school districts to provide parents with the opportunity to participate in the development of the IEP. This would include

the development of the special education and related services that were to be provided during periods of quarantine.

In this case, interviews and documentation show the student was not in attendance at school to receive his special education and related services on September 7, 8, 9, 10, 14, and 15, 2021; on November 9 and 10, 2021; and again on December 3, 2021 due to being excluded from school due to quarantine or illness. The student's current IEP does not include any plan describing how services are to be provided to the student in case of quarantine.

While the district reported special education services were offered during the first quarantine period in September, there is no documentation to support this. The foster mother reported no services were offered and indicated she were told by Ms. Patterson that, "If I wanted IEP services/school work for the student during the quarantine, I should have asked for it." Further, the December 3, 2021 email notifying the foster parents of the second 10 day quarantine period did not include any mention of the plan or procedure to be followed in order to provide the student with his special education service and related services during this timeframe.

There is also no documentation to show the biological parents of the student were ever included in any discussions regarding special education and related services to be provided while the student was quarantined.

The IDEA does not provide guidance for a change of placement based upon student absence due to illness or quarantine. However, In Letter to Clarke (48 IDELR 77, 2007) from the Office of Special Education Programs (OSEP) does provide guidance. OSEP was asked how schools should handle absences, either absences of school staff members or absences of students. OSEP answered with the following:

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.]

Federal regulations at 34 C.F.R. 300.324(b)(1)(i) and (ii)(A) require school districts to review a student's IEP periodically, but at least annually to determine whether the annual goals for the student are being achieved and revise the IEP, if appropriate, in order to address any lack of expected progress toward those annual goals.

In this case, the student's IEP Goal Progress Reports for both the first quarter and second quarter of the 2021-22 school year show the student is making inadequate progress towards the majority of his IEP goals. It is unclear whether this lack of progress is the result of absences from school or the result of the failure to provide the student with special education services while the student was quarantined. However, it is clear the student is not make adequate progress in order to achieve his annual IEP goals and that USD #437 did not reconvene the student's IEP team to review the IEP, consider the impact of the student's absences combined with lack of special education and related services during the first semester, and then to revise the student's IEP as appropriate to address this lack of progress.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the student's parents with the opportunity to participate in the development of the IEP. In addition, a violation of special education statutes and regulations is substantiated for failing to review and revise the IEP, as appropriate, due to lack of adequate progress towards the student's IEP goals during the 2021-22 school year.

ISSUE TWO: The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically by not consistently providing transportation as a related service during the 2021-22 school year.

Positions of the Parties

The foster parents report that USD #437 has required them to provide transportation for the student school multiple times during the past 12 months. During the second semester of the 2020-21 school year, they were called on at least five occasions to pick the student up from school due to his behavior. The foster parents indicated that an IEP meeting was held in September 2021 to develop a plan to address the student's

behavior at school. During the 2021-22 school year, USD #437 sent the student home on November 16, 2021 because he was reportedly “unsafe” to ride the bus home.

The foster parents also reported that they were required to transport the student to school on December 6, 7, 8, 9, 10, and 13, 2021 in order for the student to be tested for COVID-19 each morning in order to attend school through the “Test to Learn” program. The foster parents acknowledge that the district did send them a check to reimburse them for the mileage to transport the student on these dates.

USD #437 disputes the allegation that they failed to transportation as a related service to the student during the past 12 months.

Kevin Raley, Director of Special Education, wrote the district’s response to the allegations dated December 17, 2021. He stated,

As transportation had been a challenging transition for the student last year, the team met on September 3rd, 2021 to conduct observations and modify the student’s transition plan for the 2021-2022 school year. The new plan involved modifications to his late afternoon schedule, new visual supports, and transition objects to facilitate a smoother transition to dismissal. This plan has been very successful with the 11/16 date representing the only time during the current year that parents were called to pick the student up. The student was assigned one day of out-of-school suspension on the 16th as he was sent home without having received his special transportation services for that day. The foster mother and Dr. Raley spoke about this incident over the phone and Dr. Raley assured the foster mother that the Auburn team’s goal and priority is safely transporting the student home, and that it is the school’s last resort to call parents to pick him up. After this event, the school team again evaluated the student’s bus-transition plan and determined that this was truly a one-off event, and not indicative that the transition plan was not working effectively.

USD #437 acknowledged transportation was not provided when the student was quarantined on December 3, 2021 due to being in close contact with a person infected with COVID-19. Through the district’s “Test to Learn” option, the student was allowed to test each morning and, if negative for COVID-19, allowed to attend school that day

with transportation being provided at the end of the school day. The student tested negative on December 6, 7, 8, 9, 10, and 13, 2021 and was provided transportation as a related service home each of those days. USD #437 acknowledged that the district did not provide transportation to school on these dates; however, the parent was offered and provided compensation for providing the transportation to school on those dates thus meeting the district's obligation to provide transportation as a related service at no cost to the parents.

However, USD #437 acknowledged that transportation as a related service was not provided during the second semester of the 2020-21 school year on February 8, April 6, May 25, June 14 and June 24, 2021. On each of these dates, the student displayed behavior that made it unsafe for him to be transported on the school bus and the foster parents were called to provide transportation home at the end of the school day.

Dr. Raley noted that the foster parents were not reimbursed for providing the transportation on these five days and indicated the district had taken steps to reimburse the foster parents for providing the transportation as a related service on these five days during the 2020-21 school year.

Dr. Raley also noted that training had been provided to principals in the district at the beginning of the school year to ensure that school staff were aware that students who receive special transportation and are not allowed to ride the bus for any reason are being denied a special education service and this denial would be considered as an OSS and count towards the 10-day disciplinary change of placement.

Findings of the Investigation

The following findings are based upon a review of documentation and interviews with the parent and LEA staff in USD #437.

The findings of Issue One are incorporated herein by reference.

The student transferred into USD #437 on January 27, 2021 with a current IEP dated October 15, 2021 from another school district in the state of Kansas. This IEP required transportation be provided as a related service.

Both parties agree that transportation as a related service was not provided on five occasions during the second semester of the 2020-21 school year. On February 8, April 6, May 25, June 14 and June 24, 2021, the student displayed behavior that made it unsafe for him to be transported on the school bus and the foster parents were called to provide transportation home at the end of the school day.

Both parties agree that the foster parents were called on November 16, 2021 to provide transportation home at the end of the school day due to concerns with the student's behavior. This date is shown as a day of OSS in the student's disciplinary record in the Campus Portal.

Both parties agree that transportation as a related service was not provided on December 6, 7, 8, 9, 10, and 13, 2021 during the 2021-22 school year. On these dates, the foster parents provided transportation to Auburn Elementary School in order for the student to participate in the "Test to Learn" program. Both parties acknowledge that the district provided reimbursement to the foster parents for transporting the student on these dates.

Applicable Regulations and Conclusions

Federal regulations implementing the IDEA at 34 C.F.R. 300.320(a)(4) require school districts to develop an IEP that describes the special education and related services that will enable the student to make progress towards their annual goals in order to receive a free appropriate public education (FAPE). Federal regulations implementing the IDEA at 34 C.F.R. 300.34(a) and (c)(16) require related services to include any necessary transportation to and from school.

Federal regulations implementing the IDEA 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, state regulations implementing the Kansas Special Education for Exceptional Children Act 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. These services must be provided at public expense [34C.F.R.300.17(d)].

In this case, interviews and documentation show the student was not provided with transportation as a related service during the past 12 months on the following dates: February 8, April 6, May 25, June 14, June 24, November 16, December 6, December 7, December 8, December 9, December 10, and 13, 2021. However, interviews and documentation also found that the foster parents were reimbursed by USD #437 for providing transportation as a related service on December 6, December 7, December 8, December 9, December 10, and 13, 2021. So, for these dates, although transportation was provided by the foster parents, it was provided at public expense.

USD #437 acknowledge that the foster parents provided transportation as a related service on February 8, April 6, May 25, June 14, June 24, 2021. The foster parents were not reimbursed for the cost of this transportation, although reimbursement is currently being pursued to pay the foster parents for providing the transportation as a related service on these dates.

There is a similar analysis when transportation is a related service in a child's IEP, and it is not provided for disciplinary reasons. That happened on November 16, 2021 when the foster parents were called to transport the student home due to behavior that made it unsafe for him to ride the school bus. The district appropriately treated this day as a day of out-of-school suspension (OSS) because the required special education service of transportation was not provided to the student for disciplinary reasons.

The Letter to Sarzynski (59 IDELR 141, 2012) from the Office of Special Education Programs (OSEP) provides additional guidance for disciplinary action related to transportation as a related service. OSEP was asked if a school district could suspend a student who has transportation as a related service included in the IEP from the bus for behavioral issues and not provide some other form of transportation to and from school. OSEP answered by stating that when such a student is not provided with transportation as a related services due to disciplinary action, the school district is still responsible for providing that service at no cost to the parent even if the parent voluntarily provides the transportation to enable the student to attend school.

In this case, documentation and interviews showed the foster parents were called to transport the student home on only one occasion during the 2021-22 school year on

November 16, 2021 because of the student's behavioral concerns made it unsafe for him to ride the school bus. The district did not provide the required transportation as a related service and counted this day as one day of OSS.

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 transportation as a related service during the past 12 months on the following dates: February 8, April 6, May 25, June 14, June 24, and November 16, 2021. However, it is noted that USD #437 has already begun taking steps to correct this noncompliance.

ISSUE THREE: The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically by not following the Behavior Intervention Plan for using the augmentative and alternative communication (AAC) device or picture icons on his desk during the 2021-22 school year.

Positions of the Parties

The foster parents believe school staff in USD #437 deliberately denied the student access to his AAC device and picture icons when they videotaped the student as documentation to support their belief that the student requires a more restrictive setting outside of Auburn Elementary School. The foster parents reported school staff have indicated on multiple occasions that they believe the student needs to be placed in a psychiatric residential treatment facility (PRTF). The foster parents indicated that the student regularly uses his iPad to communicate his wants and needs.

USD #437 acknowledged that the student's behavior was challenging when he initially enrolled in January, 2021; however, the student has made marked growth in this area during the 2021-22 school year as evidenced by only one instance of seclusion occurring on October 6, 2021 for approximately five minutes as well as only one instance of the student not being allowed to ride the bus home for safety reasons on November 16, 2021. The district believes the dramatic decrease in inappropriate behavior is indicative of the "successful strategies and training that have been implemented by the team" as a result of the functional behavioral assessment and subsequent behavior intervention plan (BIP) developed in coordination with the Kansas Technical Assistance System Network (TASN).

The district denies not providing the student with access to his AAC systems during the three videotaped observations. USD #427 stated,

The videos of the student were taken when he was working. As part of his autism diagnosis, the student displays some obsessive-compulsive disorder-type tendencies. As reported by his teacher, Mrs. South, the student is obsessive about keeping non-work-related items out of his work-area, and as a result will always move his device away and/or give his communication device (iPad or choice board with picture icons) to a staff-person when he is engaged in his work. These short videos are not evidence of the staff withholding his communication device but rather evidence that the student prefers not to have his communication device on the table when he is working. In addition to his iPad, the student has multiple choice boards with picture icons that are always accessible, both inside his work area and in the classroom.

Findings of the Investigation

The following findings are based upon a review of documentation and interviews with the parent and LEA staff in USD #437.

The student has a BIP dated April 27, 2021 to address aggressive behaviors. The functional behavioral assessment (FBA) hypothesized that the aggressive behavior was communicating the student wanted to escape an activity, task, person, or area. The BIP includes the following replacement behavior: The student will communicate his wants and needs to peers and adults by utilizing his AAC device or pointing to picture icons.

Photos of the student's work space show several charts of picture icons to be used to communicate the student's visual schedule as well as a choice board to allow the student to choose a picture icon to complete the sentence "I want _____."

Three videos were provided showing the student working in his work space. The first video is 25 seconds and shows the student working on a writing task wearing his noise cancelling headphones. The second video is 41 seconds and

shows the student interacting with a staff member at a table top activity and following directions. The third video is 27 seconds and shows the student working on an activity wearing his noise cancelling headphones when he becomes upset and bangs his head on the wall twice and then gets up to leave the area. The student does not appear to have access to his iPad in any of the videos but it is unclear from the angle of the videos if the choice board was available to the student. Both videos of the work space show the use of visual schedules for the student.

Applicable Regulations and Conclusions

Federal regulations implementing the IDEA at 34 C.F.R. 300.324(a)(2)(ii) require school districts to develop an IEP which includes positive behavioral interventions, supports, and other strategies to address any behavior that impedes the learning of the student or the learning of others.

Federal regulations implementing the IDEA 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, state regulations implementing the Kansas Special Education for Exceptional Children Act 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 this case, interviews and documentation found the student displays aggressive behavior in the classroom that impedes his learning and the learning of others. A BIP was developed on April 27, 2021 which includes using an AAC device or pointing to picture icons as a means of communicating his wants and needs in order to decrease the need for the student to use aggressive behavior to escape an activity, task, person, or area.

Behavior Data Charts show a decrease in the number of occurrences of aggression during the 2021-22 school year. Photos of the student's work space show the use of visual schedules and choice boards. While the iPad was not visible in the three videos, school staff indicated this was because the student preferred his work area to be uncluttered by extraneous items. The angle of the three short videos did not provide a

clear view of the workspace in front of the student or near to the student in order to see the choice board. In the one video where the student became upset and banged his head on the wall, he gets up to leave the area and it is unclear if he was seeking his iPad or choice board. School staff report that the student always has access to his iPad and choice board even if it not in his work area.

Based on the foregoing, a violation of special education statutes and regulations is not substantiated for failing to implement the student's IEP, specifically by not following the BIP for using the AAC device or picture icons on his desk during the 2021-22 school year.

ISSUE FOUR: The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), shared personally identifiable information with other agencies during the 2021-22 school year without written consent.

Positions of the Parties

The foster parents reported that USD 437 created and released three videos to Sarah Feldhausen, Aetna insurance case manager, without the appropriate written parent consent in an effort to make the student eligible for a private residential treatment facility (PRTF) placement.

The district believes it appropriately disclosed the videos of the student to the insurance company under the exception in the Family Rights to Privacy Act (FERPA) allowing school districts to share information to an outside third party due to emergency medical needs. In this situation, the student losing his spot on the PRTF waitlist would be considered an emergency. Therefore, USD #437, and more specifically, the IEP team were acting under the FERPA exception "disclosure in connection with a health or safety emergency, if knowledge of the information is necessary to protect the health and safety of the student and other individuals."

USD #437 reported that Ms. Feldhausen was initially invited to be a member of the student's school team at the request of the foster mother on April 15, 2021. The district explained,

Ms. Feldhausen was then also invited by the foster mother to subsequent IEP meetings and was included by the foster mother on many email chains with other members of the student's team. Ms. Feldhausen was specifically identified as a team member who should be included on the student's ongoing email communication thread at an IEP review meeting held on 8/17/21. Ms. Feldhausen reached out in late November, 2021 asking if the school still felt if the student would benefit from a PRTF setting (and whether or not he should remain on a waitlist for Lake Mary), and also requested some video footage of the student's abilities and behavior. Mrs. Erin Bennett, Dean of Behavioral Services for the district, replied to Ms. Feldhausen that the district believed a PRTF setting would still be beneficial, as she did not want the student to lose his spot on the waitlist, especially since the PRTF setting was originally brought up last year by the foster mother. During April of 2021, the student had a period of severe aggressive behavior which resulted in the foster parents bringing him to Stormont Vail for a crisis stay under the supervision of Dr. Kirby Pope. Dr. Pope recommended parents explore a PRTF setting – the student was denied a bed at KVC [Kaw Valley Center], but was extended access to the waitlist at Lake Mary. This information was communicated via a phone call by the foster mother to the student's teacher, Mrs. Michelle South.

As Mrs. Feldhausen was added to the student's team by the foster mother, and has been actively involved as an outside team member and support for the student, it was assumed that the district had a release of information with her. However, at this time we have been unable to find a release of information. Therefore, as we move forward, we will ensure that a release of information is signed by each member of the student's outside support team, that the release is stored in his special education file, and that team members are trained in this area as well.

Findings of the Investigation

The following findings are based upon a review of documentation and interviews with the parent and LEA staff in USD #437.

The findings of Issue One are incorporated herein by reference.

The student's biological parents have not relinquished their parental rights and are the educational decision makers for the student under the IDEA. The foster parents are not the educational decision makers for the student and cannot provide written consent to release personally identifiable information about the student.

USD #437 has included Ms. Feldhausen in multiple email communications and released personally identifiable information about the student at the verbal request of the foster mother but without the written consent of the biological parent beginning in April 2021.

USD #437 acknowledged no written consent to release personally identifiable information was obtained from the biological parent prior to releasing the videos to Ms. Feldhausen.

Applicable Regulations and Conclusions

Federal regulation implementing the IDEA at 34 C.F.R. 300.30(b)(1) require that the biological or adoptive parent of a student be presumed to be the parent for the purposes of the IDEA unless the biological or adoptive parent does not have the legal authority to make education decisions for the student.

Federal regulations implementing the IDEA at 34 C.F.R. 300.622(a) require that school districts obtain written consent from the parent or guardian of a student prior to disclosing personally identifiable information to a third party and to follow the requirements of the Family Education Rights and Privacy Act (FERPA) at 34 C.F.R. 99.

Federal regulations implementing the FERPA at 34 C.F.R. 99.36(a) and (c) allows personally identifiable information to be released to a third party without written parent consent if there is an articulable and significant threat to the health and safety of the student or other individuals. In that situation, the school district may disclose personally identifiable information about the student from their education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

The Student Privacy Policy Office (SPPO) is the office in the United States Department of Education which generates the federal regulations for FERPA and oversees the implementation of FERPA. In a guidance letter regarding the emergency exception to FERPA, the SPPO said the focus of the exception is on the word “emergency.” It explained as follows:

To be 'in connection with an emergency' means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment." See: [Letter to Barrett](#), 23 FAB 21 (SPPO 2019).

In this case, USD #437 collected personally identifiable information about the student when it made the videos and this information was shared with the Aetna insurance case manager, a third party, without the written consent of the biological parent for the purpose of maintaining the student’s place on the waitlist for PRTF services.

It is the conclusion of this investigator that maintaining the student’s place on the waitlist for PRTF services is not sufficiently related to a threat of an actual, impending, or imminent emergency, and so would not be considered “articulable and significant threat to the health and safety of the student”. Therefore, this investigator further concludes that maintaining the student’s place on a waitlist for PRTF services is not considered to be an exception to the consent requirements under FERPA or special education regulations.

In addition, USD #437 has included the Aetna insurance case manager in IEP team meetings and in email communication since April 2021 at the request of the foster mother but without the written consent of the biological parent.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to obtain appropriate written consent from the parent prior to releasing personally identifiable information to a third party during the 2021-22 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. 300.322(a) which require school districts to provide parents with the opportunity to participate in the development of the IEP.

In this case, the student's current IEP does not include a plan for providing special education and related services when the student is quarantined. While it is unclear if the foster parents were included in the discussion of services to be provided during the quarantine period in September, it is clear that USD #437 failed to provide the biological parents who are the educational decision makers for the student in any discussion regarding whether services (if any) were necessary to be provided during the quarantine period in September.

- B. Federal regulations at 34 C.F.R.300.324(b)(1)(i) and (ii)(A) which require school districts to review a student's IEP periodically, but at least annually to determine whether the annual goals for the student are being achieved and revise the IEP, if appropriate, in order to address any lack of expected progress toward those annual goals.

In this case, the student's IEP Goal Progress Reports reflected the student was making inadequate progress towards the majority of his IEP goals during the first semester of the 2021-22 school year. However, USD #437 did not reconvene the IEP team to review and revise the student's IEP, as appropriate.

- C. Federal regulations at 34 C.F.R. 300. 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. In addition, state regulations implementing the Kansas Special Education for Exceptional Children Act 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 this case, USD #437 failed to provide transportation as a related service for the student on five occasions during the 2020-21 school year after January 4, 2021 which is within the federal investigative timeline of one year from the date the allegations were made.

- D. Federal regulations implementing the IDEA at 34 C.F.R. 300.622(a) which require that school districts obtain written consent from the parent or guardian of a student prior to disclosing personally identifiable information to a third party.

In this case, USD #437 acknowledged it released videos of the student to a third party without obtaining written consent from the biological parent. In addition, the district has included a third party on email communication without obtaining written consent from the biological parent.

Based on the foregoing, USD #437 is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #437 shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
 - a. Comply with federal regulations at 34 C.F.R. 300.322(a) which require school districts to provide parents with the opportunity to participate in the development of the IEP.
 - b. Comply with federal regulations at 34 C.F.R.300.324(b)(1)(i) and (ii)(A) which require school districts to review a student's IEP periodically, but at least annually to determine whether the annual goals for the student are being achieved and revise the IEP, if appropriate, in order to address any lack of expected progress toward those annual goals.
 - c. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) and state regulations implementing the Kansas Special Education for Exceptional Children Act at K.A.R. 91-40-19(a) 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.

- d. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.622(a) which require that school districts obtain written consent from the parent or guardian of a student prior to disclosing personally identifiable information to a third party.
2. No later than February 14, 2022, USD #437 will reconvene the IEP team, including the biological parents, to review and revise the student's IEP to address the lack of expected progress toward the annual IEP goals. At that meeting, the IEP team, including the biological parents, must also consider whether the student needs additional supports during periods of quarantine in order to make appropriate progress, and, if so, develop a plan to provide the student with FAPE during periods of quarantine. USD #437 will provide the parent and SETS with a copy of the resulting IEP and any appropriate prior written notice provided to the parent within 10 business days following the IEP team meeting.
 3. It is noted that USD #437 has already developed a plan to reimburse the foster parents for providing the required transportation as a related service on the five dates in the 2020-21 school year. No later than February 1, 2022, USD #437 will provide SETS with a copy of the purchase order or other written documentation for this reimbursement.
 4. It is also noted that USD #437 has already conducted district-wide training with building principals to ensure that school staff were aware that students who receive special transportation and are not allowed to ride the bus for any reason are being denied a special education service and this denial would be considered as an OSS and count towards the 10-day disciplinary change of placement. No later than February 1, 2022, USD #437 will provide SETS with a copy of the sign-in sheet documenting who received this training as well as the

name and credentials of the person who provided the training. In addition, USD #437 will provide SETS with any handouts and/or a copy of the presentation.

5. Effective upon receipt of this decision, the district shall cease to provide personally identifiable information regarding this student with all third parties who previously have been provided with any personally identifiable information regarding this student about the student until such time as the biological parents provide written consent for such disclosures. No later than January 25, 2022, the district shall provide the biological parents with written notice that it has ceased to provide this information to third parties. USD #437 shall provide a copy of this written notice to SETS no later than February 1, 2022.
6. No later than March 15, 2022, USD #437 shall provide training to the members of the student's IEP team regarding the requirements to release confidential information as described in both the IDEA and FERPA. At a minimum this training must address the definition of parent, the requirements to obtain written consent, and the exceptions to FERPA. USD #437 shall provide SETS with the name and credentials of the person providing this training along with copies of training materials as well as a sign-in sheet documenting the persons who participated in the training no later than March 18, 2022.
7. Further, USD # 437 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 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 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. 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)