

Complaint

Kansas State Educational Agency

20FC34

July 27, 2020

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

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

The Kansas State Department of Education (KSDE) received the complaint on June 18, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which ended on July 18, 2020. However, KSDE granted the investigator a nine-day extension to the 30-day timeline. During this extension, both the district and parent provided additional information. For this reason, the investigation timeline ended on July 27, 2020.

Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on July 8 and July 17, 2020 as part of the investigation process. Although USD #____ did not arrange for any district staff members to be interviewed, the district did provide a written response to the allegations.

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

- Individualized Education Program (IEP) dated April 25, 2019
- IEP team meeting notes written by school staff dated November 12, 2019
- Score report for the Woodcock Johnson Tests of Achievement - 4th edition (WJ-IV) dated January 21, 2020
- IEP dated February 25, 2020
- IEP team meeting notes dated February 25, 2020 written by the parent
- Meeting Summary dated February 25, 2020 written by _____, Assistant Principal at _____ Middle School

- Prior Written Notice for Identification, Special Education and Related services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated March 12, 2020 resulting from the continuation of the February 25, 2020 IEP team meeting
- Continuous Learning Plan for USD #___ dated March 31, 2020
- Special Education Individualized Continuous Learning Plan (ICLP) dated April 13, 2020
- Student's Grade Report for the 2019-20 school year
- Student schedule for the 2019-20 school year
- Copies of worksheets from the social studies class
- Copies of worksheets from the reading class
- Copies of worksheets from the math class
- Copies of worksheets from science class
- Screenshot of private comment from the parent to _____, Science teacher, regarding online science assignment
- Screenshot of the ICLP's Google Classroom meeting list
- Screenshot of Google Classroom assignment dated April 13, 2020
- Screenshots of the daily schedule from the ICLP dated April 13, 2020
- Screenshot of email between _____, the teacher of the Family Advocacy (FA)* class, and the parent (*note that the FA class is the homeroom at _____ Middle School)
- Screenshot of science class assignment dated April 9 -10, 2020
- Screenshot of science class worksheet
- Screenshot of Google Classroom assignments for ICLP, FA class, PE, science, and _____ Library
- Screenshots of Infinite Classroom grades and progress reports for the second and third quarters of 2019-20 school year
- Contact log for Ms. _____ [special education teacher] dated April 8, 2020 through May 13, 2020
- Contact log for related services staff dated April 9, 2020 through May 20, 2020

- USD #___ written response to the allegations dated July 10, 2020
- USD #___ written response to the allegations dated July 22, 2020

Background Information

This investigation involves a female student who was enrolled in the 7th grade at _____ Middle School in USD #___ during the 2019-20 school year. She has attended schools in USD #___ since kindergarten. The student was initially evaluated in first grade and found eligible for special education and related services due to the exceptionality category of intellectual disability. In addition, the student has medical diagnoses of Attention Deficit Disorder (ADD) and anxiety. The student's most recent reevaluation was conducted during the 2019-20 school year and showed that the student demonstrated academic skills for reading, writing and math at the kindergarten and first grade level.

Issues

Based upon the written complaint, the parent raised two issues that were investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the accommodations/modifications for homework and assignments during the 2019-20 school year.

Positions of the Parties

The parent reported USD #___ did not provide modified assignments for the student as required by the student's IEP during the 2019-20 school year. The parent indicated that her allegation in the complaint was specifically concerning the IEP accommodation/modification that stated, "Student's independent reading, writing, and math will be at her independent level." The parent specified that this accommodation/modification is referring to homework and assignments the student is expected to complete in her 7th grade general education classes.

However, the parent indicated that the student's assignments and homework were not modified on multiple occasions and in multiple classes during first, second, and third quarters for in-seat instruction as well as during fourth quarter for remote instruction. The parent reported she shared her concerns with multiple staff in USD #___ including _____, the student's special education teacher; _____, the assistant principal at _____ Middle School; _____, the special education coordinator; _____, the general education science teacher; and _____, the general education family advocacy teacher. The parent indicated she made telephone calls, sent emails and texts as well as shared her concerns with USD #___ district staff at the April 25, 2019, the November 12, 2019 and the February 25, 2020 IEP team meetings.

USD #___ believes there is no merit to the parent's complaint and that "It is unclear from the complaint what specific situations are at issue." The investigator suggested that the district provide copies of any documentation showing the implementation of the

accommodations/modifications for modifying the student's homework and assignments to her independent reading, math and writing levels during the 2019-20 school year. USD #___ stated, "Homework assignments are not typically maintained, and any such records that may exist are not readily available due to restricted access due the COVID-19 and the summer recess."

Findings of the Investigation

Documentation showed there were two IEPs and an ICLP developed for the student during the 2019-20 school year. At the beginning of the school year, the student's IEP dated April 25, 2019 was in effect. This IEP required special education be provided in both the general and special education settings and included an accommodation/modification that stated, "Student's independent reading, writing, and math will be at her independent level."

USD #___ noted that the parent requested a reevaluation of the student during the November 12, 2019 IEP team meeting. This reevaluation was completed and a new IEP was written on February 25, 2020; however, the parent reported she did not agree with the special education services proposed in this IEP. Documentation shows the IEP team then suspended the meeting so that the parent could visit other placement options in the building.

The IEP team reconvened on March 12, 2020 and USD #___ provided the parent with a Prior Written Notice for Identification, Special Education and Related services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) because of that IEP team meeting. The parent reported that she continued to disagree with the proposed IEP services and placement and "did not sign the IEP." USD #___ also reported "to date, Complainant has refused to sign this IEP."

It is noted that this investigation will not address whether or not the change in services described in the February 25, 2020 IEP was in effect during the 2019-20 school year because this is not relevant to the parent's allegation regarding the failure to provide accommodations/modifications. Both the February 25, 2020 and the April 25, 2019 IEP contained an accommodation/modification that required the student's independent reading, writing, and math assignments and homework to be provided at her instructional level.

Because of the school closure from the COVID-19 pandemic in March 2020, USD #___ developed a Continuous Learning Plan on March 31, 2020 as required by the Kansas Department of Education (KSDE). This plan states,

The goal of continuous learning in USD___ is to ensure the District continues to provide instruction beyond the classroom so that students stay connected and on track with their learning. A combination of online, grade level learning packets and choice boards focused on critical grade and course level content will be used to support Pre-K-12th grade instruction.

Documentation included a Special Education Individualized Continuous Learning Plan (ICLP) for the student dated April 13, 2020, which states "Supports, accommodations, consultation, and services will be provided to ensure access to educational materials and help student make continued progress on IEP Goal(s) and Objectives." The ICLP includes the IEP Goals/Objectives

to be addressed, a schedule of services that will be provided to the student, and a description of the plan for the USD #___ special education providers to consult with the parent and student. However, the section of the ICLP form where the description of the accommodations/modifications and other supports such as Supplementary Aids and Supports that are necessary to enable the student to access educational materials being made available during the school building closure is left blank. This information is also not found anywhere in the ICLP rendering the ICLP mute on the need to provide any of these supports for the student to ensure access to the 7th grade educational materials.

Documentation shows that the parent and Ms. _____ [special education teacher] discussed the ICLP on April 16, 2020 and the parent remembers talking with Ms. _____ [special education teacher] and being assured that accommodations/modifications would be provided during the school closure. The parent noted that she has consistently requested that the student's homework and assignments be modified to the student's instructional level. Based on the discussion, the parent believed that the student's assignments and schoolwork would continue to be provided at her independent reading, writing, and math levels consistent with the accommodations/modifications that were required in the student's IEPs prior to the school closure. The parent's written communication with Ms. _____ [general education science teacher] and Ms. _____ [general education FA teacher], two of the student's general education teachers, confirms the parent's belief in regards to the continuation of this accommodation/modification during the school closure.

Documentation shows the student's independent academic skills fall within the very low range as compared to her same age peers as measured by the Woodcock Johnson Tests of Achievement - 4th edition (WJ-IV). The student scored at an age equivalent of 6 years-0 months for both reading and math and at an age equivalent of 6 years-6 months for written language, all of which are significantly below her chronological age of 13 years-3 months. The student's standard scores for all academic areas fell below a score of 40 as compared to average standard scores falling between 85 and 115.

Documentation showed three worksheets from the math class for telling time with a.m. and p.m., addition number sentences, and sums and differences. All of these worksheets included visual cues. The Automated Readability Index rated the text as appropriate for 3- to 5-year-olds (preschool).

In addition, documentation showed two worksheets from the reading class with four daily reading assignments related to theme and vocabulary copyrighted from Read Write Middle 2017. The Automated Readability Index rated the text as appropriate for 11- to 13-year-olds (sixth and seventh grade).

Documentation also showed a social studies assignment, which included a reading passage on Buffalo Soldiers and an accompanying worksheet. The Automated Readability Index rated the text as appropriate for 17- to 18-year-olds (twelfth grade).

Documentation additionally showed a science assignment, which included a reading passage on earth science and an accompanying worksheet. The Automated Readability Index rated the text as appropriate for 15- to 17-year-olds (tenth and eleventh grades).

The November 12, 2019 IEP team meeting notes kept by district staff reflect the parent's concern that the student's schoolwork was not being modified as required by the IEP and stated, "Mom wants modified work sent home to see if her work is being modified." The February 25, 2020 IEP team meeting notes written by the parent and the Meeting Summary written by Ms. _____ [assistant principal at Middle School] both show the parent again expressed concerns to the IEP team that the student's homework and assignments were not being modified. The notes from the IEP team meeting written by the parent indicated that Mrs. _____ [special education teacher] "admitted to slacking off" in regards to modifying the student's schoolwork.

A screenshot of communication between the parent and Ms. _____, the FA class teacher, showed the parent expressed her concern about the work provided during the school closure by stating,

how [sic] is the student supposed to do this [sic] It [sic] is not on her level [sic] you [sic] know that her work is two [sic] be modify [sic]."

Another screenshot of a communication between the parent and Ms. _____, the general education science teacher, regarding a remote assignment stated,

The student can't [sic] do this work [sic] it [sic] is not modify [sic] or on her level. so [sic] please send work that is on her level or I will let mrs. _____ [sic] [special education coordinator] know. It [sic] is in her iep [sic] all the teacher [sic] know that her work is two [sic] be modify [sic] on her level.

Applicable Regulations and Conclusions

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

In this case, the student's IEPs developed on April 25, 2019 and February 25, 2020 both included an accommodation/modification requiring that the student's independent reading, writing, and math will be at her independent level. Documentation and interviews with the parent showed that the student's independent reading level was at the kindergarten and first grade level. However, the samples of assignments provided by the parent from the student's science, reading, and social studies classes were at the middle school and high school reading levels. It is noted that the samples of math assignments were provided below the student's independent reading, writing and math level.

In addition, federal regulations, at 34 C.F.R. 300.320(a)(4), require the IEP to include a statement of the program modifications that will be provided to enable the child to be involved in and make progress in the general education curriculum. Because of the exceptional circumstances caused by the COVID-19 pandemic, this must be examined in light of guidance

provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE. This guidance is contained in a document titled Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.

Question A-2 in this document asks, "What special education and related services must be provided to students with exceptionalities when a school is closed due to COVID-19, but is implementing its Continuous Learning Plan?"

The Answer to Question A-2 states:

The services and supports in a child's IEP prior to the implementation of the district's Continuous Learning Plan contemplated the traditional educational environment, which most students are no longer in. The child's IEP Team should think of the district's Continuous Learning Plan as the general education curriculum in place at this time. All services and supports are intended to support the child in accessing the general education curriculum with their nondisabled peers to the maximum extent appropriate.

The Answer to Question A-2 goes on to explain:

The child's IEP Team should think about supplementary aids and services, program modifications, and supports for school personnel in the context of "to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate" (in this instance to participate in the district's Continuous Learning Plan with their nondisabled peers). K.S.A. 72-3429(c)(4); K.A.R. 91-40-1(ttt).

The investigator notes that there is nothing in the guidance that indicates a school district may bypass the IDEA or the Special Education for Exceptional Children Act procedural requirements regarding how IEPs may be changed.

Because of the school closure due to the COVID-19 pandemic, USD #___ developed a Continuous Learning Plan dated March 31, 2020, which included a goal to continue to provide students with instruction focused on critical grade and course level content through remote learning opportunities. USD #___ then developed an ICLP for the student on April 13, 2020 and shared this plan with the parent on April 16, 2020. The ICLP states "Supports, accommodations, consultation, and services will be provided to ensure access to educational materials and help student make continued progress on IEP Goal(s) and Objectives."

However, the section of the ICLP where the accommodations/modifications and other supports such as Supplementary Aids and Supports that are necessary to access educational materials being made available during the school building closure was left blank and this information is not included anywhere else in the ICLP. Therefore, it is unclear if the intent of the IEP team was not to provide program modifications to the remote assignments or if this section of the ICLP was simply overlooked when completing the paperwork. If the IEP team intended to remove the program modifications during implementation of the continuous learning period, it was required

to notify the parent of that removal with a PWN. It did not do so. Therefore, to the extent the ICLP was to act as the IEP for this student during school closure, it was incomplete. The result is that the program modifications in this student's IEP were still in force.

The documentation of the parent's communication to multiple school district staff make it clear that the parent believed the student's assignments were to continue to be modified to her independent reading, writing, and math level consistent with the two other IEPs developed and implemented during 2019-20 school year.

Interviews and documentation showed that the student's independent academic levels fall significantly below those of her grade-level peers and, that prior to the school building closure in spring 2020, multiple IEPs for the student required modified assignments in order to access the general education curriculum. Based on this information, there is evidence to support the need for the student to continue to be provided with modified assignments and homework in order to participate in the district's Continuous Learning Plan with her nondisabled peers.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEPs, specifically the accommodation/modification that required the student's independent reading, writing, and math to be at her independent level.

ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the student with a free appropriate public education (FAPE) during the school building closure due to the COVID-19 pandemic in spring 2020.

Positions of the Parties

The parent reported Ms. _____ [special education teacher] called her on April 16, 2020 to go over the student's ICLP, which was developed by the school staff on April 13, 2020. She indicated that the student did not receive all of the services required by this ICLP during the school building closure in spring 2020 and that the services provided did not begin at the same time as the educational services, which were provided to other students in the district. The parent also indicated that the homework and assignments provided through remote instruction as part of continuous learning were often not modified to the student's instructional level even though she specifically asked for and was assured that this was in the student's ICLP. In addition, there were numerous issues with technology, which made access to remote instruction difficult. Due to the lack of services combined with the lack of modified homework and assignments during the fourth quarter of the school year, the parent does not believe the final grades are an accurate reflection of the student's progress.

USD #___ reported that when the school buildings closed in March due to the COVID-19 pandemic, school staff made several attempts to contact the parent in order to obtain her input for the development of the student's ICLP. School staff reviewed and discussed the plan with the parent on April 16, 2020 and, at that time, the district reported that the parent agreed with the ICLP. School staff subsequently communicated with the parent on numerous occasions during April and May to try to assist in the student receiving educational benefit during the extended

school building closure. USD #___'s Continuous Learning Plan includes information explaining the grading policies and procedures, which were established to ensure equity for all students and to minimize any negative effects of the school building closure on students.

Findings of the Investigation

The parent's allegation regarding the student not being provided with modified homework and assignments during the school building closure will not be investigated in Issue Two as this concern was already addressed in Issue One. Note that the findings in Issue One are incorporated herein by reference.

USD #___'s district-wide Continuous Learning Plan dated March 31, 2020 required implementation for all students beginning April 6, 2020 and ending on May 21, 2020, the last day of the 2019-20 school year. The plan calls for special education teachers to:

Provide weekly lessons that focus on maintaining and reinforcing skills identified in the IEP and state standards. In addition, teacher will provide instruction, which includes a mix of online learning tools, video conferencing, and learning packets. Teachers should be coordinating with all related services providers to ensure students have access to communication tools, visuals, behavior intervention plans, etc. Teachers will design instruction to address students' unique and individual needs and are encouraged to use small group lessons/direct instruction using Zoom or other web conferencing tools to deliver instruction to students. Special education teachers and related services providers will follow the suggested learning timeframes as identified in the USD___ 2020 Continuous Learning Plan specific to students' grade levels.

The Contact Log showed Ms. _____ [special education teacher] called the parent on April 10, 2020 at 3:05 p.m. and left a message on the answering machine to set up a time to do the ICLP. Ms. _____ [special education teacher] call the parent again on April 13, 2020 at 10:19 a.m. and left another message on the answering machine to set up the ICLP meeting. The parent called and spoke to Ms. _____ [special education teacher] that same day at 12:12 p.m. The contact log for that phone call states, "Talked to mom about the need for the ICLP. She said that she would get back to us about it after she contacted and set up a time with the person that she wanted to attend. Reminded her that it needed to be done by April 21." Ms. _____ [special education teacher] contacted the parent again by telephone on April 16, 2020 at 1:00 p.m. and noted in the contact log entry for the phone call that she "Went over the ICLP / answered questions about daughter's assignments."

The parent reported that she does not remember getting the messages about setting up an ICLP meeting. She confirmed that Ms. _____ [special education teacher] did contact her on Thursday, April 16, 2020 and told her what the ICLP developed on April 13, 2020 was going to provide. The parent indicated that her input was not requested during the April 16, 2020 phone call in regards to the IEP goals to be addressed in the ICLP or the special education and related services required to make progress towards those goals. The parent also indicated that she had not been provided with PWN regarding the ICLP to date.

The student's ICLP dated April 13, 2020 includes four goals. The first goal is to solve word problems at her instructional level involving one-digit by one-digit solutions; this same goal is only found in the February 25, 2020 IEP. The second goal is to decode words at her instruction reading level; this same goal is found in both the April 25, 2019 and the February 25, 2020 IEPs. The third goal is to compose written work using correct capitalization and punctuation; this same goal is found in both the April 25, 2019 and the February 25, 2020 IEPs. The fourth goal is to respond to inferential questions and explain how she determined her answer; this same goal is only found in the February 25, 2020 IEP.

The student's ICLP requires 120 minutes per week of special education services through remote instruction beginning April 13 and ending May 21, 2020. Documentation shows Ms. _____ [special education teacher] contacted the parent on April 9 and April 10, 2020 to arrange for the remote instruction and explained that the student could access the special education teacher through Zoom office hours Monday through Friday at 9:00 - 10:00 a.m. and again at 2:00 - 3:00 p.m. The student could also access the special education teacher during weekly check-in meetings on Zoom for 10:00 - 11:00 a.m. on Wednesdays. This schedule offered the student a total of 660 minutes per week of access to remote instruction from the special education teacher during the identified period.

The Contact Log shows Ms. _____ [special education teacher] contacted the parent and student during the weeks of April 6-10, April 13-17, April 20-24, April 27-May 1, May 4-9, and May 11-15, 2020. Documentation shows that Ms. _____ [special education teacher] was in contact with the parent and student during the week of April 6-10, 2020 on April 8, April 9, and April 10 in regards to accessing the remote learning platform and the remote instruction through Zoom meetings. On April 10, 2020, Ms. _____ [special education teacher] confirmed that the student had received her certificates of mastery for work already completed and offered to provide additional work. The documentation also shows that Ms. _____ [special education teacher] began providing a daily schedule of work for the student in phonics, reading, math, writing, and science on April 13, 2020 and arranged regularly scheduled Zoom meetings for the student and two of her peers.

Although office hours were made available, documentation shows the parent complained about technology not working to school staff four separate times on April 13, 2020. On April 19, 2020, documentation shows that Ms. _____ [special education teacher] offered to provide weekly work packets if the technology issues were not yet resolved. The parent did not respond until May 6, 2020 when she told Ms. _____ [special education teacher] that "Everything's fine for now." The parent complained again on May 13, 2020 and requested for the student's password be reset.

The ICLP also required the student receive related services of 20 minutes per week of speech/language therapy (SLT) in the home setting beginning April 6, 2020 and ending on May 21, 2020. In addition, the ICLP requires 10 minutes per month of occupational therapy (OT) in the home setting. The parent reported that she does not remember the student receiving any SLT or OT services during the school building closure in April and May 2020.

Documentation provided by USD #___ showed _____, the speech/language therapist working with the student, provided 20 minutes of SLT services on April 9 (week of April 6- April 10),

April 14 (week of April 13-17), April 22 (week of April 20-24), April 27 (week of April 27-May 1), May 7 (week of May 4-8), May 11 (week of May 11-15), and May 20 (week of May 20-21). Documentation also shows _____, the occupational therapist working with the student, provided 10 minutes of OT services on April 27 (month of April) and May 14 (month of May).

The 2019-20 grade card shows the student earned the following grades:

Class	3 rd Quarter	4 th Quarter	2 nd Semester
Integrated Reading/Writing 7	73	73	Pass
Math 7	76	76	Pass
Physical Education 7	93	93	Pass
Science 7	72	72	Pass
Social Studies 7	79	79	Pass
Study Skills	94	94	Pass

USD #___'s Continuous Learning Plan states the following in regards to grading during the school building closure:

The goal for developing the grading system will be to minimize any negative effects on students. Work scored during the closure will only be counted to provide feedback on student's academic learning or to move from a failing to a passing grade. The passing grade will not impact the student's grade point average but will be used for the purpose of acquiring credit in order for the student to progress on to the next grade, course, or meet graduation requirements.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.101, require states to ensure a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulation and statute, at K.A.R. 91-40-2(b)(1), require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the OCR, the OSERS, and the SETS team of the KSDE in a document titled Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.

Question A-2 in this document asks, "What special education and related services must be provided to students with exceptionalities when a school is closed due to COVID-19, but is implementing its Continuous Learning Plan?"

The Answer to Question A-2 states:

When a school is closed due to a COVID-19 outbreak, but is implementing its Continuous Learning Plan, the school must ensure that each student with an exceptionality also has equal access to the same opportunities, including, to the greatest extent possible under these unprecedented circumstances, a free appropriate public education (FAPE).

The Answer to Question A-2 goes on to explain:

FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, through instructional materials sent home, or telephonically. The determination of how FAPE is to be provided may need to be different during the time when a school is closed and implementing its Continuous Learning Plan.

The Answer to Question A-2 then goes on to explain how decision are to be made in determining the provision of FAPE:

The child's IEP Team should develop a contingency learning plan to enable the child: (1) To advance appropriately toward attaining the child's annual IEP goals; (2) to be involved in and make progress in the general education curriculum (in this instance, the district's Continuous Learning Plan), or appropriate activities for children ages 3-5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled peers to the maximum extent appropriate, in all of these activities (in this instance to participate in the continuous learning plan with their nondisabled peers). K.S.A. 72-3429(c)(4).

The child's IEP Team should think about the definition of specially designed instruction, in the context of the district's Continuous Learning Plan. "Specially designed instruction" means adapting, as appropriate to the needs of each exceptional child, the content, methodology or delivery of instruction for the following purposes: (1) To address the unique needs of the child that result from the child's exceptionality; and (2) to ensure access of any child with a disability to the general curriculum [in this instance, the district's Continuous Learning Plan], so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children. K.A.R. 91-40-1(III).

The child's IEP Team should think about related services in the context of what specially designed instruction (special education services) means within the district's Continuous Learning Plan. Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with an exceptionality, to benefit from special education services. K.A.R. 91-40-1(ccc).

The child's IEP Team should think about supplementary aids and services, program modifications, and supports for school personnel in the context of "to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate" (in this instance to participate in the district's Continuous Learning Plan with their nondisabled peers). K.S.A. 72-3429(c)(4); K.A.R. 91-40-1(ttt).

Based upon this compliance guidance, it is clear that the expectation is for FAPE to be provided during periods of remote learning and that the IEP team is responsible for determining what

constitutes FAPE for each individual student and then documenting the decisions regarding how to serve and support the child during periods of school building closures in a plan. Again, the investigator notes that nothing in this guidance indicates that the procedural requirements of the IDEA or the Special Education for Exceptional Children Act do not apply to this process.

In this case, USD #___ was closed due to the COVID-19 pandemic in spring 2020 and was implementing their Continuous Learning Plan dated March 31, 2020. USD #___ created a Special Education Individualized Continuous Learning Plan (ICLP) for the student on April 13, 2020, which was intended to serve as the plan for providing FAPE during the time when USD #___ was closed and implementing the district-wide Continuous Learning Plan. The student's ICLP required special education and related services to be provided "through remote instruction" and "in the home setting."

Documentation show USD #___ had a procedure for having an ICLP in place for every student with an IEP no later than April 21, 2020. This is 21 calendar days from the date of the district's Continuous Learning Plan in which to provide notification of an IEP meeting and to reconvene each student's IEP team in order to develop an ICLP.

Documentation and interviews showed Ms. _____ [special education teacher] first contacted the parent on April 10, 2020 via a phone call to schedule the ICLP meeting but did not speak to the parent and left a voice message; however, the parent indicated she does not remember receiving this message. Ms. _____ [special education teacher] contacted and spoke to the parent on Monday, April 13, 2020 and the contact log entry for this phone call states, "Talked to mom about the need for the ICLP. She said that she would get back to us about it after she contacted and set up a time with the person that she wanted to attend. Reminded her that it needed to be done by April 21."

Ms. _____ [special education teacher] contacted the parent again by telephone on Thursday, April 16, 2020 at 1:00 p.m. and noted in the contact log entry for this phone call that she "Went over the ICLP / answered questions about daughter's assignments." The parent confirmed that Ms. _____ [special education teacher] did review the ICLP developed on April 13, 2020 with her on April 16, 2020. However, the parent also reported that she did not have input into decisions regarding goals or special education and related services included in the ICLP developed on April 13, 2020. The parent also reports she was not provided with PWN related to the ICLP.

Federal regulations, at 34 C.F.R. 300.323(a)(1), require the parent to be a member of the IEP team. Because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE.

The guidance provided in the document titled Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic continues to ensure parents, as members of the IEP team, have the opportunity to participate fully in the development of the plan to serve and support the child.

In this case, documentation interviews show the student's ICLP was developed on April 13, 2020 and that school staff simply "went over the ICLP" with the parent on April 16, 2020. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to include the parent as a member of the IEP team and to provide the parent with the opportunity to participate fully in the ICLP development process.

Federal regulations, at 34 C.F.R. 300.503, require public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to identification, evaluation, placement, or the provision of FAPE. Once again, because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE in the document titled Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic

Question A-21 in this document asks, "If an IEP team creates a contingency learning plan to be triggered during school closure due to COVID-19, is notice needed? Must parent consent be obtained?"

The Answer to Question A-21 states,

Prior Written Notice (PWN) has broad application. A PWN must be given to parents whenever a school district proposes any change to any matter related to identification, evaluation, placement, or the provision of a FAPE, or when a school district refuses a parent's proposal regarding any of these matters (34 C.F.R. § 300.503). The United States Supreme Court has interpreted FAPE to mean an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances (*Endrew F. v. Douglas County School Dist. RE-1*, 580 U.S. ____ (2017)). In short, any change by a school district to the education program for a child with a disability requires a PWN. In an emergency situation, where all children are to be served virtually for a period of time, serving an exceptional child virtually for that same period of time is not a substantial change in placement or material change in services and does not require consent. The district is simply responding to the Governor's Executive Order to close school buildings and move to continuous learning for the remainder of the school year. This was not a district or IEP Team decision. This is similar to a contingency plan being created for a student during the time a student is in a juvenile detention center or psychiatric residential treatment facility. The district did not act to place a student in that environment. The district is simply recording within the contingency learning plan the way in which it will provide special education services to the greatest extent possible under the circumstances until the student returns to their typical educational environment. Because the decision to close school buildings was not the district's decision, any contingency learning plan developed for a student does not constitute a material change in services or a substantial change in placement.

This guidance makes it clear that parents are to be provided with PWN whenever an ICLP is developed for a student as a result of a governor's executive order to close building site services in public schools. In that situation, consent is not required in order to provide educational

services remotely, even if that is inconsistent with an IEP because the changes being made were not the result of a district IEP team decision but rather the result of an emergency situation.

In this case, USD #___ developed an ICLP for the student because of the building closure caused by the Governor's Executive Order and the implementation of the district-wide Continuous Learning Plan. However, interviews found the parent was not provided with PWN regarding the changes to the provision of FAPE described in the student's ICLP dated April 13, 2020. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parent with PWN of changes made to the provision of FAPE to the student.

Regardless, the parent believes USD #___ did not provide FAPE to the student during the school building closure during spring 2020. The parent expressed five specific concerns related to the provision of FAPE based on the implementation of the student's ICLP developed on April 13, 2020. First, the services were not provided as described in the ICLP; second, the services that were provided did not begin at the same time as those provided to other students in USD #___; third, the student's homework and assignments were not modified to her instructional level; fourth, the student could not access remote instruction due to technology issues; and fifth, the student's grades are not accurate due to the lack of services combined with the lack of modified homework and assignments.

Federal regulations, at 34 C.F.R. 300.101, require states to ensure a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulation and statute, at K.A.R. 91-40-2(b)(1), require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Again, compliance with this regulation must be considered in light of the guidance provided in the document titled Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.

The Answer to Question A-2 states,

The services and supports in a child's IEP prior to the implementation of the district's Continuous Learning Plan contemplated the traditional educational environment, which most students are no longer in. The child's IEP Team should think of the district's Continuous Learning Plan as the general education curriculum in place at this time. All services and supports are intended to support the child in accessing the general education curriculum with their nondisabled peers to the maximum extent appropriate.

The child's IEP Team should develop a contingency learning plan to enable the child: (1) To advance appropriately toward attaining the child's annual IEP goals; (2) to be involved in and make progress in the general education curriculum (in this instance, the district's Continuous Learning Plan), or appropriate activities for children ages 3-5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled

peers to the maximum extent appropriate, in all of these activities (in this instance to participate in the continuous learning plan with their nondisabled peers). K.S.A. 72-3429(c)(4).

This guidance makes it clear that LEAs should develop a plan designed to provide students with FAPE during periods of school closure. The plan should describe the special education and related services that will be required to support the student during periods of school closure and provide the student with FAPE.

Because of the parent's specific concerns related to FAPE, the investigation will focus on the requirement to provide FAPE to the student ensuring that the student can be educated and participate with her nondisabled peers in the district-wide Continuous Learning Plan to the maximum extent appropriate.

The parent's first concern is directly related to the provision of the special education and related services during the school building closure. The student's ICLP required 20 minutes per week of SLT in the home setting beginning April 6, 2020 and ending on May 21, 2020 as well as 10 minutes per month of OT in the home setting, and 120 minutes per week of special education through remote instruction beginning April 13, 2020 and ending May 21, 2020.

Documentation and interviews showed that the student had access to 660 minutes per week of remote special education instruction during the specified period. Documentation also shows the student was provided 20 minutes per week of SLT and 10 minutes per month of OT between the dates of April 6 and May 21, 2020. In this case, USD #___ is found to comply with special education statutes and regulations based on the documentation.

The second concern is related to the delay in providing special education and related services as compared to the educational services provided to general education students during the school building closure. In this case, USD #___'s district-wide Continuous Learning Plan required weekly contact and instruction to begin on April 6, 2020. Documentation showed Ms. _____ [special education teacher] was in contact with the parent and student during the week of April 6-10, 2020 on April 8, April 9, and April 10 in regards to accessing the remote learning platform and the remote instruction through Zoom meetings. Assignments were provided and Ms. _____ [special education teacher] confirmed that the student had received her certificates of mastery for work already completed on April 10, 2020. In addition, documentation showed that the required SLT services were provided on April 9, 2020 during the district's first week of remote instruction. In this case, USD #___ is found to comply with special education statutes and regulations based on the documentation.

The third concern is related to remote assignments being modified. Again, this concern was addressed through the findings in Issue One, which are incorporated herein by reference.

The fourth concern is related to the difficulty in accessing the remote instruction and assignments. Documentation showed the parent first expressed concerns with technology on April 13, 2020 and that Ms. _____ [special education teacher] responded to the parent concerns that same day. Ms. _____ [special education teacher] attempted to make follow-up contact with the parent on April 19, April 22, and April 29, 2020 but received no response. On May 6, 2020,

the parent told Ms. _____ [special education teacher] that "Everything's fine for now." On May 13, 2020, which is one week prior to the end of the school year, the parent requested the student's password be reset. In this case, USD #___ is found to comply with special education statutes and regulation based on the documentation.

The parent's fifth concern is related to the student's grades during the school closure; however, special education statutes and regulations do not address how grades are assigned and therefore no findings can be made. The parent is encouraged to review USD #___'s Continuous Learning Plan for information regarding the district's grading policy and procedures.

Corrective Action

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

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

In this case, the student's IEPs required the accommodation/modification for the student's independent reading, writing, and math to be at her independent level. Interviews and documentation found that the student's independent reading level was at the kindergarten and first grade level but that assignments from the student's reading, social studies, and science classes in USD #___ were provided to the student at middle school and high school reading levels.

B. Federal regulations, at 34 C.F.R. 300.320(a)(4), and Kansas regulation and statute, at K.S.A. 72-3429(c)(4) and K.A.R. 91-40-1(tt), require the IEP to include a statement of the supplementary aids and services, program modifications, and supports for school personnel that will be provided in order to enable the child to be educated and participate with other children without disabilities to the maximum extent appropriate, and, in the case of the school building closure in spring 2020, to enable the student to participate in the district's Continuous Learning Plan with their nondisabled peers.

In this case, USD #___'s Continuous Learning Plan dated March 31, 2020, includes a district-wide goal to continue to provide students with instruction focused on critical grade and course level content through remote learning opportunities during the school closures resulting from the COVID-19 pandemic. Interviews and documentation found the student's academic skills fall significantly below those of her grade-level peers and that previous IEPs included a requirement for modified assignments and homework to be provided in order to ensure the student had access to the educational materials; however, USD #___ failed to Include any statement in the student's April 13, 2020 ICLP which was intended to function as the student's IEP regarding the necessary program modifications that would be required to ensure the student had access to the educational materials used in these remote learning opportunities.

C. Federal regulations, at 34 C.F.R. 300.323(a)(1), require the parent to be a member of the IEP team and, in the case of the school building closure in spring 2020, to ensure that parents, as members of the IEP team, have the opportunity to fully participate in the development of the plan to serve and support the child during periods of school building closures.

In this case, documentation and interviews show the student's ICLP was developed on April 13, 2020 and that school staff simply "went over the ICLP" with the parent on April 16, 2020.

D. Federal regulations, at 34 C.F.R. 300.503, require public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to identification, evaluation, placement, or the provision of FAPE.

In this case, interviews and documentation show USD #___ created an ICLP on April 13, 2020 to describe the special education and related services that were necessary in order to provide the student FAPE during the period of school building closure due to the COVID-19 pandemic. The ICLP included changes to the provision of FAPE; however, USD #___ failed to provide the parent with PWN of these changes.

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

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

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

b. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.320(a)(4), and Kansas regulation and statute, at K.S.A. 72-3429(c)(4) and K.A.R. 91-40-1(ttt), requiring the IEP to include a statement of the supplementary aids and services, program modifications, and supports for school personnel that will be provided in order to enable the child to be educated and participate with other children without disabilities to the maximum extent appropriate, and, in the case of the school building closure in spring 2020, to enable the student to participate in the district's Continuous Learning Plan with their nondisabled peers.

c. Comply with federal regulations, at 34 C.F.R. 300.323(a)(1), requiring the parent to be a member of the IEP team and, in the case of the school building closure in spring 2020, to ensure that parents, as members of the IEP team, have the opportunity to fully participate in the development of the special education plan to serve and support the child during periods of school building closures.

d. Comply with federal regulations, at 34 C.F.R. 300.503, requiring public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to the provision of FAPE.

2. No later than August 28, 2020, USD #___ shall draft a procedure detailing how it will develop plans for serving children with disabilities during school building closures in a way that will ensure IDEA procedural safeguards, specifically including parent participation to the extent the plan is inconsistent with the IEP, are preserved. No later than August 31, 2020, USD #___ will provide a copy of this new procedure to SETS for review. No later than 10 school days after SETS approves this new procedure, USD #___ will share this new procedure with all special education staff responsible for the development of IEPs as well as school administrators. USD #___ will implement the procedure beginning with the 2020-21 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

3. No later than 30 calendar days following the first day of the 2020-21 school year, USD #___ will reconvene the IEP team, including the parent, to allow the parent the opportunity to participate fully in the development of the plan to serve and support the student during periods of school building closures. In addition, because USD #___ failed to modifying work to be at the student's instructional level as required by IEPs, the IEP team must identify the student's assignments above the student's academic level that were assigned during the period of the school building closure in spring 2020. These identified assignments must be modified to the student's instructional level and provided to the student in an effort to allow the student access to material taught during spring 2020. At a minimum, the assignments referenced in the findings for Issue One will be modified and provided to the student. USD #___ shall provide SETS with a listing of all the modified assignments that were provided to the student no later than 31 days following the first day of the 2020-21 school year.

4. No later than 45 calendar days following the first day of the 2020-21 school year, USD #___ will provide training to all general education teachers, special education teachers, and administrators at _____ Middle School regarding the provision of IEP accommodations/modifications. At a minimum, this training must instruct these staff on the requirements for providing the IEP accommodations/modifications as well as how to modify the reading level of homework and assignments. No later 46-calendar days following the first day of the 2020-21 school year, USD #___ will provide documentation to SETS of the name and position of the USD #___ staff member who conducted the training, the date and content of the training as well as a sign-in sheet signed by all individuals who attended the training.

5. No later than September 4, 2020, USD #___ shall develop and send to SETS for approval, a written plan describing how it will: (a) monitor the assignment for the student in Reading, Writing, and Math to ensure that these assignments are modified to the student's independent academic level; and (b) how the results of this monitoring will be reported in writing to the parent no less than monthly. The plan must include a statement that it will be in force for at least six months.

6. No later than 45 calendar days following the first day of the 2020-21 School Year, USD #___ will provide training to all special education staff and administrators at _____ Middle School regarding the requirement to provide PWN to parents when any plan is developed for a student that makes changes to the provision of FAPE. At a minimum, this training must include a review of the requirements related to PWN and program modifications as well as provide these staff with instructions for completing the documentation of the plan developed for a student with an

IEP during school building closure as well as completing the PWN documentation. No later than 46 calendar days following the first day of the 2020-21 school year, USD #___ will provide documentation to SETS of the name and position of the USD #___ staff member who conducted the training, the date and content of the training as well as a sign-in sheet signed by all individuals who attended the training.

7. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to Special Education and Title Services one of the following:

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

Right to Appeal

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

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

Nancy Thomas

Nancy Thomas, Complaint Investigator

(f) Appeals.

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

Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five

days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

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

(A) the issuance of an accreditation deficiency advisement;

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

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

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

Regulations Cited

34 CFR 300.323(c)(2)

34 CFR 300.320(a)(4)

34 CFR 300.101

34 CFR 300.17

34 CFR 300.321(a)(1)

34 CFR 300.503