This report is in response to a complaint filed with our office on behalf of Student by his parents, Mother and Father. In the remainder of the report, Student will be referred to as “the student”. Mother will be referred to as “the mother” and Father will be referred to as “the father”. Together, Mother and Father will be referred to as “the parents” or “the complainants”.

The complaint is against USD #437, Auburn / Washburn Public Schools. In the remainder of the report, “USD #437,” “the school,” the “district”, and the “local education agency (LEA)” shall refer to this responsible public agency.

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 January 3, 2023; however, the timeline to investigate the complaint was extended until February 9, 2023 due to the parents’ technical difficulties in providing supporting documentation.

**Investigation of Complaint**

Nancy Thomas, Complaint Investigator, contacted the parents by telephone on January 5, 2023 to clarify the issues of the complaint. The Complaint Investigator interviewed the parents by telephone on January 21, 2023.

The parents requested and provided written consent for several other persons to be interviewed during the investigation. These persons were contacted and offered the opportunity to provide information relevant to the allegations.

Florence Cornish and Michelle Holmer from the Disability Rights Center of Kansas indicated that they had no direct knowledge in regards to the allegations made by the parents and could only confirm what the parents had shared with them. Amanda Nestler, Licensed Master Social
Worker, declined to be interviewed because she serves as the student's individual mental health therapist and is bound by confidentiality under HIPAA

USD #437 made the following administrative staff available for telephone interviews on January 18, 2023:

- Kevin Raley, Director of Special Services
- Jamie Callaghan, Executive Director of Learning Services
- Erin Bennett, Dean of Behavioral Services
- Katie Sonderegger, Principal of Farley Elementary School
- Lori Kopp, School District Attorney

In completing this investigation, the Complaint Investigator reviewed the following resources and documentation provided by the complainants and the district:

- Multidisciplinary Evaluation and Eligibility Report dated May 20, 2019
- Evaluation Team Report dated January 11, 2021
- Discipline records dated between October 18, 2021 and October 25, 2022
- Emergency Safety Intervention (ESI) Reports for the 2021-22 school year
- Individualized Education Program (IEP) dated May 16, 2022
- Accommodation Documentation Chart for IEP dated May 16, 2022
- Responses to Therapist Concerns/Questions Regarding FBA and IEP dated May 18, 2022
- Infinite Campus Records for the student including grade cards, attendance record, discipline record, health records, etc.
- Emails between Erin Bennett, Dean of Behavioral Services, and the parents dated between August 3, 2022 and August 8, 2022
- Professional Development and Training for Farley Elementary School dated between August 5, 2022 through October 20, 2022
- Professional Development Itinerary for Farley Elementary School dated August 8, 2022
- Slides from Zones of Regulation Training presented at Farley Elementary School on August 8, 2022
- Humphry the Hamster (sensory toy) Classroom Expectations dated August 17, 2022
- Staff meeting agenda and notes dated August 29, 2022 regarding additional proactive strategies
- Staff meeting agenda and notes dated September 6, 2022 regarding providing additional supervision and planning around recess time.
- Para Educator Notes dated between September 7, 2022 through October 24, 2022
Note that multiple emails and documentation related to issues that occurred during the 2021-22 school year were also reviewed and considered as background information.

Background Information

This investigation involves an eleven-year-old student currently enrolled in the fifth grade in USD #437. At the age of seven, he was diagnosed with Autism Spectrum Disorder by Melissa Campbell, Psy.D. at Children's Mercy Division of Developmental and Behavioral Services. The student also has clinical diagnoses of social anxiety and sensory processing disorder. The student receives privately paid therapy from Amanda Nestler, Licensed Master Social Worker, on an ongoing and regular basis.
The student has attended school in USD #437 since preschool. He attended Wanamaker Elementary School starting in kindergarten through the end of fourth grade. USD #437 assigned him to Farley Elementary in August just prior to the start of the 2022-23 school year in order to have a “fresh start” because he displayed a significant increase in inappropriate and aggressive behaviors in the school setting during fourth grade. The student has attended school virtually since November 21, 2022 receiving specialized instruction and social work services on a weekly basis to address social emotional learning, social skills, and social cognition.

The student was initially evaluated at the end of first grade on May 20, 2019 but did not meet the eligibility criteria to be eligible for special education because there was no academic impact or needs at that time. The student was evaluated again on January 11, 2021 during third grade and was found eligible for special education and related services under the exceptionality category of Autism. He has received special education and related services since that time.

**Issues**

The Individuals with Disabilities Education Act (IDEA) and Kansas Special Education for Exceptional Children Act give KSDE jurisdiction to investigate allegations of noncompliance 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 parents 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 protect the student’s personally identifiable information, specifically by allowing school staff to video record the student’s behavior on their personal cell phone(s) during the 2022-23 school year.

**Positions of the Parties**

The complainants alleged that Katie Sonderegger, Principal at Farley Elementary School, used her personal cell phone to record the student on October 25, 2022. The parents reported the student was in an emotional state and having a crisis in the school social worker’s office when the principal video recorded the student’s image and stated his name while recording.
The parents stated,

Mrs. Sonderegger ignored the student’s heightened state of crisis and chose to video record what she described later as “damage” in the room, instead of following the BIP [Behavior Intervention Plan] and de-escalation strategies to assist in regulating the student. Mrs. Sonderegger falsely described the student in her report as “a danger to himself and others” and ignored protecting not only the student but the entire school by disregarding her own “observation” to pull out her phone to record. Furthermore, during the recording, she reported saying the student’s name but denies that the video showed the student.

The parents indicated that Mrs. Sonderegger never disclosed the use of the cellular device or the video in her incident report or any correspondence regarding the crisis incident. However, at the Manifestation Determination Meeting held on October 28, 2022, Mrs. Sonderegger stated that she had pulled out her cell phone to record the damage to room, not to record the student and that she had said something like “student, that’s not ok.”

The parents are upset that they were unaware of the existence of this video recording until its disclosure at the Manifestation Determination Meeting on October 28, 2022. They are also troubled that Mrs. Sonderegger failed to allow the parents to view the video recording and deleted it without documenting that she had the cell phone with her during the incident, that a video recording was made, and that the video recording was deleted. The complainants note they have never been given the reason for discarding this educational record of the student. The parents believe that the actions of Mrs. Sonderegger violated the student’s right to privacy and confidentiality.

The district indicated it was aware that the staff member used her personal cell phone to make a recording while the student was in the school social worker’s office on October 25, 2022. Based on an investigation, officials at USD #437 noted that the intent of the staff member was to document the damage to the room and school property in order to report in accordance with USD 437 District Policy EBCA. The district acknowledged that this may not have been the best time to attempt to record the damage since the student was still in the room; however, the student was not on camera until he threw something at the staff member causing the camera to move and record him.

USD #437 reported that once the student was inadvertently recorded, which was never intended, the staff member deleted the video recording to ensure the student’s privacy. The district believes that the recording made by the staff member, the video itself, its deletion, or lack of reporting to parents is not a violation of the student right to privacy and confidentiality.
because the purpose of the recording was as a personal memory aid and not as an educational record collected and maintained by USD #437.

Findings of the Investigation

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

The student was involved in a crisis situation on October 25, 2022 in the school social worker's office while in an emotional state. Items in the school social worker's office were knocked off shelves and thrown at staff members. A large item was thrown at the principal resulting in a large bruise to her forearm. The student ripped and broke personal items, shoved chairs over, and attempted to turn over a table. The student tore things off the walls and purposefully dumped crates of resources onto the floor. In addition, the student attempted to break and take apart the microwave and phone which resulted in these items being unplugged for the student's safety. The student also attempted to elope from the office area.

The email dated October 25, 2022 at 8:55 p.m. written by Ms. Sonderegger to the parents includes a summary and description of the events that occurred but does not mention a video recording being made during the incident.

Mrs. Sonderegger acknowledged that she did make a video recording on her cell phone during the incident that occurred on October 25, 2022. She indicated the purpose of the cell phone video was to record the damage to the social worker's office for reporting purposes. Ms. Sonderegger reported the student's image was inadvertently and momentarily captured on the video and that she said the student's name while videotaping. However, she also stated that the video no longer exists because it was deleted from her phone because it was no longer needed.

USD #437 School Board Policy EBCA requires school staff to immediately report any incidents of vandalism to their immediate supervisor.

Applicable Regulations and Conclusions

Federal regulations implementing FERPA at 34 C.F.R. 99.3 state that the term “personally identifiable information” (PII) includes, but is not limited to, the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and
mother’s maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the school district reasonably believes knows the identity of the student to whom the education record relates. A student’s disability status and any information about a student’s IEP services would fall under the definition of PII. In this case, the information captured on the video recording on October 25, 2022 would be considered personally identifiable information.

Federal regulations at 34 C.F.R. 300.624(a) require public agencies to inform parents when personally identifiable information that is collected, maintained, or used is no longer needed to provide educational services to the child and will be destroyed.

Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), at 34 C.F.R. 300.613(a), require school districts to permit parents to inspect and review any education records containing personally identifiable information related to their child, which are collected, maintained, or used by the agency. School districts must comply with a request without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made.

Federal regulations at 34 C.F.R. 300.611(b) state that education records mean the type of records covered under the definition of ‘education records’ in 34 C.F.R. part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1947 (FERPA)). 34 C.F.R. part 99 states that “education records “ are records that are (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for or on behalf of the agency or institution. “Record” means any information recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, and microfiche.” Personal notes made by teachers and other school officials that kept in the sole possession of the maker and not shared with others are not considered education records. Additionally, law enforcement records created and maintained by a school or school district’s law enforcement unit for a law enforcement purpose are not education records.

In this case, there are three issues related to the video recording made on Mrs. Sonderegger’s personal cell phone. The first issue relates to parent consent and the disclosure of the video recording to the parents. The second issue is whether or not the LEA appropriately responded to the parents’ request for access to the video recording and the third issue is whether or not the video recording was an educational record pertaining to the student.
The IDEA does not include any requirements for the LEA to obtain parent consent prior to collecting an educational record or any requirement that the parent must be informed when an educational record is created. However, federal regulations at 34 C.F.R. 300.624(a) do require parental notice when an educational record collected, maintained, or used by the LEA will be destroyed. In this case, the parent was clearly not informed of the destruction of the video recording; however, a determination as to whether the video recording was an “educational record” must still be made.

In regards to the second issue, federal regulations at 34 C.F.R. 300.613(a) require USD #437 to provide the parent with access to the educational records used by the school district without unnecessary delay and in no case more than 45 days from the date of the request. In this case, it appears that the parents requested access to the video recording during the Manifestation Determination Meeting held on October 28, 2022 and that the district responded to the parent request on that same date informing the parents that the video no longer existed and was therefore unavailable to be shared.

In order for the video recording to be considered an educational record, federal regulations at 34 C.F.R. part 99 require that the record to be (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for or on behalf of the agency or institution.

In this case, the video recording is directly related to the student as the student's image was recorded and his name stated in the video recording that was made to document the damage he caused in the social worker’s office on October 25, 2022. However, the reported purpose of the video recording was to serve as a personal memory aid for the principal to use when reporting the incident of vandalism per school board policy. It is noted that the video recording was subsequently deleted and was therefore not maintained by the LEA or the principal. Based on this information, the video recording would not meet the requirements to be considered an educational record.

Based on the foregoing, a violation of the IDEA requirements for protecting the privacy of the personally identifiable information of the student is not substantiated.

**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(s) as written, specifically the 1-1 paraprofessional support, the behavior intervention plan (BIP) and accommodations related to behavior during the 2022-23 school year.
Positions of the Parties

The complainants alleged that the staff at Farley Elementary School failed to follow the student’s IEP which caused numerous disciplinary situations resulting in emergency safety interventions (ESI) and suspensions from school. The parents specifically referenced the failure of USD #437 to provide 1-1 paraprofessional support during recess on August 17 and August 26, 2022; failure of USD #437 to provide the accommodations listed in the IEP; and the failure of USD #437 to implement the student's BIP, specifically the recess plan and providing access to preferred sensory materials.

The parents indicated that USD #437 changed the student's building assignment from Wannamaker Elementary School where he attended for five years to Farley Elementary School in order to provide the student with a “fresh start” in the 2022-23 school year. The parents were notified of this building assignment on August 7, 2022 with the first day of school being August 11, 2022. The parents reported they were not in agreement with the change in building assignments but were told by USD #437 administrators that the student's building assignment was a district decision since the change would not impact the special education services described in the current IEP.

Once school started again, the parent reported the student almost immediately began to display the same type of negative behaviors at Farley Elementary as were seen at the end of the 2021-22 school year at Wannamaker Elementary School. The mother believes this was caused by the student not knowing any staff or peers at the new school and the IEP and BIP developed in May 2022 at Wannamaker Elementary School was not implemented by the staff at the new school. The parents believe the student felt distrustful at his new school which has caused his behavior to spiral and become increasingly more frequent and severe. The parent's believe that if the district had implemented the IEPs proactively as written, the student would not have displayed the escalating behaviors resulting in multiple disciplinary actions.

The district responded that the staff at Farley Elementary School did implement the May 16, 2022 IEP and BIP with fidelity during the 2022-23 school year. The staff provided numerous services, supports, and interventions to assist the student to be successful at Farley Elementary School.

USD #437 believes the staff at Farley Elementary School implemented the May 16, 2022 IEP as written during the 2022-23 school year and continuously worked with parents to discuss the student’s inappropriate behavior and clarify the precursor, setting events, and antecedents
that triggered the student's problem behavior as well as the proactive and reactive strategies to be implemented when the behavior occurred.

Findings of the Investigation

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

There have been two IEPs in effect for the student during the 2022-23 school. The second IEP was in effect starting November 21, 2022 through the present time. It was developed on that same date as a result of a mediation agreement between the parents and the LEA to settle an expedited due process hearing. The parents made no allegations related to this IEP.

The first IEP was in effect between August 11 and November 21, 2022 and was developed on May 16, 2022 with the parents in attendance. This IEP requires 310 minutes per week of specialized instruction in the special education setting; 400 minutes per week of specialized instruction in the general education setting; 125 minutes per week of “attendant care - a non-instructional para educator” in the general education setting; 20 minutes per week of social work services in the special education setting; and 300 minutes per week of special transportation.

The Farley Elementary School schedule begins at 8:45 a.m. and ends at 3:45 p.m. on regularly scheduled school days for a total of 420 minutes per day. Based on the special education and related services required in the IEP, the student was provided with specialized instruction in the special education setting for 330 minutes per week (16% of the time); with specialized instruction and support in the general education setting for 525 minutes per week (25% of the time); and no special education instruction / support for 1070 minutes per week (59% of the time). It is noted that the IEP does not require a 1-1 para educator with the student in all settings throughout the entire school day.

The chart below shows the May 16, 2022 IEP accommodations that were to be provided to the student and a summary of the documentation USD #437 provided to substantiate that the accommodation had been provided during the 2022-23 school year:
<table>
<thead>
<tr>
<th>Accommodation</th>
<th>Location</th>
<th>Frequency (when)</th>
<th>Duration (length of accommodation)</th>
<th>Summary of USD #437 response and documentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allow time for organization of materials</td>
<td>All subjects</td>
<td>At each task or subject transition</td>
<td>Until materials are organized</td>
<td>Morning Meeting was the designated time in the fifth grade classroom when students organized their materials. A Daily Schedule was posted on classroom whiteboard showing “Morning Meeting”.</td>
</tr>
<tr>
<td>Visual or list of coping and calming strategies</td>
<td>All subjects</td>
<td>Daily and when feeling overwhelmed or anxious</td>
<td>Until he is feeling calm and self-regulated</td>
<td>Zones of Regulation and targeted coping strategies and tools were used building-wide to support appropriate behavior. Posters were placed throughout the building and in each classroom showing the “tools” to use for each of the four zones (Blue, Red, Green, and Yellow). In addition, the student had a visual for a “hamster break” on his desk until the hamster was no longer allowed at school because it had become a distraction and trigger for inappropriate interactions with peers.</td>
</tr>
<tr>
<td>Alert student to transitions</td>
<td>All subjects</td>
<td>Before each transition</td>
<td>2-3 minutes before transition occurs</td>
<td>A Daily Schedule is posted on the classroom whiteboard showing the schedule of activities for the school day. In addition, the social worker had a morning check-in with the student where the daily schedule was reviewed. School staff reportedly gave verbal cues for transitions between activities.</td>
</tr>
<tr>
<td>Option to take assessments in small group setting</td>
<td>All subjects</td>
<td>For each assessment</td>
<td>Until assessment is complete</td>
<td>Separate, private study carrels were accessible in the CHAMPS classroom if the student chose to take any assessment in a small group setting.</td>
</tr>
<tr>
<td>Option to use noise cancelling headphones</td>
<td>All subjects</td>
<td>When student feels over-stimulated by noise</td>
<td>Until the noise level is reduced</td>
<td>Staff report the student regularly used the noise canceling headphone in the special education classroom when younger students were being noisy.</td>
</tr>
<tr>
<td>Accommodation</td>
<td>Location</td>
<td>Frequency (when)</td>
<td>Duration (length of accommodation)</td>
<td>Summary of USD #437 response and documentation</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
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</tr>
<tr>
<td>Option for barrier to block visual and auditory distractions</td>
<td>All subjects</td>
<td>When the student is distracted by his surrounding in a classroom setting</td>
<td>Until the task is complete</td>
<td>Portable cardboard study carrels were available to any student in the classroom to place on their desk if desired. In addition, the separate, private study carrels in the CHAMPS classroom was available to the student to use if requested.</td>
</tr>
</tbody>
</table>

This IEP also includes a behavior intervention plan (BIP) which identifies the problem behaviors as well as describes the precursor, setting events, and antecedents that trigger or predict that the student will display a problem behavior. The BIP identifies the function of the student's behavior as avoidance as well as a “function of his disabilities (Autism Spectrum Disorder, social anxiety, and sensory processing disorder) and related lagging skills in cognitive flexibility, social thinking, and emotional and self-regulation.” The BIP also includes both proactive and reactive strategies be implemented and also requires training for staff.

The recess plan in the BIP states,

The student has para support during recess. After recess, the student will reflect/self-monitor with the adult who has been with him at recess. The reflection will center around skills such as having positive conversations, being able to share, take turns, etc. and appropriate body control for the activity. If there has been an incident of physical aggression at recess, the student and staff will follow his structured recess plan. The plan is for the student to have 5 days of structured recess where he will engage in positive social interaction while learning and practicing some pro-social skills. After the 5 days, the team would re-evaluate the next steps with the plan to eventually fully re-integrate in recesses with his peers.

The complainants specifically described an incident which occurred on August 17, 2022 where the 1-1 para educator was not with the student during recess and a peer bullied the student which resulted in the student becoming dysregulated. The student subsequently disrupted and destroyed the classroom. The complainants also referred to an incident that occurred on August 26, 2022 during recess where the 1-1 para was unaware of the student being bullied by another student and did not intervene prior to the student displaying inappropriate behavior towards a peer.
The Manifestation Determination Review described the August 17, 2022 incident as follows:

The student became escalated at recess and came into the classroom upset. He destroyed the classroom, ruining many school and personal items of the students’ and teacher. The parents note that earlier in the day the student had been called names by another student. They also note there is no confirmation that there was a para present at that recess.

USD #437 believes the para educator was with the student during recess on August 17, 2022 but acknowledged that there is no documentation to support this. Because of this lack of documentation, the student's assigned para educator started keeping daily logs of the student’s behavior beginning on August 23, 2022, which focused on first recess, band, and second recess, the unstructured times of the school day where the student struggled the most with his behavior.

The Behavior Log described the August 26, 2022 incident as follows:

At recess, the student got extremely close to another student who then pushed him away. The student then wandered around the tree line for several minutes while looking at both the other student and the para educator assigned to him at recess. When the para educator turned her head away to survey another group of students, the student took this opportunity and charged the other student, tackling him to the ground. He then proceeded to get up and stomp the student on the head with his foot several times.

Interviews and documentation show the recess plan was put into effect on Monday, August 29, 2022.

The BIP includes several reactive strategies that staff should implement when the student is becoming dysregulated and overwhelmed and specifically requires that the student “be provided with access to his preferred sensory materials/activities. The parent reported, August 2022, the student was prevented from being able to be provided access to preferred sensory materials as written in his BIP. The student had identified a small stuffed hamster, prior to being forced to transition to Farley Elementary School as a comforting sensory object, often utilized for his anxiety and utilized when stemming. After more than one incident of bullying at Farley that led to [discipline] incidents, the student was informed by the social worker he was no longer allowed to provide his sensory item at school.
USD #437 reported the student was initially allowed to bring his stuffed sensory toy, “Humphry the Hamster”, to school to help him be comfortable and focused during the school day. School staff reported,

However, as time went on, the toy was used less frequently for stimming or soothing purposes, and instead as a tool to distract other students or gain attention form students or staff. This typically manifested by the student throwing Humphry into the ceiling tiles or onto other students’ desks while they were trying to complete work. Students would then often get frustrated or annoyed and ask the student to stop, tell him he was being annoying, or complain to the teacher. We do not consider these responses to be evidence of bullying behavior towards the student but instead age-appropriate responses to distracting and interfering behavior . . . Mrs. Reynoso [social worker] continued to offer the student sensory breaks and other sensory toys, puzzles, and games – the student would frequently take these items to class as well and were less distracting for him and his peers.

Applicable Regulations and Conclusions

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 implementing the IDEA at 34 C.F.R. 300.320(a)(4) require school districts to include a statement of the individualized program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual IEP goals; to be involved in an make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children.

In this case, the parents specifically alleged USD #437 failed to provide the 1-1 para educator. However, the May 16, 2022 IEP does not require a 1-1 para educator be with the student throughout the entire school day. This IEP only requires para educator support in the general education setting for 125 minutes per week and the BIP requires the student to have a para during recess as part of the recess plan.
The parents also allege that the accommodations listed in the IEP during the 2022-23 school year were not implemented at Farley Elementary School. Documentation and interviews found that the majority of the accommodations provided for the student were Tier one / universal accommodations which are available for all students and not individualized for the student.

For example, USD #437 reported that the student used “morning time” in the classroom to organize his materials; however all fifth grade students used this time for the organization of materials. The student’s IEP accommodation required the organization of materials to occur at “each task or transition” throughout the school day, not just at the beginning of the school day.

Another example would be the building-wide use of the Zones of Regulation and posters displayed around the building and classroom which USD #437 indicated as the accommodation provided in the IEP for the listing of coping/calming strategies. Again, this is a Tier one / universal accommodation for all students in the building and not an individualized listing of the coping/calming strategies specific to the student to choose from when he was dysregulated.

The parents also alleged USD #437 failed to follow the recess plan included in the BIP. The recess plan does state that the student is to have a para educator with him at recess and includes a plan for a “structured recess” if inappropriate behavior occurs.

In this case, USD #437 acknowledged that there was no documentation to support that the student had access to a paraeducational with him at the August 17, 2022 recess. Following the disciplinary incident that same day, the district responded appropriately by reviewing its procedures and practices and creating a new procedure to collect data as well as document this behavioral support was in place during recess on a daily basis.

Documentation shows the para was at recess with the student when the disciplinary incident occurred on August 26, 2022. The interviews and documentation show the student deliberately waited until the paraeducator was distracted before using that opportunity to attack another student. Following this situation, the structure recess plan was implemented the following Monday. It should be noted that the BIP does not guarantee that the student will never display inappropriate behavior; instead the BIP includes both proactive and reactive strategies/plans designed to support and teach the student in an effort to increase the instances of appropriate behavior.

The district argues that court cases have found that the law does not require “perfection” so that, even if a paraeducator was not present during recess on August 17, 2022, there would
be no violation of failing to implement the IEP or providing a free appropriate public education (FAPE) to the student. While it is not certain if one instance of USD #437 failing to provide para support during recess results in a failure to provide FAPE, these are definitely instances where the IEP was not implemented as written which is the requirement of federal regulations at 34 C.F.R. 300.323(c)(2) and Kansas state regulations at K.A.R. 91-40-19(a).

Also in relation to the failure to follow the BIP, the parents reported that, beginning in August 2022, the student was prevented from accessing his preferred sensory support item, a small stuffed hamster. Interviews and documentation show the student was allowed to bring the hamster to school as a preferred sensory material at the beginning of the school year. However, when the hamster became a distraction for both the student and his peers in the classroom, use of the hamster was denied and other sensory strategies and materials were introduced and used by the student.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP, specifically the individualized accommodations listed in the IEP and the para educator support during recess on August 17, 2022 during the 2022-23 school year.

**ISSUE THREE:** The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to review and revise the student's IEP during the 2022-23 school year in response to bullying incidents.

**Positions of the Parties**

The complainants alleged the student suffered from significant bullying from peers when he transferred to Farley Elementary School in August 2022. The parents believe this bullying combined with the lack of staff's response to the bullying resulted in the student responding to the bullying with inappropriate behavior. This inappropriate behavior then caused the student to be disciplined with out-of-school suspensions which resulted in manifestation determination meeting. The parents reported that after reviewing the situation and the facts, it was determined that the inappropriate behavior was a manifestation of his disability. The parents believe that if USD #437 had responded appropriately to the bullying episodes, the student's behavior would not have escalated in the school setting during the 2022-23 school year.

USD #437 noted that Kansas regulations at K.S.A. 72-6147 define “bullying” as any intentional gesture or intentional written, verbal, electronic or physical act or threat either by any student, staff member or parent towards a student or by any student, staff member or parent towards
a staff member that is sufficiently severe, persistent, or pervasive that such gesture, act, or threat creates an intimidating, threatening or abusive educational environment that a reason person, under the circumstances, knows or should know will have the effect of harming a student or staff member, either physically or mentally; damaging a student's or staff members property; placing a student or staff member in reasonable fear of damage to the student's or staff member's property; cyberbullying; or any other form of intimidation or harassment prohibited by the board of education school district policies.

USD #437 stated,

Peer conflict or aggression should not be confused or conflated with bullying. As opposed to bullying, peer conflict is a mutual disagreement or hostility between peers that occurs occasionally and is not planned. These are the types of interactions that occurred between the student and his peers at school. His peers were not seeking him out or targeting him, but rather were responding to situations that either the student or they initiated, which is a conflict in social situations, not bullying. Therefore, while the school addressed the situations, they did not address them as bullying because they were not bullying.

School staff noted that numerous conferences were held with the parents following the disciplinary incidents to discuss the student's behavior, clarify expectations and procedures, and review proactive strategies between August and November, 2022. The district indicated the IEP team first met on September 19, 2022 to review/revise the student's IEP and a recommendation for a smaller more structured setting was proposed; however, the parents refused to provide consent for any change of services or change of placement.

The LEA believes that the IEP team did their best to prepare and implement an IEP which would enable the student to be safe and develop skills around self-regulation and navigating interpersonal relationships, while also advocating that the student required a smaller and more structured setting to be safe and successful.

**Findings of the Investigation**

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

The findings of Issue Two are incorporated herein by reference.

Interviews and documentation show that multiple conferences with parents and school staff were held following the disciplinary incidents to discuss the student's behavior, clarify
expectations and procedures, and review proactive strategies between August and November, 2022. The IEP team first met on September 19, 2022 to review/revise the student’s IEP and proposed a smaller more structured setting but the parents refused to provide consent for any change of services or change of placement.

The behavioral concerns continued to escalate in frequency and intensity in October resulting in the student being out-of- school suspended for more than 10 cumulative school days with a pattern. A manifestation determination meeting was held on October 28, 2022 with the decision that the behavior resulting in the disciplinary actions was related to the student’s disability.

USD #437 then filed for an expedited due process hearing in order to change the student's placement to an interim alternative educational setting. Through mediation, a settlement was reached for the student to receive his education virtually with social work and specialized instruction for social skills training provided on a weekly basis. An IEP for this placement and services was written on November 21, 2022.

**Applicable Regulations and Conclusions**

The IDEA does not define bullying so no findings will be made in regards to whether the student was bullied or was not bullied during the 2022-23 school year in USD #437.

However, the federal regulations implementing the IDEA at 34 C.F.R. 300.324(b)(1) require school districts to review the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved and to revise, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum; the results of any reevaluation, information about the student provided to or by the parents; the student's anticipate needs; or any other matters.

In this case, there was ample reason for the IEP team to meet regardless if it was the result of bullying, inappropriate behavior at school, or the disciplinary infractions. Interviews and documentation show that USD #437 did attempt to review and revise the student's IEP. Staff met with the parents on multiple occasions to discuss the IEP and BIP between August and November 2022. The district followed the appropriate procedures and held an IEP team meeting on September 19, 2022 to discuss concerns and to develop a more appropriate plan; however, the parents refused to provide consent for any changes. USD #437 staff continued to meet with the parents until such time a manifestation determination meeting was required due to a disciplinary change of placement. Following the district filing for an expedited due
process hearing, the parents and USD #437 were able to reach a settlement agreement through mediation for the appropriate program to provide the student FAPE. USD #437 is currently implementing this IEP.

Based on the foregoing, a violation of special education statutes and regulations is not substantiated for failing review and revise the student’s IEP during the 2022-23 school year in response to bullying incidents.

**ISSUE FOUR**: The USD #437, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to train staff on de-escalation strategies during the 2022-23 school year.

**Positions of the Parties**

The complainants alleged USD #437 did not provide staff with training in the proactive strategies for working with the student and how to engage with him in positive way as well as training to recognize his precursor behaviors and “triggers” during the 2022-23 school year.

The district staff reported they were trained not only in general principals of de-escalation and crisis prevention / intervention but also specifically on the student’s IEP and BIP. These trainings occurred prior to the school year starting and involved meeting with previous school staff as well as the on-going review and clarification of procedures and practices related to implementing the IEP and BIP.

**Findings of the Investigation**

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

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

The BIP states, “Staff need to be trained in the proactive strategies for working with the student and how to engage with him in positive ways. They also need to be trained to recognize his precursor behaviors and “triggers”.
The BIP lists the following proactive strategies that staff should use to prevent problem behaviors:

- Adults new to working with the student should work to establish a connection/relationship with him
- Zones of Regulation training and practice
- Proactive plans for a substitute teacher is in his classroom
- Break card system to request a break nonverbally
- Reinforcement system with daily behavior data tracking
- Structured and visual schedule of his day with preparation and/or coaching regarding anticipated changes as well as stressful or exciting events
- Social Skills curriculum in the resource room to learn and practice skills such as expected / unexpected behaviors, perspective taking, active listener skills, scaling the size of the problem, social awareness and adaptability
- Additional lessons/coaching regarding engaging in positive interactions with peers, how to appropriately engage with peers and adults, and how to appropriately disagree with peers and adults
- Stating expectations and ensuring the student is aware and understands these clearly
- Activities to practice expectations that include movement that is rhythmic, repetitive, and patterned
- Using visual representations of expectations and identifying his energy as high, low, or in between
- Using the language of high, low, and in between to describe his energy. For describing boundaries, it is framed as “busting boundaries vs respecting boundaries”; the word “pause” is used when expectations and boundaries are challenging and a break is needed to reset.
- If stimming behavior is becoming loud or otherwise disruptive, let the student know his options for an alternative location
- Humor and conversation about the student’s preferred topics (currently hamsters) can be good ways to redirect his attention and de-escalate a situation.
Based on interviews and documentation, the chart below shows the training provided to the staff at Farley Elementary School during the 2022-23 school year:

<table>
<thead>
<tr>
<th>Date</th>
<th>Training Provided</th>
<th>Details</th>
<th>Staff Included</th>
</tr>
</thead>
<tbody>
<tr>
<td>8/5/22</td>
<td>Basic De-Escalation</td>
<td>All school based mental health staff were provided training on basic de-escalation strategies and practices.</td>
<td>Social worker, school psychologist and elementary school principal at Farley Elementary School</td>
</tr>
<tr>
<td>8/8/22</td>
<td>Tier 1 Behavior Plan</td>
<td>All staff were trained on the school-wide behavior system which focuses on explicitly teaching expectations, actively monitoring student behavior, providing positive reinforcement, and using proactive strategies to prevent escalation.</td>
<td>All Farley Elementary School staff</td>
</tr>
<tr>
<td>8/8/22</td>
<td>Zones of Regulation</td>
<td>Staff were trained on how to implement Zones of Regulation to help students identify their feelings and learn strategies to self-regulate. The expectation is that all classrooms start their day with individual student check-ins and morning meetings as a way to help students mentally prepare for the day.</td>
<td>All Farley Elementary School staff</td>
</tr>
<tr>
<td>8/8/22</td>
<td>Special Education IEP</td>
<td>Special education teachers met with classroom teachers and support staff to go over details of student accommodations/BIPs, and IEP goals.</td>
<td>All Farley Elementary School staff</td>
</tr>
<tr>
<td>Date</td>
<td>Training Provided</td>
<td>Details</td>
<td>Staff Included</td>
</tr>
<tr>
<td>------------</td>
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<td>-----------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8/8/22</td>
<td>Student's Team Meeting</td>
<td>The student’s new Farley Elementary School staff met with Wanamaker Elementary School staff to discuss his transition to new building and how to implement the BIP and IEP.</td>
<td>The Dean of Behavioral Services, the Wanamaker Elementary School principal and school psychologist, and the Farley Elementary School special education teacher, fifth grade classroom teacher, social worker, and school psychologist.</td>
</tr>
<tr>
<td>9/26/22</td>
<td>Crisis Prevention and Intervention (CPI) Training</td>
<td>Comprehensive, full day training from Crisis Prevention Institute in behavioral de-escalation and crisis response</td>
<td>Farley Elementary School social worker</td>
</tr>
<tr>
<td>10/4/22</td>
<td>CPI Training</td>
<td>Comprehensive, full day training from Crisis Prevention Institute in behavioral de-escalation and crisis response</td>
<td>Para educator assigned to work with the student at Farley Elementary School</td>
</tr>
</tbody>
</table>

In addition, USD #437 reported multiple meetings with parents and school staff between August and November 2022 to specifically review procedures and practices related to implementing the student’s IEP and BIP with fidelity. These discussions and clarifications are considered individualized ongoing training for school staff who worked with the student on a regular basis.

**Applicable Regulations and Conclusions**

Again, 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 support a finding that USD #437 did provide appropriate training for the school staff working with the student. Training on the general theory and practice of de-escalation was provided as well as training specifically focused on the student's IEP and BIP. When the student's behavior continued to increase in frequency and severity, USD #437 responded appropriately by meeting to specifically review and clarify the procedures and practices being used to implement the student's IEP.

Based on the foregoing, a violation of special education statutes and regulations is not substantiated for failing to implement the student's Individualized Education Plan (IEP), and BIP by not providing the required training to staff during the 2022-23 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 implementing the IDEA at 34 C.F.R. 300.323(c)(2) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. 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 USD #408 failed to provide the special education staff support in the general education setting for Student A for 25 minutes per day for 84 days during the first semester of the 2022-23 school year resulting in Student A not receiving a total of 35 hours of specialized instruction required by the April 13, 2022 IEP. In addition, Student B was not provided with 90 minutes per day for 84 days during the first semester of the 2022-23 school year resulting in Student B not receiving a total of 126 hours of specialized instruction required by the August 24, 2022 IEP amendment. In addition, Student A's IEP accommodation for using regulation tools and strategies until the student has regained emotional control was not implemented during the incident that occurred on September 15, 2022.
Based on the foregoing, USD #437 is directed to take the following actions:

1) Within 30 calendar days of the date of this report, USD #408 shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:
   a) Comply with federal regulations implementing the IDEA at 34 C.F.R. 300.323(c)(2) which require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP.

2) No later than February 20, 2023, USD #437 shall contact TASN to request that TASN conduct a training for the special education staff, school psychologist, social worker, and administrators at Farley Elementary School regarding the IDEA requirements related to individualized accommodations and modifications for students with disabilities. No later than five days after the completion of the TASN training, 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.

3) No individual corrective action is ordered regarding the failure to implement the IEP as written because the IEP team met on November 21, 2022 and agreed to make significant changes in services and a substantial change of placement for the student in order to provide FAPE to the student.

4) 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) written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f) as described below.
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, M.Ed., Complaint Investigator


(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)