

# CHAPTER 6

## EDUCATIONAL PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT

### INTRODUCTION

Educational placement refers to the educational environment for the provision of special education and related services rather than a specific place, such as a specific classroom or school (K.A.R. 91-40-1(t)). The IEP team makes the decision about the child's educational placement. For children with disabilities, the special education and related services must be provided in the environment that is least restrictive, with the general education classroom as the initial consideration. The teams' decision must be based on the child's needs, goals to be achieved, and the least restrictive environment for services to be provided. Least restrictive environment (LRE) means the child is provided special education and related services with peers who are not disabled, to the maximum extent appropriate (K.A.R. 91-40-1(ll)). The IEP Team must consider how the child with a disability can be educated with peers without disabilities to the maximum extent appropriate, and how he/she will participate with children without disabilities in other activities such as extracurricular and nonacademic activities.

Placement decisions for all children with disabilities, including preschool children with disabilities, must be determined annually, be based on the child's IEP, and be as close as possible to the child's home. Additionally, each child with a disability is to be educated in the school the child would attend if the child did not have a disability, unless the child's IEP requires some other arrangement (K.A.R. 91-40-21(e)(f)). LRE does not require that every child with a disability be placed in the general education classroom regardless of the child's individual abilities and needs. The law recognizes that full time general education classroom placement may not be appropriate for every child with a disability. School districts are to make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for a continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The continuum of alternative educational placements include instruction in general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (K.A.R. 91-40-21(b); 34 C.F.R. 300.115(b)(1)).

This chapter includes Federal and State requirements for determining educational placement and the following topics are discussed:

- A. Parent Participation
- B. Determining Educational Placement
- C. Least Restrictive Environment
- D. Early Childhood Least Restrictive Environment
- E. Recent Case Law

### A. PARENT PARTICIPATION

Parents have the right to be part of the decision-making team for determining their child's educational placement and have input into that decision. In Kansas, placement decisions are made by the IEP team. The parent must be provided notice of the IEP team meeting at least 10 calendar days prior to the meeting to ensure that parents have the opportunity to participate. When conducting IEP meetings addressing placement, if neither parent can participate, the parents and the school may agree to use alternative means of participation in the meeting, such as video conferences and conference calls. Schools must ensure that parents understand and are able to participate in any discussions concerning the educational placement of their child. The school must provide an

interpreter if parents have a hearing impairment, or whose native language is other than English (K.A.R. 91-40-21(d); 34 C.F.R. 300.501(b)(c)(1)(2)(3)).

The team may hold the IEP meeting to determine placement without the parents if the school has made multiple attempts to contact them and the parent did not respond, or the school is unable to convince them to participate. The school district is required to have documentation of the attempts made to contact the parents to provide them notice of the meeting and to secure their participation. The record must have at least two of the following methods: telephone calls, visits to parents' home, copies of correspondence sent to the parents, and detailed records of other methods. (K.A.R. 91-40-17(e); 34 C.F.R. 300.501(c)(4)).

Once the IEP team has made the decision on the initial placement of a child with an exceptionality, the parents must be provided Prior Written Notice about the placement decision and requested to provide consent before initial provision of special education and related services in the proposed placement. Within the notice requirements, parents must be informed about the placement options that were considered and the reasons why those options were rejected. Additionally, for subsequent changes in the IEP, parents must provide consent for any substantial change in placement (more than 25% of the child's school day) or material change in services (increase or decrease of 25% or more of the duration or frequency of a special education service, a related service, or a supplementary aid or a service) (K.S.A. 72-988(b)(6)). (Chapter 1 of this Handbook includes additional information about Prior Written Notice requirements.)

**K.S.A. 72-962**

(aa) "Substantial change in placement" means the movement of an exceptional child, for more than 25% of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment.

(bb) "Material change in services" means an increase or decrease of 25% or more of the duration or frequency of a special education service, a related service, or a supplementary aid or a service specified on the IEP of an exceptional child."

**K.S.A. 72-988(b)**

(6) consent, or refuse to consent, to the evaluation, reevaluation or the initial placement of their child and to any substantial change in placement of, or a material change in services for, their child, unless a change in placement of their child is ordered pursuant to the provisions of section 17, and amendments thereto, or the agency can demonstrate that it has taken reasonable measures to obtain parental consent to a change in placement or services, and the child's parent has failed to respond. If the parent fails to respond to the request for parental consent to a substantial change in placement or a material change in services, the agency must maintain detailed records of written and verbal contacts with the parent and the response, if any, received from the parent;

**K.A.R. 91-40-21(d)**

(1) Each agency shall give notice to the parent of any meeting to discuss the educational placement of the child. The notice shall meet the requirements of K.A.R. 91-40-17.

(2) If a parent cannot participate in person at a meeting relating to the educational placement of the child, the agency shall offer to use other methods to allow the parent to participate, including conference calls and video conferencing.

(3) An agency may conduct a meeting to determine the appropriate educational placement of a child with a disability without participation of the child's parent if the agency, despite repeated attempts, has been unable to contact the parent or to convince the parent to participate.

(4) If an agency conducts a meeting to determine the appropriate educational placement of a child without the participation of the child's parent, the agency shall have a record, as prescribed in K.A.R. 91-40-17(e)(2), of the attempts that the agency made to contact the parent.

(5) An agency shall take action to ensure that parents understand and are able to participate in, any discussions concerning the educational placement of their children, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

**K.A.R. 91-40-17(e)**

(1) An agency may conduct an IEP team meeting without parental participation if the agency, despite repeated attempts, has been unable to contact the parents or to convince the parents that they should participate.

(2) If an agency conducts an IEP team meeting without parental participation, the agency shall have a record of the attempts that the agency made to contact the parents to provide them notice of the meeting and to secure the parents' participation. The record shall include at least two of the following:

(A) Detailed records of telephone calls made or attempted, including the date, time, and person making the calls and the results of the calls;

(B) detailed records of visits made to the parents' home or homes, including the date, time, and person making the visit and the results of the visit;

(C) copies of correspondence sent to the parents and any responses received; and

(D) detailed records of any other method attempted to contact the parents and the results of that attempt.

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## B. DETERMINING EDUCATIONAL PLACEMENT

In determining the educational placement of a child with an exceptionality (including gifted and preschool children with disabilities), each school district must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. IEP Teams, including the parents, must make each child's educational placement decisions on an individual basis for each child with exceptionalities (K.A.R. 91-40-21(c)). Placement decisions must be based on the child's IEP and must be determined at least annually. For children with disabilities, the placement should be as close to the child's home as possible, and be in the school the student would normally attend, unless other factors determine this is not possible (K.A.R. 91-40-21(e)).

The team must consider each child's unique educational needs and circumstances, rather than the child's category of disability. Placement decisions should allow the child with a disability to be educated with nondisabled children to the maximum extent appropriate. The first placement option considered for each child with a disability is the general education classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate this placement. Therefore, before a child with a disability can be placed outside of the general education environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the general education classroom setting must be considered. Following that consideration, if a determination is made that the child with a disability cannot be educated satisfactorily in the general educational environment, even with the provision of appropriate supplementary aids and services, that child could be placed in a setting other than the general education classroom (K.S.A. 72-976(a)). (See Section D of this chapter for how these requirements apply to preschool-aged children.)

Federal and State regulations also preclude removing a child from a general education class just because the general curriculum must be modified to meet his or her individual needs (34 C.F.R. 300.116(e)). If an entirely different curriculum is needed for the child's alternate goals, it needs to be determined if appropriate special education supports (for both the child and teacher) can be appropriately provided within the context of the general education classroom. It is not the intent to have the general education teacher devote all or most of his/her time to the child with a disability or to modify the general education curriculum beyond recognition. A child's removal from the general education environment cannot be based solely on the category of disability, configuration of the delivery system, availability of special education and related services, availability of space or administrative convenience. (See LRE Decision Tree at the end of this chapter.)

### 1. Continuum of Placement Options

Schools are required to ensure that a continuum of placement options is available to meet the needs of children with disabilities for special education and related services in the least restrictive environment (LRE). Although, each school is not required to establish or maintain all options on the continuum, it must make an option available if the individual needs of a child require a specific placement option. The continuum includes various educational settings, such as general education class, special classes, special schools, home instruction, instruction in hospitals, and instruction in institutions (K.A.R. 91-40-21(b); 34 C.F.R. 300.115(b)(1)). This continuum of various types of classrooms and settings in which special education is provided is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully with other children without disabilities to the maximum extent appropriate.

In addition, although each school building is not required to be able to provide all the special education and related services for all types and severities of disabilities at the school, the school district has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of the child's abilities and needs and on each child's IEP; and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. (Federal Register, August 14, 2006, p. 46588.) To help schools make the full continuum available, K.S.A. 72-967 identifies and authorizes the options that districts have for meeting the LRE requirement by providing services within its schools; in the home, hospital, or other facilities; through a contract with another district; through a

cooperative agreement with one or more districts; or through a contract with a private nonprofit or a public or private institution. Facilities where special education services are provided must be equivalent to those where general education classes are held.

## 2. Harmful Effects

The IEP Team must also consider possible harmful effects in determining the educational placement, both in terms of the general education setting and a more restrictive setting. The language in 34 C.F.R. 300.116(d) and (K.A.R. 91-40-21(g) mentions "possible harmful effects on the child or on the quality of services that he or she needs." For example, the team must consider the distance that the child would need to be transported to another school, if not in the home school (e.g., length of bus ride, importance of neighborhood friendships, and other such considerations). In addition, potential disadvantages of being removed from the general education setting must be assessed (such as, what curriculum content will the child miss when out of the classroom, etc.). Parents and other team members, including the child's general education teacher, should discuss openly the possibility of supplementary aids and services, and other supports, that would allow the child to remain in the general education setting. A part of this discussion must include what is needed for the child to be able to participate and progress in the general education curriculum.

The IEP Team must also consider other harmful effects such as those that may exist when it may be inappropriate to place a child in a general education classroom. For example, the IEP Team may consider the well-being of the other children in the general classroom (e.g., would being in the classroom impede the child's or the ability of other children to learn). Courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a general education classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such a determination, schools must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the general education educational environment to accommodate the unique needs of the child with a disability. If the group making the placement decision determines, that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the general education environment, that placement would not be the LRE placement for that child at that particular time, because her or his unique educational needs could not be met in that setting.

### **K.S.A. 72-976**

(a) Each school district shall be required, to the maximum extent appropriate, to educate children with disabilities with children who are not disabled, and to provide special classes, separate schooling or for the removal of children with disabilities from the regular education environment only when the nature or severity of the disability of the child is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily.

### **K.A.R. 91-40-1**

(t) "Educational placement" and "placement" mean the instructional environment in which special education services are provided.

### **K.A.R. 91-40-21. Educational placement.**

(a) Each agency shall ensure that the children with disabilities served by the agency are educated in the LRE.

(b) Each agency shall ensure that a continuum of alternative educational placements is available to meet the needs of children with disabilities.

These alternative educational placements shall meet the following criteria:

(1) Include instruction in regular classes, special classes, and special schools; instruction in a child's home; and instruction in hospitals and other institutions; and

(2) make provision for supplementary services, including resource room and itinerant services, to be provided in conjunction with regular class placement.

(c) (1) In determining the educational placement of a child with a disability, including a preschool child with a disability, each agency shall ensure that the placement decision meets the following requirements:

(A) The decision shall be made by a group of persons, including the child's parent or parents and other persons who are knowledgeable about the child, the meaning of the evaluation data, and the placement options.

(B) The decision shall be made in conformity with the requirement of providing services in the LRE.

(2) In determining the educational placement of a gifted child, each agency shall ensure that the placement decision is made by a group of persons, including the child's parent or parents and other persons who are knowledgeable about the child, the meaning of the evaluation data, and appropriate placement options for gifted children.

**Sec. 300.116. Placements** In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that--

(a) The placement decision--

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- (2) Is made in conformity with the LRE provisions of this subpart, including Secs. 300.550-300.554;
- (3) Is as close as possible to the child's home;
- (b) The child's placement--
  - (1) Is determined at least annually;
  - (2) Is based on the child's IEP; and
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

## C. LEAST RESTRICTIVE ENVIRONMENT (LRE)

The process for determining the least restrictive environment (LRE) must be individualized for each child with a disability, including preschool age children, children in public schools, private schools, or other care facilities. The IEP team must ensure that children with disabilities are educated with children who do not have disabilities, to the maximum extent appropriate. Removing a child from the general education classroom must not occur unless the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily (K.S.A. 72-976(a)). The IEP must include an explanation of the extent, if any, that the child will NOT participate with children without disabilities in general education classes AND in extracurricular and other nonacademic activities (K.S.A. 72-987(c)(5)). The general education environment encompasses general education classrooms, and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.

When determining the least restrictive environment, IEP teams must consider:

- Whether the child's IEP can be implemented in the regular educational environment with the use of supplementary aids and services (34 C.F.R. 300.114(a)(2)(ii)).
- Whether placement in the regular classroom will result in any potential harmful effect on the child or on the quality of services that he needs (34 C.F.R. 300.116(d)).
- Whether placement in the regular classroom, even with appropriate behavioral interventions, will significantly impair the learning of classmates (34 C.F.R. 300.324(a)(2)(i)).

The IEP Team must discuss what program modifications or supports for teachers and staff may need to be provided to enable the child: (1) to advance appropriately in attaining the annual goals listed on the IEP, (2) be involved in and make progress in the general curriculum and participate in extracurricular and nonacademic activities, and (3) be educated and participate with other children with and without disabilities in these activities, as appropriate (K.S.A. 72-987(c)(4)).

LRE requirements do NOT apply to children who are identified as gifted (K.A.R. 91-40-21(c)(2)). Children who are gifted must have an educational placement determined by the IEP Team, based on their individual needs and to ensure that the child receives FAPE.

### **K.S.A. 72-976. Requirements for education of children with disabilities in regular classes, exception; admission to state institutions.**

(a) Each school district shall be required, to the maximum extent appropriate, to educate children with disabilities with children who are not disabled, and to provide special classes, separate schooling or for the removal of children with disabilities from the regular education environment only when the nature or severity of the disability of the child is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily.

### **K.S.A. 72-987(c)**

(4) a statement of the special education and related services and supplementary aids, based on peer-reviewed research to the extent practicable, and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:

- (A) To advance appropriately toward attaining the annual goals;
- (B) to be involved in and make progress in the general education curriculum in accordance with provision (1) and to participate in extracurricular and other nonacademic activities; and
- (C) to be educated and participate with other exceptional and nonexceptional children in the activities described in this paragraph;

(5) an explanation of the extent, if any, to which the child will not participate with nonexceptional children in the regular class and in the activities described in provision (4);

**K.A.R. 91-40-1**

(ll) "Least restrictive environment" and "LRE" mean the educational placement in which, to the maximum extent appropriate, children with disabilities, including children in institutions or other care facilities, are educated with children who are not disabled, with this placement meeting the requirements of K.S.A. 72-976, and amendments thereto, and the following criteria:

- (1) Determined at least annually;
- (2) based upon the student's individualized education program; and
- (3) provided as close as possible to the child's home.

**K.A.R. 91-40-21. Educational placement**

(f) Unless the IEP of a child with a disability requires some other arrangement, the agency shall ensure that the child is educated in the school that the child would attend if nondisabled.

## 1. Supplementary Aids and Services

IEP Teams must consider the supplementary aids and services, and other supports, that may be needed for the child to be in the general education class, other education-related settings, and in extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate (K.A.R. 91-40-1(ttt); 34 C.F.R. 300.42). Examples of supplementary aids and services may include paraeducator or interpreter services, assistive technology devices and services, resource room and itinerant services to be provided in conjunction with regular class placement (K.A.R. 91-40-21(b)(2)). (See also Chapter 5, Special Education and Related Services.)

In the case of a child who is deaf or hard-of-hearing, a sign language interpreter may be needed to enable the child to participate in the general education classroom. The sign language interpreter would sign what the teacher and children say, and if necessary voice what the child who is deaf or hard-of-hearing signs. The teacher and children may need training about communicating through an interpreter, how best to communicate with the child, and the interpreter's role on the educational team. Assistive technology needs of the child may also require training and ongoing technical assistance for teachers and other staff members (K.A.R. 91-40-1(d); 34 C.F.R. 300.9). For example, if a communication device is used, school personnel and parents may need training to be able to use the system initially and thereafter when the device is updated with new vocabulary. The IEP team should identify these needs for teacher training under supports for school personnel.

## 2. Nonacademic and Extracurricular Services and Activities

In order to receive FAPE, children are to be included in more than just classroom activities. The school must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in school sponsored nonacademic and extracurricular settings. Children with disabilities are to participate with children without disabilities in nonacademic settings and extracurricular activities, to the maximum extent appropriate. Again, these services or activities must be considered based on the child's individual needs. This requirement also applies to children who are being educated solely with others who have disabilities, including those in public schools, private institutions or other care facilities (K.A.R. 91-40-3(b); 34 C.F.R. 300.107; 34 C.F.R. 300.117).

The IEP Team is responsible for considering how the child with a disability can participate with children who do not have a disability in a wide range of possible nonacademic and extracurricular services and activities to the maximum extent appropriate. Parents and others close to the child should consider what would benefit the child and promote the achievement of IEP goals and objectives as well as the provision of access to other children without disabilities. It is difficult to make general statements about such activities as senior trips, activities sponsored by the Student Council (technically not school-sponsored), and other such nonacademic activities. Again, such decisions would need to be made individually by the IEP Team. (See Chapter 5, Special Education and Related Services.)

**K.A.R. 91-40-1**

(d) "Assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. This term shall include the following:

- (1) Evaluating the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
- (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
- (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

- (4) coordinating and using other therapies, interventions, or services with assistive technology devices, including those associated with existing education and rehabilitation plans and programs;
- (5) providing training or technical assistance for a child with a disability or, if appropriate, that child's family; and
- (6) providing training or technical assistance for professionals including individuals providing education and rehabilitation services, employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of a child.

**K.A.R. 91-40-1**

(ttt) "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes, or other education-related settings, and extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

**K.A.R. 91-40-3**

- (b) (1) Each agency shall provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities, including the provision of supplementary aids and services as determined to be necessary by the child's IEP team.
- (2) Nonacademic and extracurricular services and activities shall include the following:
  - (A) Counseling services;
  - (B) athletics;
  - (C) transportation;
  - (D) health services;
  - (E) recreational activities;
  - (F) special interest groups or clubs sponsored by the agency;
  - (G) referrals to agencies that provide assistance to individuals with disabilities; and
  - (H) employment of students, including both employment by the agency and assistance in making outside employment available.
- (d) (1) Each agency shall ensure that assistive technology devices or assistive technology services, or both, are made available to a child with a disability if required as a part of the child's special education or related services, or the child's supplementary aids and services.
- (2) Each agency, on a case-by-case basis, shall allow the use of school-purchased assistive technology devices in a child's home or in other settings if the child's IEP team determines that the child needs access to those devices at home or in other settings in order to receive FAPE.

**Sec. 300.117. Nonacademic settings.** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

### 3. Policies of the Kansas State Board of Education

The Kansas State Board of Education has developed a policy regarding the Kansas State Schools for the Deaf and Blind. According to this policy, when a student is to be placed at one of the State schools, the local district AND the parents are jointly responsible for applying for admission to the school. However, the steps preceding the admissions application require the local district and parents to:

1. Complete the initial evaluation or reevaluation;
2. Conduct an IEP meeting;
3. Determine the educational placement;
4. If a representative from the State school was not in attendance, hold a placement meeting with the representative(s) from the State school to finalize the IEP;
5. Obtain informed parent consent for services and placement; and
6. Initiate the admissions application with the parents.

In developing the IEP, the team must also plan opportunities for access to educational programs in local school districts near the State school, either part- or full-time. Under K.A.R. 91-40-4, Conditions for Admission, the following requirements are included:

**K.A.R. 91-40-4. FAPE for exceptional children housed and maintained in certain state institutions.**

- (a) Subject to K.S.A. 72-1046 and amendments thereto, each state agency shall provide FAPE to exceptional children housed and maintained at any facility operated by the agency. All educational programs shall comply with the requirements of state special education laws and regulations.
- (b) State schools.
  - (1) The procedures for placing Kansas residents into the Kansas state school for the blind and the Kansas state school for the deaf shall meet the following requirements:
    - (A) Admission procedures shall be initiated by the child's home school district and by the child's parent or parents.
    - (B) Placement of any child in a state school shall be made only after the local school district and the child's parent or parents have considered less restrictive placement options.

- (C) Placement shall be based on a child's IEP, which shall indicate a need for educational services provided at the state school.
- (D) Any agency may refer a child to a state school for a portion or all of the child's evaluation. In such a case, a representative or representatives from the agency shall be included in any meeting at which the child's eligibility for services or placement is determined.
- (E) If the initial evaluation and staffing are conducted by any local school district and if one of the state schools is proposed as a placement for the child, a representative or representatives from the state school shall be included in the meeting at which placement for the child is determined.
- (2) Personnel from the child's home school district, as well as personnel from the state school and the child's parent or parents, shall be afforded an opportunity to participate in any IEP meeting for the child. Placement of the child in the home school district shall be considered at each annual IEP meeting.
- (3) Each state school shall attempt to make arrangements so that each child enrolled in the state school has access to the educational programs in the local school districts near the location of the school, on either a part-time or full-time basis.
- (4) If a state school determines that its program is not appropriate for a student and it can no longer maintain the student in its program, the state school shall give the district of residence of the student at least 15-day notice of this determination.

#### 4. Children in Other Educational Placements

Schools are responsible to ensure that LRE requirements are being applied to children who have been placed by the public school in private institutions or other care facilities. As IEP teams make educational placement decisions about children for whom they do not have an appropriate program at the public school, they must consider all LRE requirements carefully. (See Chapter 14 in this Handbook, Children in Private Schools.)

The LRE requirement may be modified for students who are incarcerated in local detention facilities, a state juvenile correctional facility or an adult correctional institution (K.A.R. 91-40-5).

##### **K.A.R. 91-40-5**

(b) State juvenile correctional facilities.

- (1) The commissioner of the juvenile justice authority shall make provision for FAPE for each child with a disability detained or incarcerated in any state juvenile correctional facility or other facility at the direction of the commissioner.
- (2) The requirements in this article concerning parental rights, placement, and LRE may be modified in accordance with state and federal laws and the child's conditions of detention or incarceration.

##### **K.A.R. 91-40-21 Educational placement.**

- (a) Each agency shall ensure that the children with disabilities served by the agency are educated in the LRE.
- (b) Each agency shall ensure that a continuum of alternative educational placements is available to meet the needs of children with disabilities. These alternative educational placements shall meet the following criteria:
- (1) Include instruction in regular classes, special classes, and special schools; instruction in a child's home; and instruction in hospitals and other institutions; and
- (2) make provision for supplementary services, including resource room and itinerant services, to be provided in conjunction with regular class placement.

##### **K.A.R. 91-40-22. Agency placement in private schools or facilities.**

- (a) If an agency places a child with a disability in a private school or facility as a means of providing FAPE to the child, the agency shall remain responsible for ensuring that the child is provided the special education and related services specified in the child's IEP and is afforded all the rights granted by the law.
- (b) (1) Before an agency places a child with a disability in a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child.
- (2) The agency shall ensure that a representative of the private school or facility attends the meeting. If a representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.
- (c) (1) After a child with a disability enters a private school or facility, the agency responsible for providing FAPE to the child may allow any meetings to review and revise the child's IEP to be initiated and conducted by the private school or facility.
- (2) If the private school or facility initiates and conducts these meetings, the agency shall ensure that the parent and an agency representative are involved in any decision about the child's IEP and shall agree to any proposed changes in the IEP before those changes are implemented.

#### 5. Support for Staff

Schools must ensure that all teachers and administrators know their responsibilities in ensuring LRE, and that they are provided with the needed technical assistance and training. Considerations might include: providing written information to staff; offering ongoing in-service training, professional development, results-based staff development; individual technical assistance; or mentoring by experienced teachers and administrators.

Schools must consider the supports that all general and special education teachers and related services personnel need to maintain a child in the LRE. Such support might include training for the general education teacher,

paraeducators and other personnel. Special educators or related services personnel might provide this training regarding supports that are required. Other examples would be the supports that staff need to implement a child's behavioral intervention plan, such as training regarding modeling, providing positive feedback, and offering peer interactions as appropriate. (34 C.F.R. 300.119 and 300.320(a)(4))

**Sec. 300.119. Technical assistance and training activities.** Each SEA shall carry out activities to ensure that teachers and administrators in all public agencies--

(a) Are fully informed about their responsibilities for implementing Sec. 300.550; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

**Sec. 300.320(a)**

(4) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

## D. EARLY CHILDHOOD LEAST RESTRICTIVE ENVIRONMENT

For preschool children ages 3-5 with disabilities, placement and LRE requirements are the same as for school-aged children (K.A.R. 91-40-21(b)(c)). This means that preschool children with disabilities are to have a continuum of placement options available and have the right to be educated with their peers without disabilities to the maximum extent appropriate. As with school-aged children, the needs of preschoolers are to be considered individually, and the individual needs of the child would determine the most appropriate setting for services to be provided. Most preschoolers benefit from placement in a preschool program with typically developing peers.

School districts that do not operate programs for preschool children without disabilities are not required to initiate general education programs solely to satisfy the LRE requirements. However, many school districts provide early childhood services to children without disabilities in programs such as 4-year-old at-risk preschools, child care centers, Parents as Teachers, and various other early childhood settings all constituting general education environments. School districts that do not operate early childhood programs for children without disabilities may seek alternative means to provide inclusive options for young children through collaborative relationships with private preschool programs or other community-based settings. If a preschool child with a disability is already attending a general education preschool program, the IEP team should consider whether special education and related services can be provided in that setting with the use of supplementary aids and services, or supports for school personnel (Federal Register, August 14, 2006, p. 46589).

Various educational placement options are possible, both within the community and at the school. The key question for the IEP Team to consider is where this child would be if s/he did not have a disability. The full continuum of placement options at K.A.R. 91-40-21(b), including integrated placement options with typically developing peers, must be available to preschool children with disabilities. Examples include Head Start, community-based preschools (may be in churches, whether or not religiously affiliated), child care centers or family child care homes, mothers'-day-out programs, Title I programs, at-risk 4-year-old preschools, migrant or bilingual programs, Even Start, play groups, and other such early childhood programs. For children who are age 5 by August 31, kindergarten would be the least restrictive environment, to the extent appropriate. Note that children with IEPs cannot be counted for general fund reimbursement in the 4-year-old at-risk preschool program, but they may participate in the program.

The regulations allow school districts to choose an appropriate option to meet the LRE requirements. Schools are encouraged to explore and use community resources to provide comprehensive services. Paying for the placement of preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to school districts to meet the LRE requirements. However, if a school district determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.

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## E. RECENT CASE LAW

For the first time, the United States Circuit Court of Appeals for the 10th Circuit, adopted a legal standard (the “Daniel R.R.” test) for determining least restrictive environment in *L.B. and J.B v. Nebo Sch. Dist.*, 379 F3d 966, 41 IDELR 206 (10th Cir. 2004). Subsequently, in *T.W. v. United Sch. Dist. No 259, Wichita, Kansas*, 136 Fed. Appx. 122, 43 IDELR 187, (10th Cir. 2005), the 10th Circuit affirmed that the “Daniel R.R.” test would continue to be the legal standard for determining the least restrictive environment for children with disabilities in the 10th Circuit—which includes Kansas. The Daniel R.R. test has two parts:

Part 1: In determining whether a particular placement is the least restrictive environment for a particular child, the court first determines whether education in a regular education classroom, with the use of supplemental aids and services, can be achieved satisfactorily. If the court determines that a child can be satisfactorily educated in a regular education classroom with the use of supplemental aids and services, then the regular education classroom is the least restrictive environment for that child and there is no further analysis.

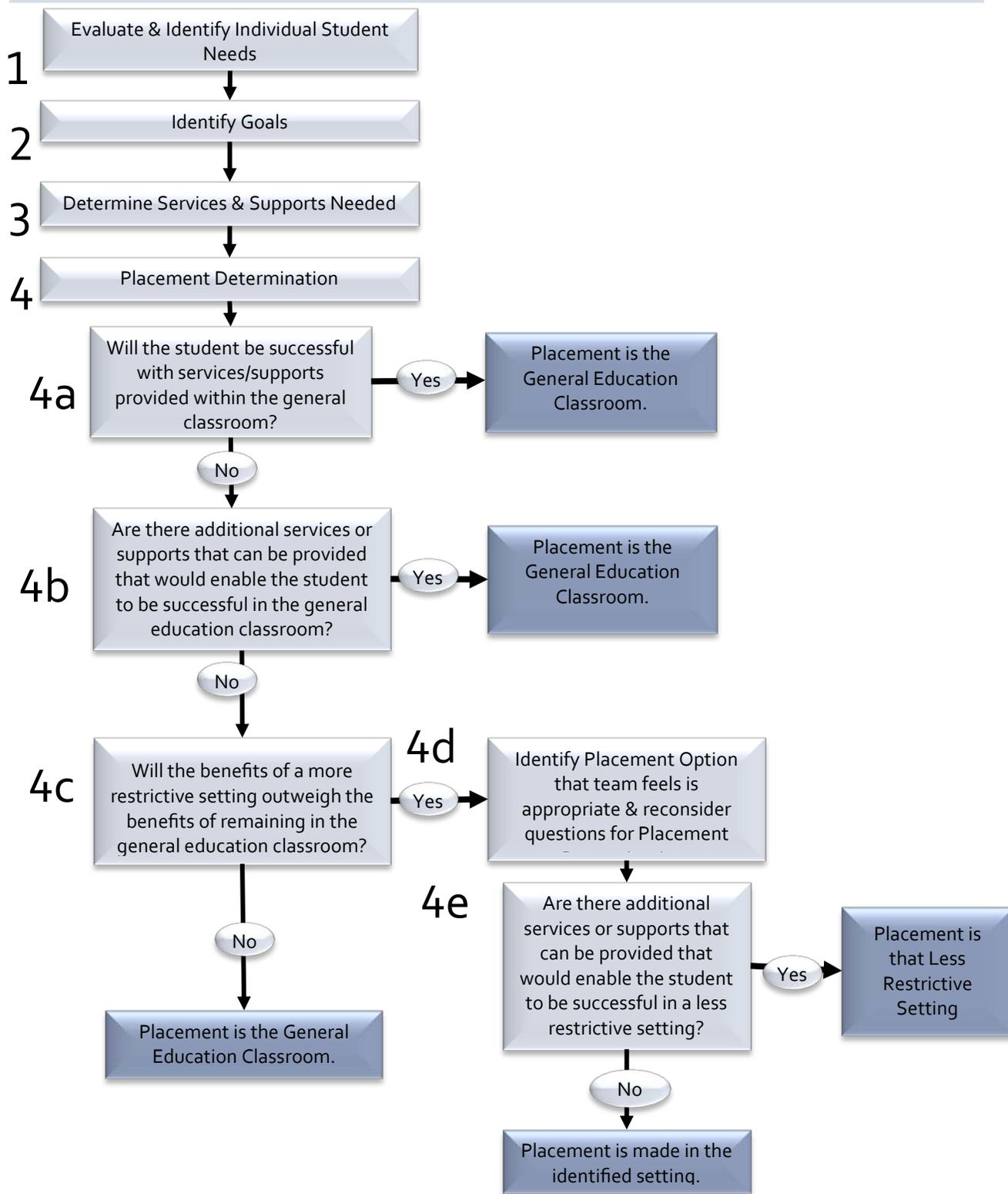
Part 2: However, if the court determines that the child cannot be satisfactorily educated in the regular education classroom, even with the use of supplemental aids and services, the court then proceeds to the second part of the test by determining whether the school district has mainstreamed the child to the maximum extent appropriate. In other words, the court looks to see if the placement selected by the IEP team enables the child to have contact with nondisabled students to the maximum extent appropriate. If the placement selected by the IEP team does mainstream the child to the maximum extent appropriate, then the placement is the least restrictive environment for that child.

In applying these two parts of the Daniel R.R. test to a particular placement, the court considers the following non-exhaustive factors:

1. Steps the school district has taken to accommodate the child in the regular education classroom, including the consideration of a continuum of placement and support services;
2. Comparison of the academic benefits the child will receive in the regular classroom with those he/she will receive in the special education classroom;
3. The child’s overall educational experience in regular education, including nonacademic benefits; and
4. The effect on the regular classroom of the disabled child’s presence in that classroom.

The 10th Circuit has instructed that this list of considerations is not exhaustive, and that other considerations may also be appropriate in a particular case. For example, some courts have considered the cost of mainstreaming a child in the analysis. The 10th Circuit did not consider the cost of mainstreaming the child in either of the cases in which it used the Daniel R.R. standard because costs were not presented as an issue in either case. However, the 10th Circuit did not rule out consideration of the costs of a particular placement if it was presented as an issue in a case regarding least restrictive environment.

## LRE DECISION TREE



1	<p><b>Evaluate &amp; Identify Needs</b> – For the IEP Team to be able to make any decisions for a student they must clearly understand the student’s needs. Think beyond academics and consider function as well.</p> <ul style="list-style-type: none"> <li>• Does the team understand how the disability manifests itself within the general education classroom?</li> <li>• Does the team understand what it is about the student’s disability that prevents the student from being successful in the general education classroom?</li> </ul>
2	<p><b>Identify Goals</b> – After the team completely understands the student’s needs they can then prioritize the needs and identify the goals for the student (both post-school and annual goals). Using their understanding of the two questions above the team can determine what the student needs to become more independent and successful within the general education classroom.</p>
3	<p><b>Determine Services &amp; Supports Needed to Achieve Goals &amp; Meet Other Needs</b> – After the goals for the student have been identified that team then moves to determining what services and supports need to be provided to enable the child to achieve those goals and to address the other needs identified in the present levels but do not have goals written for them. The services that the team needs to consider are special education, related services, program modifications, supplementary aids &amp; services and supports for school personnel. When making these decisions the team needs to keep in mind how much support the student needs to be successful. Too much support can build dependence in a child but providing the wrong type of services can prevent the student from being able to function in more independent ways. In addition to all of these considerations it’s important to remember, by law, a child with a disability cannot be removed from age-appropriate general classrooms solely because of needed modifications in the general education curriculum. Some questions to keep in mind when making service decisions include:</p> <ul style="list-style-type: none"> <li>• Are there skills that could be taught to the student in order to reduce the amount of support she/he needs?</li> <li>• Is the focus every year on making the student as independent as possible?</li> </ul> <p><i>Note: The following are placement decisions not service decisions, they are not considered at this point: Resource Room, Pull-Out, Self-Contained, Inclusion, Center Based, BD/JED Program.</i></p>
4	<p><b>Determine Placement</b> – Once the team has determined the services that the student needs then the discussion can move to placement, where services will be provided. To assist with this decision process the following questions lead the team through the placement discussion.</p>
4a	<p><b>Can the services determined necessary be provided within the general education classroom?</b> – When having this conversation try to focus on whether services could be provided in the general education classroom and not how we typically provide services. The discussion of whether the services can be provided in the general education classroom must be done for each individual student based on their specific needs. If the team determines it is possible to provide the services in the general education classroom then the least restrictive environment for the student is the general education classroom.</p>
4b	<p><b>If not, are there additional services or supports that can be provided that would enable the student to be successful within the general education classroom?</b> – If the team determines that the services as originally identified as necessary are unable to be provided in the general education classroom the next discussion should be whether additional supports or services could be provided that would allow the student to remain within the general education classroom. When making the decisions the team should consider the same issues of student independence as was considered in Step 3.</p>
4c	<p><b>If not, will the benefits of a more restrictive setting outweigh the benefits of remaining in the general education classroom?</b> – If the team determines that it is not possible to provide additional services and supports in the general education classroom to meet the needs of the student then the consideration of placement options outside of the general education classroom are then considered. The team should move in small incremental steps away from the general education classroom and at each movement in the continuum the team should readdress questions in 4a and 4b for that placement. It is not until this point in the placement determination does the team consider placement options such as pull-out, resource room, etc. In making this decision, the team should consider (a) whether reasonable efforts have been made to accommodate the student, (b) the educational benefits, both academic and social that are available in each setting, (c) the possible negative effect of the inclusion of the student on the education of other students, and (d) the harmful effects of a more restrictive environment on the student.</p>
4d	<p><b>Identify Placement Option that team feels is appropriate &amp; reconsider questions for Placement Determination</b> – If it is determined that the general classroom is not appropriate, based on the student’s needs and the services to be provided, the team identifies a reasonable and appropriate placement.</p>
4e	<p><b>Are there additional services or supports that can be provided that would enable the student to be served in a less restrictive setting?</b> – The team needs to consider whether program modifications could occur or additional services could be provided which would enable the student to be appropriately served in a less restrictive setting. Even if these program modifications have never before been provided in the less restrictive setting, it should still be considered. When making the decision the team should consider the same issues of student independence as described in Step 3. Placement in the less restrictive setting should occur if additional modifications or supports would make that setting appropriate for the student.</p>

KSDE & Project SPOT June 2007

## QUESTIONS AND ANSWERS ABOUT EDUCATIONAL PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT

### 1. Does the school have to provide aids and services to assist the child to be in a general education classroom? What if the school says that providing those aids and services is too expensive?

The district must provide supplementary aids and services to accommodate the special educational needs of children with disabilities in the general curriculum in the least restrictive environment. In a Federal appellate court decision, *Roncker v. Walter*, 700 F. 2d 1058 (6th Cir.), cert. denied, 464 U.S. 864 (1983), the court made the following statements about LRE:

The Roncker Court also noted that:

*"Cost is a proper factor to consider since excessive spending on one child with a disability deprives other students with disabilities. Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of placement options for students with disabilities. The provision of such placement options benefits all children with disabilities."*

In other words, the law, regulations, and court decisions all presume in favor of maximum appropriate contact with children without disabilities.

### 2. What if the school says the child cannot be included because s/he cannot benefit academically from instruction in the general education class?

The school should not make such an assertion. The Federal District Court in *Sacramento City Unified School District v. Holland* (1992), said the law requires educating a child with disabilities in a general education classroom if the child can receive a satisfactory education there, even if it is not the best academic setting for the child. The court looked at whether the child's IEP goals and objectives could be met in the classroom by adapting the curriculum, or by providing supplementary aids and services. The school district in *Holland* argued that a general education classroom would not be appropriate for a student if that would require significant changes to the general curriculum for the child. However, the court rejected the school's view. It said that students with disabilities may require and be entitled to substantial curriculum changes to be sure they benefit from being in the general education class. The court stated that "modification of the curriculum for a student with a disability, even dramatic modification, has no significance in and of itself. The IDEA, in its provision for the IEP process, contemplates that the academic curriculum may be modified to accommodate the individual needs of students with disabilities."

*"[IDEA] does not require states to offer the same educational experience to a student with disabilities as is generally provided for students without disabilities.... To the contrary, states must address the unique needs of a child with disabilities, recognizing that the student may benefit differently from education in the regular classroom than other students.... In short, the fact that a child with disabilities will learn differently from his or her education within the regular classroom does not justify exclusion from that environment" *Oberti v. Board of Education of the Borough of Clementon School District* (3rd Cir. 1993).*

If an entirely different curriculum is needed for the child's alternate goals, it needs to be determined if appropriate special education supports (for both the child and teacher) can be most appropriately provided within the context of the general education classroom. It is not the intent to have the general education teacher devote all or most of his/her time to the child with a disability nor to modify the general education curriculum beyond recognition.

### 3. What are supplementary aids and services that would help the child in the general education classroom?

The law is very broad and includes: “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...” Supplementary aids and services might include paraeducator services, assistive technology devices and services, and other accommodations, as appropriate.

**4. If the child is not placed in a general education classroom, does the district have any other LRE responsibilities?**

Even if the child is not placed in a general education classroom, the school district must still find ways for the child to be with children without disabilities in noneducational and extracurricular activities as much as is appropriate to the child’s needs. Where the district suggests a placement other than a general education classroom, the Prior Written Notice form for informed written consent must list other placement ideas that were considered and the reasons they were rejected. Also, according to 34 C.F.R. 300.320(a)(5), the IEP Team must document in the IEP the extent to which the child will not participate with nondisabled children in the regular class and in other school activities. The IEP Team may also address the potential for moving to a less restrictive environment in the future. The LRE for each child must be considered annually to determine whether the current placement is appropriate.

**5. Is there anything that the district may not consider in deciding LRE?**

The district may not make placement decisions based only on such things as the category or severity of the child’s disability, convenience of staff, the choices for placement options currently available, the availability of educational or related services, space availability, availability of staff, bus routes, or administrative convenience.

**6. If a child is not placed in the general education classroom, can s/he participate in other school activities or services?**

Yes. The law is clear that children with disabilities have the right to participate in nonacademic and extracurricular services and activities with children who do not have disabilities to the maximum extent appropriate to their needs (34 C.F.R. 300.117). Also, school districts must provide these activities in a way that gives children with disabilities an equal opportunity to participate (34 C.F.R. 300.107). Such services and activities include:

- lunch
- recess
- athletics
- health services
- employment opportunities
- counseling services
- transportation
- recreational activities
- special interest groups or clubs

**7. May the nature or severity of a child’s disability be used to justify a segregated educational setting?**

All children with disabilities have the right to an education in the least restrictive environment based on their individual educational needs, not the “label” that describes their disability. Schools must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.

Special classes, separate schooling, or other removal of children with disabilities from the general education environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily (34 C.F.R. 300.114(2)).

## 8. What responsibility does the general education staff have in serving children in the least restrictive environment?

Both general and special educators are required to be members of IEP Teams who make decisions about services needed by eligible children and where they should be provided. This is a mutual responsibility for general and special education staff. The IEP Team is required to consider the supplementary aids and services needed for a child to be successfully educated in the general education classroom. Some examples are:

- Aids to assist the child
- Adaptive equipment
- Co-teaching staff
- Assistive technology
- Class/environmental accommodations
- Adapted/modified/enriched curriculum
- Classroom tests modified or accommodated
- Training or supports for the teacher

These strategies can be used in any class, including classes like physical education, art, music, and vocational education. Teacher-made tests can include any accommodations the child needs; with regard to State and district-wide assessments, however, IEP teams should be careful to avoid specifying accommodations that would invalidate the tests.

The IEP Team must include at least one of the child's general education teachers, if the child is or may be participating in general education classes. The general education teacher must, as much as is appropriate, help develop the IEP. This includes helping to decide things like appropriate positive behavioral interventions and strategies, supplementary aids and services, program modifications, and support for school staff in providing the supplementary aids and services and program modifications. After the initial IEP has been developed, the general education teacher must also help review and revise the IEP. The IEP Team must also have a school person who is knowledgeable about the general curriculum and what resources are available in the district. The school is responsible for providing the services on the IEP. That means both special and general education teachers must assist in determining the services and ensuring that appropriate services are provided.

## 9. What if the school district has a policy that related services are available only at a segregated location?

A policy of this nature is against the law. The school cannot legally have a policy that predetermines placement for related services. The district must provide the needed related services to meet individual needs of the child in the least restrictive environment. Decisions about location of services is determined by the IEP Team.

The Office of Special Education Programs says:

*"The determination of appropriate program placement, related services needed, and curriculum options to be offered is made by the IEP team based upon the unique needs of the child with a disability rather than the label describing the disabling condition or the availability of programs."*

## 10. Does LRE apply to preschool?

Yes, LRE requirements apply to children who are ages 3 through 5. Some settings for LRE for preschool to serve children where they would be if not disabled include:

- Public school preschools
- Head Start
- Play groups
- Community preschool
- Child care
- Kindergarten for 5 year old

**11. Does LRE apply to children who are gifted, or just to those with disabilities?**

According to K.A.R. 91-40-21, LRE and the continuum of services do not apply to children who are gifted. However, individual placement decisions must be made according to the unique needs of each child and to ensure that the child receives FAPE.

**12. If services are needed during an extracurricular activity, do we need a goal that addresses it?**

No. The IEP Team is required to address how children will participate with others who do not have disabilities during nonacademic and extracurricular activities. Services may be listed to meet those needs, without having a specific goal.

**13. Is parent consent required when moving a child from placement in a neighboring district back to the home district?**

No, if the placement in both districts is the same place on the continuum and the child has the same opportunity to participate with peers without disabilities. If the IEP specifies a certain classroom in a certain school, then consent would be required. Placement is not determined by the name of the building, rather it is the place on the continuum of service environments. For example, if the IEP reads "services will be provided in Mrs. Jones' 4th grade class at Eisenhower Elementary School," then parent permission would be needed to move the student from Mrs. Jones's classroom. However, if the IEP reads "services will be provided in a regular 4th grade classroom," then parent permission would not be needed, if everything else stayed the same. Placement is not the same as location.

**14. Is moving a child from a regular bus to a special education bus a change of placement?**

Yes, since a special education bus is a more restrictive setting than a regular education bus (34 C.F.R. 300.107). Nonacademic services, lists transportation as a service (34 C.F.R. 300.117). Nonacademic settings, ties transportation to ensuring a child with disabilities participates with children without disabilities. If the change is made, the IEP Team would need to provide Prior Written Notice, and if it is a material change in services the district would need to obtain consent from the parent.