

# **Due Process Decisions, Formal Complaint Reports Case Law and Guidance**

## **Annual Review by Kansas SEAC – 4/17/19**

Mark Ward & Laura Jurgensen

Federal regulations, at 34 C.F.R. §300.514(c), require that findings and decisions of due process hearings be sent to the State Advisory Panel in redacted form. The actual decisions and findings in redacted form are available on the Kansas State Department of Education (KSDE) web site on the bottom of the special education legal page. Some of these decisions are quite lengthy. Any member of the Special Education Advisory Council (SEAC) who would like a hard copy of any of these decisions may contact Mark Ward or Laura Jurgensen to request copies.

This presentation includes a summary of all of the due process decisions rendered in the past one-year period. For the SEAC's convenience, the KSDE Special Education Team has summarized the points the team wanted to emphasize in these due process hearing decisions. The team has also included selected formal complaint reports from investigations of special education complaints over the last year. Underlined text indicates the issue(s) involved, and bold text is used for emphasis. All complaint decisions are also now on the KSDE website on the bottom of the special education legal page in redacted form. Other selected materials are also included at the end of this document.

### **DUE PROCESS**

19DP-001

The parents of a 7th grade student requested a due process hearing on July 10, 2018. Various motions were filed, including a motion for summary judgment. On January 4, 2019 the motion for summary judgment was denied. The hearing lasted five days: January 22, 23, 24, and February 11 and 18, 2019.

The student had multiple disabilities, including malignant infantile osteoporosis, anxiety, depression, attention deficit disorder, eating disorder, and autism. The student was also legally blind. In 2013 and 2014, the student lived in one of the dorms at the Kansas State School for the Blind [KSSB]. The student's father stayed in the dorm with him to address the student's medical, behavioral, and feeding concerns, and to aid in facilitating the student's behavior plan. Beginning in 2015, the student was home-schooled and attended a private parochial school for one hour per day. In the 2016 school year, the student attended the private school on a full-time basis. During that time, the student attended KSSB each summer for extended school year (ESY) services. During ESY the student lived in the dorms independently with few problems.

Prior to the due process hearing, the parents filed two formal complaints, one in 2017 and one in 2018, alleging that the district failed to provide braille and closed caption television for the student at the private school. The complaint investigator found a failure to implement the IEP; as a result, the district agreed to provide one year of compensatory education at the KSSB. To do so, the district modified the student's IEP to state that the district would reimburse the parents at the mileage rate for transportation to and from KSSB and the student's home in western Kansas. The IEP stated that the mileage rate would be paid for "each time the student has to be transported to KSSB for school and each time the student has to be transported home from school [emphasis added]." The parents believed the district would pay the transportation costs for travel each day (674 miles round-trip), and later when the district objected, each weekend, whether or not the student went home. The school did not agree to either of these interpretations. This became an important issue when the parents rented an apartment in Lenexa so that the student could remain with a parent instead of living in the dorm. The parents did not consult with the IEP team about this living arrangement, so the IEP did not address this situation. While negotiations were ongoing, the student was expelled from the KSSB dorms for behavior reasons. The parents made additional requests for an IEP amendment to address the student's living and transportation situation, even notifying the district that they could no longer afford to rent the Lenexa apartment. However, the district maintained that the statement of compensatory services in the current IEP was appropriate.

The parents requested a due process hearing to resolve this disagreement and the hearing officer disagreed with the district's position on the appropriateness of the compensatory services in the IEP. Finding that the IEP was not reasonably calculated to provide a free appropriate public education (FAPE), the hearing officer stated, "the IEP failed to address how and where [the student] would reside during his compensatory placement at KSSB..." The hearing officer noted that the parents also failed to respond to district requests for specific information, but added: **"Regardless, once the Parents put the District on notice that they could not afford, or no longer had the intention to continue to rent the Lenexa apartment, and they wanted the IEP transportation services to be re-evaluated based upon the same, the IEP team should have addressed a continuum of services that could have provided the related service of transportation to [the student's] residential (or potential lack of residential) placement... This did not occur, instead the District choose to stick with the original language from the July 19, 2017 consented IEP and refused to address the change in circumstances that were affecting [the student's] need for services in order to receive a free and public education at his compensatory placement at KSSB."**

The hearing officer denied, however, the parent's request to be reimbursed for the costs of the apartment, including rent, utilities, late fees, and renter's insurance. The parents had asserted these should be considered related services. The hearing officer denied this request for reimbursement based on evidence that the parents made a unilateral decision to rent the apartment and did not attempt to inform, or even request, such expenses from the district prior to incurring these costs.

On another issue, the hearing officer concluded that the parents were not denied the opportunity to meaningfully participate in the IEP process.

The hearing officer ordered the following:

1. Within 10 days of the date of the decision, convene an IEP meeting to **address the housing needs of the student**, including appropriate housing, and provide for that need in the IEP as a related service;
2. The District is directed that the **parents are not required to maintain the Lenexa apartment** to make the KSSB placement feasible, and if the parents choose not to maintain the Lenexa apartment, the District must provide the related services to address both the housing and transportation needs to maintain the KSSB placement in a realistic manner (although the one-year timeline had expired, the **KSSB placement continued as the "stay put" placement during this litigation**);
3. The IEP team is required to address the transition services needed by the student, and include in related services: Braille and CCTV services;
4. The IEP team must develop a transition plan for the student's transition back to the home district;
5. **If the parents refuse any services or supports that the IEP team agrees are appropriate, the District must obtain a written refusal of services from the parents for each denied service or support;**
6. **The parents were directed to submit an itemized statement for mileage transporting the student to and from home and KSSB, including all mileage to and from the Lenexa apartment and KSSB** [this was a major part of the initial dispute], and the district shall make timely payment for transportation reimbursement.
7. The **parents were the "substantially prevailing party,"** which has implications with regard to an award of attorneys' fees, which must be determined by a court.

#### **FORMAL COMPLAINTS:**

19FC-001

Twelve issues were presented, most asserting a failure to implement the IEP.

The investigator substantiated some allegations and did not substantiate others. With regard to those not substantiated, the investigator correctly stated that **missed IEP services do not need to be made up when school is not in session, during winter break or when school is**

**canceled due to weather**, for example, or when the **student is absent** [See Letter to Kane, 72 IDELR 75 (OSEP 2018)].

Also, the parent **alleged that the IEP team made changes to the student's health care plan without parent consent**. These changes involved additional comments in the health plan and changes to interventions related to fatigue. The investigator determined that **these changes were not a material change in services, thus did not require consent, because none of these comments or interventions changed the frequency or duration of the health care plan. At most, the changes represented changes in instructional methodology**. However, the district also did not provide a prior written notice (PWN) for these changes and that was a violation of law. The investigator cited the recent United States Supreme Court ruling in Endrew F. v. Douglas County Sch. District, stating that a FAPE is an IEP reasonably calculated to enable a child with a disability to make progress that is appropriate in light of the child's circumstances. Thus, **any change to an IEP is a change related to FAPE, and requires a PWN**.

19FC-002

In this complaint, a child was evaluated and determined to be ineligible for special education. The parent requested an independent educational evaluation (IEE) at public expense. The district denied the parent's request for an IEE, and did not request a due process hearing to show its evaluation was appropriate, as required by 34 C.F.R. §300.502(b)(2). The district held the position that it was not limited to the options of either providing an IEE at public expense or initiating a due process hearing because the **regulation stated at 34 C.F.R. §300.502(a)(1) said: "The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child...[emphasis added]"** The term "child with a disability" is defined in the regulations at 34 C.F.R. §300.8, to mean a child evaluated as having one of the specified categories of disability and, who by reason thereof, needs special education and related services. The investigator found that the same language occurs in other procedural safeguard regulations, including the **right of a parent of a child with a disability to:**

- (a) receive the **notice of procedural safeguards** upon the initial referral or request of a parent for an evaluation;
- (b) receive **prior written notice** before initiating or refusing any proposal related to the identification or evaluation of the child;
- (c) file a **due process hearing** on matters related to evaluation and identification;
- (d) **attend meetings** with respect to the evaluation and identification of their child; and
- (e) **attorney's fees** when they prevail in a due process hearing.

The investigator found, although the district had used a literal interpretation of the regulation, that interpretation was inconsistent with the intent of the law, and if used consistently, would **render all of the above referenced procedural safeguards meaningless for parents of children in the child find process. If, as the district argued, parents were only parents of a child with a disability after the child was evaluated and found to be in need special education and related services, then those parents whose child had not been evaluated or had been evaluated and found to be ineligible, would have none of the listed procedural safeguards.** That would lead to an **absurd result -- that the regulations state that these procedural safeguards do apply to parents of children in the child find process and, at the same time, that they do not.** Canons of statutory construction say that **when a literal reading of a statute or regulation leads to inconsistent, contradictory, or absurd results, the statute should be interpreted to avoid those results, and, instead, be interpreted to reconcile the different provisions so as to make them consistent and practicable.** The investigator concluded that ***parents of a child who had been evaluated and determined to be ineligible for special education do have a right to an IEE at public expense unless the district initiates a due process hearing to show that its evaluation is appropriate.***

19FC-003

In this complaint the parent challenged the district's denial of a request for an IEE. The parent had informed the district that she wanted to use a doctor who is located in Wichita. The district denied this request for an IEE because the district's IEE criteria limited IEEs to a 100-mile radius and to school psychologists with at least three years of experience.

The investigator cited **OSEP guidance** on this topic, stating that, although schools may set criteria for IEEs, they: (1) **cannot prohibit IEE examiners from associating with private schools or advocacy groups** because that kind of restriction is unrelated to the examiner's ability to conduct an IEE; (2) **cannot require the examiner to have "recent and extensive experience in the public schools"** because that is too narrow and unrelated to their ability to conduct an IEE; (3) **may not require examiners to be licensed, or eligible for licensure by the State Department of Education** because that could make it impossible to assess certain areas of disability (example might be a student who needs assessment by clinical psychologist); (4) **may provide a list of IEE examiners, but if they do, the list must be exhaustive;** and (5) **districts must allow exceptions to their criteria if a parent can demonstrate unusual circumstances** (a condition that has no definition). These are examples that OSEP provides to illustrate the regulatory requirement that **any criteria must be consistent with a parent's right to an IEE.** Letter to Young, 39 IDELR 98 (OSEP 2003), Letter to Parker, 41 IDELR 155 (OSEP 2004), Letter to Petska, 35 IDELR 191 (OSEP 2001).

In addition, the investigator cited these paragraphs in federal regulation 34 C.F.R. § 300.502:

(e) Agency criteria. (1) If an independent educational evaluation is at public expense, **the criteria** under which the evaluation is obtained, **including the location** of the evaluation

and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

In this case, the investigator said she did not need to determine whether the district's criteria conformed with the guidance from OSEP because, under the applicable regulation, **when a parent disagrees with the school's evaluation and requests an IEE at public expense, the school has only two options: provide the IEE or initiate a due process hearing.** In this case, the district did neither. Accordingly, the investigator found a violation of law and ordered the district to, within 5 days, provide written notice to the parent either agreeing to the IEE using the evaluator previously identified by the parent, or requesting a due process hearing.

In a portion of the report, titled "**Additional Comments,**" the investigator said that if the district requested a due process hearing, questions regarding its IEE criteria would need to be addressed by the hearing officer, but observed that the 100-mile limitation appeared to be unnecessarily restrictive because the parent was not asking for travel expenses and the 100-mile radius did not include any major city. The requirement that the examiner be a school psychologist with at least three years of experience is different than the district's own criteria for its evaluators because it permits evaluations to be conducted by any of its school psychologists, regardless of the length of the school psychologist's experience, and the examiner selected by the parent, although currently in private practice, has four years of previous experience as a school psychologist, holds an ED Masters in school psychology, a PhD in school psychology, and a PHD in clinical psychology. In addition, the district indicated that school psychologists are involved in every initial evaluation, but other specialists, such as speech/language pathologists, reading specialists, and special education teachers are also involved where expertise is required to assess need. Accordingly, restricting IEEs to only

school psychologists appeared to be an undue restriction on IEEs. In addition, the list of IEE providers given to the parents was not exhaustive because of the 100-mile radius, and because it was limited to school psychologists who are members of KASP.

So, what if the LEA believes its criteria are not met?

The regulations at 34 C.F.R. § 300.502(b)(2)(ii) state that the public agency (LEA) must demonstrate in a due process hearing that the evaluation obtained by the parent did not meet agency criteria. Further, OSEP has provided guidance stating that the regulations provide **only two options**. With regard to criteria, OSEP has said: "If the out-of-district IEE obtained by the parent **does not meet the public agency's location, qualification, or reasonable cost criteria, the public agency may challenge the parent's right to a publicly-funded IEE by initiating a due process hearing.**" Letter to Heldman, 20 IDELR 621 (OSEP 1993). **If a district denies a request for an IEE because it believes the parent's choice is inconsistent with the district's criteria and does not request a due process hearing, parents may file a state complaint or initiate due process to show the district elected an option not available to it.** Letter to Anonymous, 56 IDELR 175 (OSEP 2010). In Letter to Zirkel, 52 IDELR 77, (OSEP 2008), OSEP said an LEA may refuse to pay for an IEE if it initiates **a due process hearing to show its evaluation was appropriate, or to show the parent's IEE did not meet agency criteria**, and that if a parent did receive an IEE at public expense, and the **parent's IEE did not meet agency criteria, the LEA would not need to consider the results** of that IEE [the LEA could also give lesser weight to the IEE]. In this letter, OSEP added that a school may deny a request for an IEE without initiating a due process hearing if the school has not completed an evaluation because until an evaluation has been completed, there is nothing with which the parent can disagree (34 C.F.R. 300.502(b)(1) states "a parent has the right to an IEE at public expense *if the parent disagrees with an evaluation obtained by the public agency...*[emphasis added]"). However, in Letter to Baus, 65 IDELR 81 (OSEP 2015), OSEP said that **if a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area** to determine whether the child has a disability and the extent of services the child needs as a result of that disability, and the school must either ensure the IEE is provided at public expense or initiate a due process hearing.

19FC-004

The district responded to a parent's request for an "emergency" IEP meeting by conducting a meeting after school hours. The meeting did not include a regular education teacher of the child. The investigator found a violation of law and the district appealed indicating that it did not need to include a regular education teacher of the child if the meeting was outside of school hours. The appeal committee disagreed, saying: "The Appeal Committee notes that **districts are not required to conduct IEP meetings outside of school hours** [See Letter to Thomas, 108 LRP 65843, 51 IDELR 224 (OSEP 2008)]. However, if a district does conduct an IEP meeting after school hours, the **meeting must comply with the legal requirements for conducting IEP meetings.**" The violation was sustained.

In another issue, the investigator substantiated a violation of law because the district added a communication book to the IEP as an accommodation, but did not put the communication book in a PWN and did not obtain parent consent. The **district appealed arguing that a PWN and consent were only needed when adding or removing a service, and were not required when adding or removing an accommodation.** For the PWN, the district relied on the regulations saying that a PWN is required when there is any proposal to initiate or change, or to refuse to initiate or change, the identification, evaluation, placement, or the provision of FAPE. The **district's position was that adding an accommodation did not involve identification, evaluation, or placement. In addition, the district took the position that adding an accommodation did not involve the provision of FAPE, because FAPE is defined at 34 C.F.R. 300.17 as, in relevant part, "special education and related services."** The appeal committee disagreed, saying:

**FAPE is not limited to special education and related services.** There is a rich history of case law regarding FAPE stretching back over thirty six years to Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), where the Supreme Court said a FAPE is an IEP reasonably calculated to provide educational benefit. More recently, in Endrew F. v. Douglas County School District, 117 LRP 9767 (S.C. 2017), the Supreme Court added some clarity, stating that a FAPE is an IEP reasonably calculated to enable a child with a disability to make appropriate progress in light of the child's unique circumstances, and to include challenging goals and objectives in the IEP. **From this lengthy history of case law, it is evident that a FAPE involves all parts of the IEP.** Thus, when the federal regulation, at 34 C.F.R. 300.503, requires a Prior Written Notice whenever an agency proposes to initiate or change, or refuses to initiate or change, the provision of a free appropriate public education to the child, it is requiring a **Prior Written Notice for any change to an IEP.**

The appeal committee also agreed with the complaint report that the addition of the communication book required parent consent, saying:

The term '**Supplementary Aids and Services**' is defined in Kansas regulations, at 91-40-1(ttt), to mean 'supports that are provided in regular education classes, other education-related settings, and extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children.' **These Supplementary Aids and Services are sometimes referred to as accommodations, although the term 'accommodations' is not used in either federal or state regulations regarding special education. Because an accommodation, such as the Communication Book in this case, is also a Supplementary Aid, the addition of the Communication Book to the IEP constitutes a 100% change in that Supplementary Aid, and requires parent consent under state law.** \* In K.A.R. 91-40-1, a Material Change in Services means an increase or decrease of 25 percent or more of the duration or frequency of a special education



service, related service, or supplementary aid or service specified on the IEP of an exceptional child. Accommodations are supplementary aids and services.

Finally, the appeal committee added that regulations regarding consent require that the parent be fully informed of all information relevant to the activity for which consent is sought [K.A.R. 91-40-1(l)(1)]. That is another reason the committee concluded that a PWN must be provided whenever a school district is requesting parent consent for a special education action.

**\*In a separate complaint against another district, for the same reason, the investigator found a violation when the IEP team changed an IEP goal without providing a prior written notice.**

19FC-005

The parent enrolled the student in a private ABA program from 1:15 to 3:15 p.m. on Mondays and Fridays. The parent subsequently filed a complaint alleging that the school was not providing all of the special education services specified in the IEP, and requesting compensatory services. The investigator determined that the district, at all times, stood ready, willing, and able to provide the services scheduled from 1:15 to 3:15, but failed to do so only because of the **parent's unilateral decision to enroll the student in the private services during the time the IEP services at the public school were scheduled**. The investigator also determined that the **district is not required to provide compensatory services for services missed when the services are available at the school and the student fails to attend school** [Letter to Clarke, 48 IDELR 77 (OSEP 2007) and Letter to Kane, 72 IDELR 75 (OSEP 2018)]. In addition, the investigator said **compensatory services are not required when a student does not receive services specified in the IEP at times when no students are receiving educational services** [not a school day], including holidays, student activities [field trip], or mandatory safety drills, such as fire drills, **unless otherwise specified in a child's IEP**. **If activities are interfering with progress, schools may have to change service times for those children being adversely affected.**

The parent also alleged that the student was being bullied and suffering from discrimination to the extent the student was not receiving a (FAPE). The investigator noted that the terms "bullying" and "discrimination" are not defined, nor addressed in any other way, in the IDEA. Accordingly, a **complaint investigator will not make any findings as to whether bullying or discrimination are occurring. Rather, the investigator will address only the FAPE issue: Is the student making appropriate progress in light of the student's unique circumstances?**

## OCR/OSEP:

Kansas Unified School District, 73 IDELR 79 (OCR 2018)

This was a retaliation complaint made to the Office for Civil Rights (OCR) against a Kansas school district that banned a parent from entering the school or making any physical contact with school personnel. The ban included a provision that the school would call the sheriff's office if the parent did not comply with the ban. IEP meetings were to be conducted in the school board of education office. Any parent contact with school personnel had to be in writing, and any response by school personnel had to be in writing. To establish a prima facie case of **retaliation**, under Sec. 504 of the Rehabilitation Act, the OCR must find **(1) an individual engaged in a protected activity; (2) the recipient school district was aware of the individual's protected activity; (3) the recipient took an adverse action against the individual contemporaneous with or subsequent to the protected activity; and (4) a causal connection between the adverse action and the individual's participation in a protected activity can be reasonably inferred (OCR presumes a causal connection when there is a close proximity in time between the protected activity and the adverse action)**. **If these four elements are established, OCR determines whether the recipient had a legitimate, non-discriminatory reason, that is not a pretext, for the adverse action**. In this case, the **school banned the parent from coming into the school building or making any physical or telephonic contact with school personnel**. The OCR determined that **all four elements of retaliation were present**, and so, there was a prima facie case of retaliation. Accordingly, it looked to see if the adverse action was taken for a legitimate, non-discriminatory reason, that was not a pretext, for the adverse action. OCR determined that the **ban was imposed not because of the protected activity** [parent advocacy for her child], **but because the parent was rude, demanding, and took up inordinate amounts of time (multiple hours of personal and phone conversations) which disrupted school, and the parent would not follow visitation requirements such as making advance arrangements, not disrupting school activities, and leaving when asked to leave**. Case law is consistent with this outcome [see Lagervall v. Missoula County Public Schools, 71 IDELR 40 (D. MT. 2018) and Forest Grove School District, 73 IDELR 115 (D. OR 2018)]. **When imposing restrictions on parent contact with school officials, the school should make sure it is doing so for a legitimate, nondiscriminatory reason, and that the restrictions are reasonable based on the circumstances**.

Kansas Unified School District, 119 LRP 7674 (OCR 2018)

This OCR complaint was filed against a Kansas special education interlocal. The complaint alleged that the interlocal failed to evaluate the student before changing his placement and failed to provide the student with a FAPE. The interlocal gave OCR a proposal to resolve the complaint. OCR accepted the proposal and is monitoring the completion of the proposal.

Of interest, is that the IDEA does not require an evaluation before making a change of placement. However, Section 504 regulations, at 34 C.F.R. 104.35, require schools to conduct

an evaluation of a student "before taking any action with respect to the initial placement of the person in regular or special education and any subsequent **significant change in placement** [emphasis added]". Unlike the Kansas statutory definitions of substantial change in placement and material change in services, there is no mathematical calculation in the Section 504 regulations for when a "significant change in placement" occurs. However, OCR guidance has said a "significant change in placement" occurs when there is a **substantial and fundamental change in a student's educational program.**" That change may include a **change in educational environment and/or change in services.**

Letter to Kane, 72 IDELR 75 (OSEP April 18, 2018)

OSEP says that "Generally, a special education or related **service missed due to participation in required scheduled assessments would not constitute a denial of FAPE** and the **LEA would not be required to make up the missed service.** And, for a child who is **absent from school on testing days due to a parent's choice, the LEA would not be obligated to make other arrangements to make up the missed services.** OSEP based this opinion on the IDEA requirement that children with disabilities must be included in all general state and districtwide assessment programs [and alternate assessments where necessary], as indicated in their respective IEPs. This letter provides the same analysis as used in Letter to Clarke, 48 IDELR 77 (OSEP 2007).

Letter to Anonymous, 72 IDELR 251 (OSEP August 23, 2018)

OSEP was asked whether a school district could limit the amount of time an independent evaluator, who is paid by the parent, could observe children in their classrooms. OSEP said that the IDEA does "not provide a general entitlement for third parties, including attorneys and educational advocates, to observe children in their current classrooms or proposed educational placements. The determination of which individuals may have access to classrooms may be addressed by State and/or local policy." With regard to agency criteria for an IEE, however, OSEP said: "it would **be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include the amount of time that the independent evaluator spends with the child.**" Also see, Letter to Savit, 64 IDELR 250 (OSEP 2014), where OSEP says a **two-hour limit for independent educational evaluators** would be **inconsistent with the IDEA** because such a limitation may restrict the scope of the IEE and prevent an independent evaluator from fulfilling his or her purpose, **unless the LEA also limits its evaluators to a two hour observation period.**

Letter to Wayne, 73 IDELR 263 (OSEP January 29, 2019)

OSEP said: "If a determination is made through IDEA's child find process that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private school, the LEA where the child's parent resides, is not required to make FAPE available to the child. However, the LEA where the child's parents reside must make FAPE available and be prepared to develop an IEP if the parent enrolls the child in public school [citations omitted]. Note: There is abundant case law saying that if a parent of a child with a disability who is attending a private school, requests the development of an IEP, or an update to an existing IEP, the school is required to do so, because although the receipt of FAPE is based on enrollment, the offer of FAPE is conditioned only on residency. So, a school may not require re-enrollment as a condition to conducting an evaluation or updating an IEP [See, Woods v. Northport Public School, 59 IDELR 64 (6<sup>th</sup> Cir. 2012)]. [ Note also, the LEA is required to conduct a re-evaluation of parentally placed private school children every three years (with parent consent). [See, Letter to Goldman, 53 IDELR 97 (OSEP 2009)].

Letter to Nathan, 73 IDELR 240 (OSEP January 29, 2019)

When a district has imposed a long-term suspension of a child not yet identified, and that district is deemed to have knowledge that the student is a child with a disability, may the district wait until an initial evaluation has been completed before conducting a manifestation determination review (MDR)? If not, how is the district to determine whether the behavior subject to discipline is a manifestation of a disability even before the LEA has made its eligibility determination?

OSEP said there is no exception to allow more than 10 school days from the date of the decision to make a disciplinary change of placement to complete an MDR. So, the answer to the first question is "no." With regard to the second question, OSEP said:

We appreciate that the LEA would not have the IEP to use in its assessment of whether the behavior was a manifestation of the child's disability in these situations. See 20 U.S.C. § 1415(k)(1)(E)(i)(II). Nevertheless, it would still be possible for the LEA to convene a group of knowledgeable persons, as determined by the parent and the LEA, who would be able to conduct the MDR even before the LEA has made its eligibility determination, if the LEA cannot conduct the evaluation before the MDR. The group would likely **consider the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child.** Based upon its review and consideration of the available information, the group would determine whether the conduct in question was caused by, or had a direct and substantial relationship to the child's **suspected disability.**

Letter to Zirkel, 73 IDELR 241 (OSEP 2019)

OSEP affirms that there is nothing in the IDEA which would prohibit children who have an IEP from receiving instruction using RTI or MTSS strategies, with the understanding that all special education and related services must continue to be provided consistent with each child's IEP.

\*EDITOR'S NOTE: Section 504 regulations regarding discrimination, at 34 C.F.R. 104.4, state that recipients of federal funds may not "limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service."

Letter to Siegel, 74 IDELR 23 (OSEP 2019)

The regulations regarding students who transfer from one school district to another, within the same state and in the same school year, require that the receiving district provide comparable services until it adopts the IEP the student brings with him/her or develops a new IEP. This regulation does not address cases where a student moves to a new school during the summer. However, OSEP said that when a student transfers during the summer, the IDEA requires that an IEP be in effect at the beginning of the school year. OSEP summarized:

Therefore, public **agencies must ensure that an IEP is in effect at the beginning of the school year for children who move into a new public agency during the summer.** How a public agency meets this requirement is a matter to be decided by each individual new public agency. **If the parent requests that the new public agency convene the IEP Team prior to the start of the school year and the public agency refuses to do so, the agency must provide written notice to the parent of the refusal. The prior written notice must include, among other content, an explanation of why the agency determined that conducting the meeting is not necessary to ensure the provision of appropriate services to the student.**

Letter to Olex, 74 IDELR 22 (OSEP 2019)

Asked whether parent consent is required before conducting "age appropriate transition assessments," OSEP said this:

...we believe that **generally, parental consent is not required prior to conducting an age appropriate transition assessment because the purpose of the assessment is to develop appropriate postsecondary IEP goals and not to determine whether a child has or continues to have a disability, and the nature and extent of the special education and related services that the child needs.** If, however, the IEP Team determines that a reevaluation of the child is warranted in order to obtain additional data, based on the student's educational or related services needs including improved academic

achievement and functional performance, the public agency is required to obtain parental consent consistent with 34 C.F.R. § 300.300(c).

#### CASE LAW

##### **\*The two cases directly below illustrate some of the problems with due process**

L.J. v. School Board of Broward County, Florida, 70 IDELR 260 (S.D. Fla. 2017)

The parents alleged that the district failed to implement the IEP, resulting in a denial of FAPE. The court found that any failure to implement the IEP was not a material failure (using the 5th Circuit standard). This case is remarkable for its length. There were two due process hearings, the first for 26 days with a 191-page decision, and the second, for 18 days over a six-month period. Fifteen months after the second hearing, the hearing officer issued a 101-page ruling in favor of the parent. This court overturned that decision. To be fair, after a hearing of this length a hearing officer will often order the parties to submit proposed findings of fact, and that can take significant time. But, here is **a court in 2017 reviewing a due process order from 2011, for a hearing conducted in 2009, regarding an IEP from 2006-07.**

\* Intent for special education due process was a relatively short and informal hearing, but the need to establish a record for appeal has interfered.

\* Recent Kansas due process hearings have exceeded 10 days of hearing, over a thousand pages of transcript, hundreds of exhibits, and decisions in excess of 100 pages.

\* Cost is heavy fiscally and emotionally.

School District of Philadelphia v Kirsch, 71 IDELR 123 (3rd Cir. 2018)

The district did not have an IEP in place at the start of the 2013 school year for twins with autism, and did not develop an appropriate IEP until December. The parents set up a non-profit private school, called "A Step Up Academy (ASUA)." Parents entered into an irrevocable tuition contract with ASUA for the twins' enrollment in the school for the 2013-14 school year. ASUA charged the parents the following for each of the twins:

- \$35,000 basic annual tuition for the 2013-14 school year;
- \$11,000.00 for an instructional assistant;
- \$9,000.00 for individual speech therapy;
- \$1,800.00 for individual occupational therapy; and
- \$7,250.00 for a six-week Extended School Year ("ESY") program.

The twins' basic tuition included ABA-based behavior support, academic instruction, one individual and three group speech/language therapy sessions per week, and one individual and three group occupational therapy sessions per week. **The court found the parents were entitled to tuition reimbursement from September 2013 to December 2013 because of the**

**failure to have an IEP in place** during that period of time. But, **because "stay put" was in place** during the entire litigation from the filing for due process in October of 2013 until this decision in 2018, the school had to **reimburse the tuition for the entire 2013 school year and all of the next three school years that totaled almost \$500,000, plus attorneys' fees.**

T.B. v. Prince George's Co. Bd. Of Ed., 72 IDELR 171 (4th Cir. 2018)

In this "child find" case, the 4<sup>th</sup> Circuit Court said the district committed a procedural violation by not evaluating a student with an emotional disability earlier. Although there was a procedural violation, it was not a violation of FAPE because **even after the evaluation was completed and an IEP developed, the student showed no interest in academics and refused to come to school.** Thus, the procedural violation was not the cause of the student's educational detriment (a prerequisite for relief).

This court then concluded:

*Every child possesses a gift within, something unique that he or she can contribute to society. Many times special education is needed to nurture that gift. But there are times too when students need to assist educators in developing their own inner capabilities. **Poor motivation and poor performance do not always and invariably lie at the feet of teachers and schools. Students themselves also have to try.***

This was not a unanimous decision by the three-judge panel. The dissenting judge said:

***The easy explanation for T.B.'s educational demise is that he did not attend school regularly, and when he did, he did not put forth his best effort.** The unfortunate reality of this case, however, is that the evidence presented at the due process hearing **fails to answer the obvious question: "Why?"** In the special education context, the answer is rarely that a student "simply does not want to go to school." J.A. 31. While one could certainly argue that the ALJ's conclusion that T.B. would not have come to school even with an appropriate IEP was speculative, the plaintiffs' evidence offered nothing to counter it.*

K.D. v. Downingtown Area School District, 904 F.3d 248, 72 IDELR 261 (3rd Cir. 2018)

This case involved a third-grade girl with multiple disabilities, who was making slow, but steady progress, but falling behind her peers. The parent's challenged her third-grade IEP. At the initial hearing, which occurred before the Supreme Court's ruling in Endrew, the hearing officer used the Third Circuit standard for FAPE [meaningful benefit] in concluding that the student was receiving a FAPE. On appeal, the District Court said it was not error to use the "meaningful benefit" standard because, in Endrew, the Supreme Court **"simply affirmed the standard that has been used in the Third Circuit for years."** On further appeal, the Third Circuit agreed, saying "But **Endrew F. did not overrule our precedent.**" It added:

The Supreme Court rejected the Tenth Circuit's standard, not ours. **On the contrary, *Endrew F.*'s language parallels that of our precedents.** The Court held that the IDEA 'requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.' That language mirrors our longstanding formulation: **the educational program "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities."** Our test requires **an educational program 'likely to produce progress, not regression or trivial educational advancement.'** (Citations omitted).

With regard to the limited progress made by this student, the court said:

While courts can expect fully integrated students to advance with their grades, they cannot necessarily expect the same of less-integrated students. As *Endrew F.* explained, "for a child fully integrated in the regular classroom, an IEP typically should ... be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." But the District Court found that K.D. was not fully integrated into the regular classroom. Instead, she received supplemental learning support for much of the day. So there is no reason to presume that she should advance at the same pace as her grade-level peers (citations omitted).

The Court said **slow progress does not prove that this student's IEPs were not challenging enough or updated enough. Progress must be meaningful, or in the words of the Supreme Court, appropriate in light of the student's circumstances.**

The 9th Circuit has also said the **Endrew F. decision did not change the 9th Circuit's FAPE standard.** In E.F. v. Newport Mesa USD, 71 IDELR 161 (9th Cir. 2018), the court noted that the Supreme Court **rejected the Tenth Circuit's interpretation that the Rowley decision permitted merely a de minimis standard for measuring progress**, but added, "We have already noted that ***Endrew* did not change, but simply clarified *Rowley*.** *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1200 (9th Cir. 2017). Consequently, the ALJ's application of the Ninth Circuit's standard was proper even before Endrew clarified the Supreme Court's holding in *Rowley*."

E.I.H. v. Fair Lawn Board of Education, 72 IDELR 263 (3rd Cir. 2018)

A girl with autism had transportation specified in her IEP. She was later diagnosed with epilepsy and prescribed Diastat, a medication that must be administered rectally for seizures lasting longer than two minutes. Her parents requested that a medical professional who could administer the medication be on board the bus taking the student to and from school. The IEP team agreed the student needed this support, but declined to put it in the IEP because it was a need related to a medical condition that was not part of her autism and was not needed for



educational purposes. Recognizing the student's need for this service, although the district did not put in in the IEP, the district did agree to put a nurse on the bus in the student's Individualized Health Plan (IHP). **The hearing officer ruled that the nurse's presence on the bus was a related service and needed to be added to the IEP,** and ordered the district to do so, and to reimburse the parents \$192.00 for the cost of transporting their daughter to and from school until the nurse was provided. The parents initiated a court action seeking attorney's fees. The school then made a cross claim against the ruling that the nurse services on the bus needed to be in the IEP. **The District Court ruled in favor of the district, holding that the nurse was simply a health precaution that had nothing to do with the child's education.** The parents appealed to the United States Circuit Court of Appeals for the Third Circuit. The Third Circuit noted that the definition of the term related services is: "Transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education...;" The court laid down as a guiding principle that **"Anything considered to be a 'related service' -- i.e., a service necessary to assist a qualifying student in obtaining an education -- must be listed in the student's IEP."** The court said both parties agreed that the student could not take the bus unless a nurse was provided to administer the medication when needed. Accepting that, the Third Circuit said **"it stands to reason that she would not be able to access her FAPE without the nurse. And, if that is the case, then the ALJ was correct to include the nurse within L.H.'s IEP as opposed to IHP."** In a foot note, the court indicated **whether the nurse services were in an IHP or an IEP made a difference** because, unlike a Health Care Plan, an IEP cannot unilaterally be changed or disregarded at will. The Third Circuit overturned the District Court decision and ordered the nurse to be added to the IEP as a related service and that the parents were entitled to **attorney's fees.** \* Same result as Donald B. v. Bd. Of Sch. Comm. Of Mobile County, Ala., 26 IDELR 414 (11<sup>th</sup> Cir. 1997), where the court said **a school may have to provide transportation to a child with a speech impairment, who is fully mobile, if, "in its absence, a disabled child ... would be denied a genuine opportunity for equitable participation in [a special education program]."**

## QUESTIONS:

q1. We have a child who has been at Children's Mercy Hospital in Kansas City, Missouri for 6 months, and in isolation for an immune issue. The parents have notified the district that he will soon be able to have educational services in the hospital. What is our obligation?

a1. This situation is not directly addressed in law. We do know that the IDEA applies to all children with disabilities. So, what happens where a parent places their child in an out-of-state facility, and the other state takes the position that it is not obligated to provide services to the child under the IDEA because the child is not a resident of that state? If the state where the parents live also take the position that it has no IDEA responsibility because the student is no longer living within the state, we have a child who has fallen through a crack, where no state has responsibility. Although there are some exceptions, courts have been generally unwilling to

let children with disabilities fall through such a crack, and will assign responsibility where it most belongs –usually to the state and district where the child’s parents live.

We have such a case in our circuit. In Jefferson County v. Elizabeth E., 60 IDELR 91 (10<sup>th</sup> Cir. 2012)

the United States Circuit Court of Appeals for the Tenth Circuit dealt with a situation where the parents and child lived in Colorado. The parents placed their child in a psychiatric residential treatment facility in Utah, and then transferred the child to another residential facility in Idaho for a lengthy stay. Meanwhile, the parents wanted to continue to talk to the Colorado district about the child’s placement and on-going evaluation in Colorado. The Colorado district took the position that because the student was no longer living in Colorado, it had no obligation to the student under the IDEA.

The decision’s main focus was on how to analyze the conditions under which a district was required to pay for a residential placement. Near the end of this decision, the Tenth Circuit cited, with approval, Catlin v. Sobol, 93 F.3d 1112 (2<sup>nd</sup> Cir. 1996), and the court’s determination that **“under the IDEA a child’s residence is the same as that of the child’s parents.”** In the next section of the case, the Tenth Circuit applies that analysis to this case and says the Colorado district’s position that it had no ongoing IDEA responsibility for this child because the child was physically living in Idaho, was wrong. **The Colorado district remained the responsible district, and retained all IDEA obligations.** The school had responded to the parents requests to continue with the on-going evaluation and to conduct an IEP meeting with a **“ready, willing, and able” letter**, stating it would continue with the evaluation and IEP development when the child returned to Colorado. The court said that **was insufficient. The district was required to meet IDEA requirements, including the requirement to respond to the parent’s requests with a PWN.**

This decision **did not say that the Colorado district needed to provide services in Idaho** when the placement was made unilaterally by the parent. What it said was that the district was required to **continue its IDEA responsibilities to this child, and that included continuing the on-going evaluation, continuing IEP meetings to discuss proposed services, placement, etc. Had the district done so, perhaps the IEP team would have reached a decision that would have offered a FAPE under the circumstances. Because it did not do so, the court found the district had failed to offer a FAPE to this student and the cost of the Idaho placement, including the residential costs, fell on the Colorado district.**

Also noteworthy for this issue, is the Kansas statute, at K.S.A. 72-3410(b). That statute says that if a child with a disability, upon referral by a person licensed to practice medicine, is admitted to a hospital, treatment center, or other health care institution, or to a group boarding home or other care facility, and the institution or facility is **located outside the school district in which the child resides**, the **district where the facility is located may contract with the district where the parent of the child resides** to provide special education and related services. If a contract is not entered into between the school districts, the **child is deemed to be a student in the**

**district which is providing special education services to the student.** This statute adds:  
"Nothing in this subsection shall be construed to limit or supersede or in any manner affect or diminish the requirements of compliance by each school district with the provisions of subsection (a) [addressing **child find**], but shall operate as a comity of school districts in assuring the provision of special education services **for each exceptional child in the state** [emphasis added]."

q2. I have heard that when an IEP team cannot reach consensus with regard to what goes into an IEP, the LEA representative on the team makes the decision. Does that mean that if everyone on the team believes the student needs a particular service, the LEA representative can just veto the whole team?

a2. In Letter to Richards, 55 IDELR 107 (OSEP 2010), OSEP said the IEP team should work toward a general agreement, but **the school is ultimately responsible** for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority vote. **If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parent's right to seek resolution of disagreements through due process or a state complaint.** \* EDITORS NOTE: This is not a blank check. If a parent requests a due process hearing or files a state complaint, and all members of the IEP team differ from the LEA representative, the parent will likely prevail.

q3. We sometimes conduct a re-evaluation for a limited purpose, such as to determine whether a related service is still necessary. Do we have to, or may we, extend the date for the triennial evaluation to three years from the date of this limited evaluation?

a3. The re-evaluations you described are insufficient to satisfy the requirements of the three-year reevaluation regulation, at 34 C.F.R. 300.303.

There are two specific regulations for reevaluations. They are 300.303 and 300.305.

300.303 says: "A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 304 through 300.311..." So, reevaluations have the same requirements as initial evaluations, which includes the requirement in 300.304(c)(4) that a child be **assessed in all areas related to the suspected disability**, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. Accordingly, to satisfy the three- year reevaluation requirement, the reevaluation would need to satisfy this requirement that the child be assessed in all areas related to the disability.

There is also 300.305, which requires, as part of an initial evaluation, **if appropriate**, and as part of **any reevaluation**, the IEP team must review existing evaluation data, and under 300.305(a)(2)(B) determine: whether the child continues to have a disability; the present levels of academic achievement and related developmental needs of the child; whether the child continues to need special education and related services; and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

In other words, **to satisfy the three-year reevaluation requirement, the reevaluation must be a full reevaluation that is conducted in accordance with all of the requirements in §§ 300.304 through 300.11, including both 300.304(c)(4) [assessed in all areas related to the disability], and specifically including the requirements in 300.305.** Despite the regulations that say “any reevaluation” must include everything in 300.304 through 300.311, there are many reevaluations that are conducted with much more limited scope. It is important to conduct those limited reevaluations from time to time, but those limited reevaluations do not meet the requirements to constitute a three-year reevaluation, as that term is described in 300.303(a).

q4. We evaluated a student who qualified for special education, developed an IEP, and made multiple attempts to have a meeting with the parents to sign the paperwork (consent), but the parents never showed up. May we go ahead and place the student since we made multiple attempts to have a meeting?

a4. Do not confuse the ability to conduct a meeting without the parents after multiple attempts to schedule a meeting with the consent requirement for the initial evaluation and initial IEP. While there is an exception to the consent requirement for a re-evaluation, a material change in services, and a substantial change in placement, there is no exception for the consent requirements related to the initial evaluation and initial IEP.

In K.S.A. 72-3430, paragraph 6, it says parents have a right to consent or refuse to consent to a substantial change in placement or a material change in services, unless those changes are ordered pursuant to the **disciplinary authority** of school officials under the law [72-3433], or if the child’s **parents fail to respond to the request for consent**. Note that the last sentence says that if there is a failure to respond to a request for consent for a material change in services or a substantial change in placement, there must be detailed records of all contacts with the parents to demonstrate both (a) the request for consent and (b) any response.

Accordingly, if, after an IEP meeting is completed, a request for consent is made regarding a proposed material change in services or a substantial change in placement, and the parents fail to respond to that request within 15 school days, the school may implement the proposed changes without consent. When those changes mean the student will no longer receive any services, however, there must also be a reevaluation that supports the decision that the

student is no longer eligible for special education. That is a federal requirement, at 34 C.F.R. 300.305(e).

This process requires the district to schedule a meeting. The district should send two notices of that meeting to the parents in two different ways and if the parents do not come to that meeting, the team may proceed to make proposed changes to the IEP. Then, a PWN and request for consent is sent home to the parents. If the IEP date is Feb 8 and the parents do not respond within 15 school days, the proposed changes could be made in 15 school days from Feb 8. That could include ending services if the proper re-evaluation had been conducted.

In addition, Kansas Administrative Regulation 91-40-27(g) says the same thing as the statute. This Kansas regulation however, adds reevaluations to this authority to proceed without consent, when the parents fail to respond to a request for consent to a re-evaluation [this would also include giving the parents a reasonable time to respond to the request for consent – that is where the 15 school days comes in].

Note, the time to give the parents to respond is not 15 days. It is 15 school days.

q5. With regard to the 10-day notice for an IEP meeting, the location of the meeting is required. Does that mean the notice must include the specific room number? Sometimes that is difficult to schedule.

a5. There is no official guidance on that issue. Of course, putting the room number where the meeting will take place would almost always be adequate. So, that is the preferred method, but because the law does not directly address this question, there is some flexibility. If a specific room number is not on the notice, the notice must provide a reasonable description of the location. That is somewhat subjective. From a compliance standpoint, the question would be “Would a reasonable person be able to find the meeting with reasonable effort?” A notice that said the meeting would be held in Kansas, for example, is clearly not reasonable (and therefore not adequate) notice. Even notice that says the meeting will be in a particular building may not be reasonable if the building is a large building, at Topeka High School for example. People can argue about whether that kind of notice is adequate, and if people are arguing there is a problem with the reasonableness of the notice.

There are times where a notice of meeting goes out and the exact location for that meeting has not yet been reserved. That notice could be adequate notice if it describes how parents will be reasonably able to find the meeting. For example, the notice could say “The meeting will be located at Topeka High School. It is a large building. Please go directly to the business office, Room 4, and show a staff member this notice. You will be given instructions on how to find the location of the meeting or be escorted to the meeting room.” Something like this provides a reasonable explanation of the location of the meeting because it enables a reasonable person to be able to find the meeting room with reasonable effort, and could even be standard language on a district’s notice of meeting.

q6. Can the excusal process for IEP members be used for the LEA representative on the team?

a6. Yes, an LEA representative may use the excusal process to be excused from an IEP meeting in whole or in part. The federal regulation says this process may be used by team members described in paragraphs (a)(2) through (a)(5) of regulation 300.321. (a)(2) is the regular education teacher of the child, (a)(3) is the special education teacher of the child; (a)(4) is the LEA representative; and (a)(5) is the individual who can interpret instructional implications of evaluation results. So, the only members of the IEP team who are not part of the excusal process are the parent, the student (if the student has been invited as a member of the team), and those invited to the meeting as members of the team who have knowledge or special expertise of the child.

It would generally be unwise to have an IEP meeting without an LEA representative because the district is going to be bound by whatever that team puts into the IEP. A better course of action would be for the LEA representative to appoint some other [trusted] person to act as the LEA representative at the meeting. Federal regulations, at 34 C.F.R. 300.321(d) specifically allow an LEA representative to designate another member of the IEP team to act as the LEA representative, as long as that other member of the team meets the requirements to be an LEA representative. Those requirements are: [1] is qualified to provide or supervise the provision of special education services; [2] is knowledgeable about the general education curriculum; and [3] is knowledgeable about the availability of resources of the district.

q7. A mother is asking that we not provide a copy of the IEP to the father because there is a Protection from Abuse order in place and the father does not know where the children live or go to school. This information is on the IEP and the mother believes she and the children would be in danger if the father had this information.

a7. A parent has a right to inspect and review the education records of their children. However, FERPA regulations, at 34 C.F.R. 99.4, say parents have this right “unless the educational agency or institution has been provided evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.” The order you attached does not revoke the parent’s right to access education records, but it does specifically provide that the mother’s address and telephone number shall remain confidential for her protection. So, it does look like a redacted IEP omitting at least the address and telephone number of the mother would be proper.

In Letter to Anonymous, 21 FAB 7 (FPCO 2017) the Family Policy Compliance Office (FPCO), the office in the U.S. Dept. of Education which oversees FERPA, addressed a situation where a father filed a complaint against a school district which only gave the father a redacted copy of education records. The father took the only action available to him by filing a complaint with the FPCO [a parent does not have a right to a due process hearing over this kind of allegation]. The FPCO cited the same regulation referred to above, and then went even further, adding that:

“However, we have historically advised that, if school officials are concerned for the safety of the student or custodial parent or if a restraining order preventing contact exists, the school would not be required to disclose the student's contact information, **such as home address and telephone number, or the name of the school within the district in which a student is enrolled** (emphasis in bold print added).”

The FPCO then closed the complaint without conducting a full investigation. Notice that the FPCO said if school officials are concerned for the safety of the student or the custodial parent or if there was a restraining order. If a complaint were to be filed with KSDE, KSDE would apply the same standard as the FPCO applied in this complaint.

When there is a legitimate safety concern, the safety of the children and the custodial parent is the primary consideration. So, when there is such a legitimate safety concern, or there is an order from a court restricting information from a parent due to safety concerns, the better course of action is to provide parents with a redacted copy of education records which omits the kind of information the FPCO indicated could be redacted. That would not only include the address where a mother or children are living and the telephone number of such a residence, but also information regarding where the children are attending school.

DISPUTE RESOLUTION DATA for 2017-2018 school year:

#### Complaints

Complaints filed .....	35
Complaints investigated.....	27
Reports with findings of non-compliance.....	16

#### Mediations

Mediations requested.....	23
Mediations Held.....	21
Mediation Agreements.....	16

#### Due Process

Due Process filed.....	15
Resolution Meetings.....	9
Resolution Agreements.....	5
Withdrawn or Dismissed [includes agreements]...	13
Hearings completed.....	0







## Early Childhood, Special Education and Title Services

Kansas State Department of Education  
Landon State Office Building  
900 SW Jackson Street, Suite 620  
Topeka, Kansas 66612-1212

(785) 291-3097  
(800) 203-9462  
(785) 291-3791 - fax  
[www.ksde.org](http://www.ksde.org)

To: Members of the House and Senate Education Committees and Governor

Date: January 20, 2019

Re: Report of Emergency Safety Data for the 2017-18 School Year

The Kansas State Department of Education (KSDE) is required to submit certain emergency safety intervention data, in accordance with K.S.A. 2017 Supp. 72-6154 (c), to the Governor and the House and Senate Education Committees by January 20, 2016, Intervention and annually thereafter. You can view previous years' data analysis on the emergency safety intervention page of the KSDE website, <http://www.ksde.org/Default.aspx?tabid=524>.

### Requirements for Reporting Emergency Safety Intervention Data

Each district is required to report emergency safety intervention data to KSDE "by the date and in the form specified" by KSDE. K.A.R. § 91-42-3(b)(3). KSDE requires that all schools accredited by the Kansas State Board of Education submit an Emergency Safety Intervention Report by December 15 and June 15 of each year (unless one of these dates falls on a weekend and then the deadline is the business day following that date). The December 15 report must include any emergency safety intervention incident that occurred between June 1 and November 30 of that year. The June 15 report must include any emergency safety intervention incident that occurred between December 1 and May 31 of that year.

An "emergency safety intervention" is defined in Kansas law as "the use of seclusion or physical restraint." K.S.A. 2017 Supp. 72-6152(g); K.A.R. § 91-42-1(g). Seclusion is defined as "placement of a student in a location where all the following conditions are met:

- (1) The student is placed in an enclosed area by school personnel;
- (2) the student is purposefully isolated from adults and peers; and
- (3) the student is prevented from leaving, or the student reasonably believes that such student will be prevented from leaving, the enclosed area." K.S.A. 2017 Supp. 72-6152(t); K.A.R. § 91-42-1(o). Physical restraint is defined as "bodily force used to substantially limit a student's movement, except that consensual, solicited or unintentional contact and contact to provide comfort, assistance or instruction shall not be deemed to be physical restraint." K.S.A. 2017 Supp. 72-6152(p); K.A.R. § 91-42-1(m).

Each accredited school must report the following information about an emergency safety intervention incident for any student which it is responsible:

1. The student's Kansas Individual Data on Students (KIDS) identification number. This is the identification number that KSDE assigns to each student. From this number KSDE pulls the student's race, ethnicity, and age as reported by the districts in the KIDS secured web application.
2. Whether the student had an individualized education program (IEP) at the time of the incident
3. Whether the student had a Section 504 plan at the time of the incident
4. Whether the student had a behavior intervention plan (BIP) at the time of the incident
5. The date of the incident
6. Whether the incident was physical restraint or seclusion
7. The total minutes of physical restraint or seclusion. If the duration of the incident is less than one minute, then the duration must be reported as one minute.

Each accredited school must submit any seclusion or physical restraint incidents for any student for which it is responsible, even if the student attends school in a different location. “Responsible building for a student with a disability and an IEP” means the student’s Responsible School Building, as defined in KSDE’s SPEDPro application. “Responsible building for a student without a disability and an IEP” means the student’s Accountability School Identifier, as defined in KSDE’s KIDS application. You can find additional information about the applicable SPEDPro definition, <http://www.ksde.org/Portals/0/SES/MIS/MIS-DD.pdf>, and the KIDS definition, <http://kidsweb.ksde.org/Documents>, on the KSDE website. The student’s attendance school building must get any necessary data to the student’s responsible school building in time for that school to include the data in its Emergency Safety Intervention Report for a given reporting period.

### Data Analysis

A team composed of KSDE and Technical Assistance System Network (TASN) staff analyze the emergency safety intervention data immediately following each reporting period. This analysis includes all calculations required by Kansas statutes. In addition, this team also completes the following state-level calculations:

1. Total number of physical restraint incidents and seclusion incidents reported
2. Average duration of physical restraint incidents and seclusion incidents
3. Average age of student with which physical restraint is used
4. Average age of student with which seclusion is used
5. Number of physical restraint incidents and seclusion incidents aggregated by student ethnicity
6. Number of physical restraint incidents and seclusion incidents aggregated by whether the student has an IEP, Section 504 plan, BIP, or none of these
7. Median number of physical restraint incidents and seclusion incidents
8. Standard deviation of number of physical restraint incidents and seclusion incidents
9. Median duration of physical restraint incidents and seclusion incidents
10. Standard deviation of duration of physical restraint incidents and seclusion incidents

There is an accredited nonpublic school that, due to the nature of its program, serves only students with very challenging behavior. There is a very high number of emergency safety intervention incidents reported by this school. Due to these high numbers, the KSDE and TASN team analyze the emergency safety intervention data statewide with this school’s data included and again without this school’s data. The team does this to give them a complete picture of these data statewide, but technical assistance offerings are based on the data analysis completed without this school’s data. This school receives ongoing technical assistance from KSDE and TASN providers. Due to the significant difference in data calculations when this school’s data is included, the descriptive statistics section of this report will present the data calculations without this school. The data that Kansas statutes require KSDE to report will be presented with this school’s data.

### Targeted Technical Assistance

Initially, districts that indicated in a statewide survey that they did not have an emergency safety intervention policy in place also received onsite targeted technical assistance and now all school districts have an emergency safety intervention policy in place. Prior to Reporting Period 2 of the 2016–17 school year, KSDE and TASN offers targeted technical assistance to every school whose total physical restraint incidents, total seclusion incidents, total physical restraint minutes, or total seclusion minutes are two standard deviations or more above the state median.

Beginning with the data submitted for Reporting Period 2 of the 2016-2017, school year KSDE and TASN changed how technical assistance is provided. The data analysis team continues to do all of the aforementioned calculations, review the results and provide technical

assistance as needed. Because individual student data is collected, the focus of technical assistance shifted, and it is now primarily provided based on the needs of individual students with whom emergency safety interventions were used. This individualized technical assistance requires parental consent and is intended to improve outcomes for individual students. Finally, as resources allow, schools that reported no emergency safety intervention incidents are selected for targeted technical assistance, at random, to ensure that all emergency safety intervention legal requirements are in place.

The technical assistance providers are members of the KSDE and TASN team that complete the data analysis. Targeted technical assistance is provided through a combination of email and phone contacts and an onsite visit when necessary. The technical assistance provider ensures that all emergency safety intervention legal requirements are in place at the school. This is done using a comprehensive checklist of every legal requirement. This checklist is available on the TASN website, <http://www.ksdetasn.org/resources/488>. The technical assistance provider works with school staff to analyze patterns in the school's emergency safety intervention data, or with a specific student's data if parent consent has been obtained, and brainstorm methods of reducing the need to use physical restraint and seclusion, including ensuring that school staff have the necessary tools to accomplish this. The technical assistance provider also determines whether there is additional assistance that KSDE and TASN can offer to help school staff reduce the need to use physical restraint and seclusion.

KSDE and TASN began providing targeted technical assistance in the 2014–15 school year, after the emergency safety intervention regulations became final. Since that time targeted technical assistance has been provided to well over 200 schools and districts. Through the targeted technical assistance process the providers have determined that the vast majority of schools identified for targeted technical assistance either have one or more self-contained classrooms for students with disabilities or are responsible for a student or students who attend school elsewhere in a self-contained classroom for students with disabilities. Most of these self-contained classrooms serve primarily students identified with an emotional disturbance or autism. The majority of these schools had all emergency safety interventional legal requirements in place and for those schools that needed to make changes these changes were very minor in nature. For example, the most common legal requirement missed by a school is that the district's emergency safety intervention policy was posted on the district website and not the school's website, as required by regulation. When providers asked school staff what unmet needs they have that would help to reduce the need to use physical restraint and seclusion, school staff most commonly discussed the significant mental health needs of their students. School staff frequently expressed a need for additional training in the area of mental health and understanding the effect of trauma on students. One way that KSDE is working to address these needs is through the School Mental Health Initiative, which is a provider within TASN, <https://www.ksdetasn.org/smhi>. School staff also indicated that they would like to see increased collaboration between community mental health agencies and schools as well as this same partnership at the state level. One way that the Kansas State Board of education is working to address this need is through the Kansas School Mental Health Advisory Council, <https://www.ksde.org/Default.aspx?tabid=556>. This Council was created in July 2017 to advise the Kansas State Board of Education of unmet needs within the state in the area of school mental health, coordinate with legislators and stakeholders to address relevant issues effectively to best meet the needs of students, and coordinate statewide collaborative social emotional character development partnerships with stakeholders that will benefit students.

## Resources

Please review the Emergency Safety Intervention Resources page of the TASN website at <http://www.ksdetasn.org/>. These resources are designed to assist district staff and families in understanding the law on emergency safety interventions and ensuring that these requirements are in place in their school.

We hope this information can be used to start conversations with KSDE, TASN, and school districts about how we can all support district staff and families in our shared goal of making school a safe and supportive place for all students. Please feel free to contact Laura Jurgensen at [ljurgensen@ksde.org](mailto:ljurgensen@ksde.org) or (785) 296-5522 with any specific questions or concerns.

## **Descriptive Statistics for the 2017–18 school year**

(The following information does not include data from one accredited, private school that serves only students with challenging behavior or any schools that did not submit a report.)

### **Physical Restraint**

Total number of incidents of restraint reported: 7697

Average Duration of Restraint: 2.0 minutes

Average age of student receiving restraint: 9.0

### **Descriptive Statistics Based on School Data**

(Number of schools included: 1687)

Median Number of Physical Restraint Incidents	Standard Deviation of Number of Physical Restraint Incidents	Median Duration of Physical Restraint Incident	Standard Deviation of Duration of Physical Restraint Incident
0.00	23.929	0.00	145.417

### **Seclusion**

Total number of incidents of seclusion reported: 8643

Average Duration of Seclusion: 6.0 minutes

Average age of student receiving seclusion: 8.0

### **Descriptive Statistics Based on School Data**

(Number of schools included: 1628)

Median Number of Seclusion Incidents	Standard Deviation of Number of Seclusion Incidents	Median Duration of Seclusion Incident	Standard Deviation of Duration of Seclusion Incident
0.00	26.215	0.00	298.461

**Data That KSDE Must Report According to K.S.A. 2017 Supp. 72-6154(c)**

1) The number of incidents in which emergency safety interventions were used on students who have an individualized education program (IEP).

<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
8643	8285	16928

(2) The number of incidents in which emergency safety interventions were used on students who have a Section 504 plan.

<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
85	29	114

(3) The number of incidents in which emergency safety interventions were used on students who do not have an IEP or a Section 504 plan.

<b>Number of Physical Restraint Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students without an IEP or a Section 504 Plan</b>
586	492	1078

(4) The total number of incidents in which emergency safety interventions were used on students.

<b>Number of Physical Restraint Incidents</b>	<b>Number of Seclusion Incidents</b>	<b>Number of Emergency Safety Intervention Incidents</b>
9249	8801	18050

5) The total number of students with behavior intervention plans (BIP) subjected to an emergency safety intervention.

<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
1014	899	1409

(6) The number of students physically restrained.

1475 students were physically restrained.

(7) The number of students placed in seclusion.

1086 students were placed in seclusion.

(8) The maximum and median number of minutes a student was placed in seclusion.

<b>Maximum Number of Minutes a Student was Placed in Seclusion</b>	<b>Median Number of Minutes a Student was Placed in Seclusion</b>
233	7

(9) The maximum number of incidents in which emergency safety interventions were used on a student.

<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
727	531	814

(10) The information reported under subsection (c)(1) through (c)(3) by the school to the extent possible has been pulled out in an appendix due to its length. You can access that information on the emergency safety interventions page of the KSDE website, <https://www.ksde.org/Default.aspx?tabid=524>.

(11) The information reported under subsections (c)(1) through (c)(9) aggregated by age, ethnicity, and free and reduced lunch of the students on a statewide basis.

### **BY AGE**

The number of incidents in which emergency safety interventions were used on students who have an individualized education program (IEP) aggregated by age.

<b>Age</b>	<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
2	0	0	0
3	9	0	9
4	54	7	61
5	238	398	636
6	701	1148	1849
7	885	1186	2071
8	788	1397	2185
9	866	752	1618

<b>Age</b>	<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
10	1003	1178	2181
11	419	399	818
12	537	325	862
13	491	255	746
14	425	349	774
15	496	182	678
16	266	167	433
17	403	57	460
18	191	129	320
19	81	267	348
20	482	44	526
21	308	45	353

The number of incidents in which emergency safety interventions were used on students who have a Section 504 plan aggregated by age.

<b>Age</b>	<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
2	0	0	0
3	0	0	0
4	0	0	0
5	0	3	3
6	0	1	1
7	1	4	5
8	6	15	21
9	5	2	7
10	63	4	67
11	1	0	1
12	3	0	3
13	4	0	4
14	0	0	0
15	0	0	0
16	2	0	2

<b>Age</b>	<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
17	0	0	0
18	0	0	0
19	0	0	0
20	0	0	0
21	0	0	0

The number of incidents in which emergency safety interventions were used on students who do not have an IEP or a Section 504 plan aggregated by age.

<b>Age</b>	<b>Number of Physical Restraint Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students without an IEP or a Section 504 Plan</b>
2	0	0	0
3	1	0	1
4	9	1	10
5	127	131	258
6	218	110	328
7	84	117	201
8	45	77	122
9	30	20	50
10	14	17	31
11	15	12	27
12	3	4	7
13	3	1	4
14	8	1	9
15	7	0	7
16	14	1	15
17	7	0	7
18	1	0	1
19	0	0	0
20	0	0	0
21	0	0	0



The total number of incidents in which emergency safety interventions were used on students aggregated by age.

<b>Age</b>	<b>Number of Physical Restraint Incidents</b>	<b>Number of Seclusion Incidents</b>	<b>Number of Emergency Safety Intervention Incidents</b>
2	0	0	0
3	10	0	10
4	63	8	71
5	365	532	897
6	919	1258	2177
7	970	1306	2276
8	838	1488	2326
9	900	774	1674
10	1024	1197	2221
11	435	411	846
12	541	329	870
13	495	256	751
14	433	350	783
15	503	182	685
16	280	168	448
17	410	57	467
18	192	129	321
19	81	267	348
20	482	44	526
21	308	45	353

The total number of students with behavior intervention plans (BIP) subjected to an emergency safety intervention aggregated by age.

<b>Age</b>	<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
2	0	0	0
3	3	0	3
4	11	1	11
5	55	46	78
6	138	123	194

<b>Age</b>	<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
7	145	155	219
8	158	166	232
9	120	148	201
10	132	127	196
11	89	89	141
12	78	65	116
13	50	37	75
14	49	38	65
15	47	21	56
16	41	20	49
17	30	18	35
18	21	11	24
19	6	2	7
20	10	3	11
21	3	1	3

The number of students physically restrained aggregated by age.

<b>Age</b>	<b>Number of Students Physically Restrained</b>
2	0
3	10
4	35
5	134
6	241
7	203
8	202
9	169
10	170
11	116
12	88
13	62
14	67
15	58

<b>Age</b>	<b>Number of Students Physically Restrained</b>
16	55
17	38
18	22
19	6
20	10
21	3

The number of students placed in seclusion aggregated by age.

<b>Age</b>	<b>Number of Students Placed in Seclusion</b>
2	0
3	0
4	4
5	81
6	161
7	193
8	200
9	166
10	147
11	99
12	70
13	41
14	39
15	23
16	20
17	19
18	11
19	2
20	3
21	1

The maximum and median number of minutes a student was placed in seclusion aggregated by age.

<b>Age</b>	<b>Maximum Number of Minutes a Student was Placed in Seclusion</b>	<b>Median Number of Minutes a Student was Placed in Seclusion</b>
2	0	0.0
3	0	0.0
4	20	11.0
5	60	5.0
6	135	6.0
7	120	6.0
8	233	6.0
9	150	7.5
10	205	6.0
11	160	9.0
12	230	8.0
13	117	15.0
14	100	2.5
15	77	6.0
16	87	9.0
17	71	6.0
18	97	7.0
19	114	8.0
20	29	5.5
21	43	6.0

The maximum number of incidents in which emergency safety interventions were used on a student aggregated by age.

<b>Age</b>	<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
2	0	0	0
3	1	0	1
4	9	5	9
5	17	49	50
6	38	87	87
7	99	105	121

<b>Age</b>	<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
8	48	96	101
9	104	42	105
10	286	531	531
11	40	41	51
12	141	38	146
13	135	123	258
14	86	230	230
15	124	61	133
16	49	99	99
17	129	15	129
18	72	52	110
19	33	264	264
20	438	42	480
21	289	45	334

### **BY ETHNICITY**

The number of incidents in which emergency safety interventions were used on students who have an individualized education program (IEP) aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
Hispanic/Latino	589	827	1416
Multi-Ethnic	770	734	1504
American Indian or Alaska Native	82	125	207
Asian	153	563	716
Black or African American	1132	1384	2516
Native Hawaiian or Other Pacific Islander	48	2	50
White	5775	4595	10370

The number of incidents in which emergency safety interventions were used on students who have a Section 504 plan aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
Hispanic/Latino	8	2	10
Multi-Ethnic	2	5	7
American Indian or Alaska Native	0	0	0
Asian	0	0	0
Black or African American	5	8	13
Native Hawaiian or Other Pacific Islander	0	0	0
White	70	13	83

The number of incidents in which emergency safety interventions were used on students who do not have an IEP or a Section 504 plan aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Physical Restraint Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students without an IEP or a Section 504 Plan</b>
Hispanic/Latino	48	56	104
Multi-Ethnic	87	56	143
American Indian or Alaska Native	12	0	12
Asian	1	0	1
Black or African American	81	60	141
Native Hawaiian or Other Pacific Islander	0	0	0
White	352	306	658

The total number of incidents in which emergency safety interventions were used on students aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Physical Restraint Incidents</b>	<b>Number of Seclusion Incidents</b>	<b>Number of Emergency Safety Intervention Incidents</b>
Hispanic/Latino	642	885	1527
Multi-Ethnic	859	795	1654
American Indian or Alaska Native	94	125	219
Asian	154	563	717
Black or African American	1218	1451	2669
Native Hawaiian or Other Pacific Islander	48	2	50
White	6135	4910	11045

The total number of students with behavior intervention plans (BIP) subjected to an emergency safety intervention aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
Hispanic/Latino	107	87	145
Multi-Ethnic	101	99	145
American Indian or Alaska Native	10	17	18
Asian	12	10	17
Black or African American	171	143	229
Native Hawaiian or Other Pacific Islander	4	2	4
White	620	544	861

The number of students physically restrained aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Students Physically Restrained</b>
Hispanic/Latino	172
Multi-Ethnic	148
American Indian or Alaska Native	13
Asian	16

<b>Ethnicity</b>	<b>Number of Students Physically Restrained</b>
Black or African American	236
Native Hawaiian or Other Pacific Islander	4
White	890

The number of students placed in seclusion aggregated by ethnicity.

<b>Ethnicity</b>	<b>Number of Students Placed in Seclusion</b>
Hispanic/Latino	105
Multi-Ethnic	118
American Indian or Alaska Native	19
Asian	12
Black or African American	162
Native Hawaiian or Other Pacific Islander	2
White	670

The maximum and median number of minutes a student was placed in seclusion aggregated by ethnicity.

<b>Ethnicity</b>	<b>Maximum Number of Minutes a Student was Placed in Seclusion</b>	<b>Median Number of Minutes a Student was Placed in Seclusion</b>
Hispanic/Latino	100	6.0
Multi-Ethnic	160	8.0
American Indian or Alaska Native	110	5.0
Asian	80	3.0
Black or African American	205	8.0
Native Hawaiian or Other Pacific Islander	12	7.5
White	233	7.0



The maximum number of incidents in which emergency safety interventions were used on a student aggregated by ethnicity.

<b>Ethnicity</b>	<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
Hispanic/Latino	103	230	230
Multi-Ethnic	121	79	166
American Indian or Alaska Native	35	28	41
Asian	87	531	531
Black or African American	135	123	258
Native Hawaiian or Other Pacific Islander	31	1	31
White	727	316	814

## **BY GENDER**

The number of incidents in which emergency safety interventions were used on students who have an individualized education program (IEP) aggregated by gender.

<b>Gender</b>	<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
Male	7330	7328	14658
Female	1313	957	2270

The number of incidents in which emergency safety interventions were used on students who have a Section 504 plan aggregated by gender.

<b>Gender</b>	<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
Male	80	29	109
Female	5	0	5

The number of incidents in which emergency safety interventions were used on students who do not have an IEP or a Section 504 plan aggregated by gender.

<b>Gender</b>	<b>Number of Physical Restraint Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students without an IEP or a Section 504 Plan</b>
Male	458	414	872
Female	128	78	206

The total number of incidents in which emergency safety interventions were used on students aggregated by gender.

<b>Gender</b>	<b>Number of Physical Restraint Incidents</b>	<b>Number of Seclusion Incidents</b>	<b>Number of Emergency Safety Intervention Incidents</b>
Male	7803	7766	15569
Female	1446	1035	2481

The total number of students with behavior intervention plans (BIP) subjected to an emergency safety intervention aggregated by gender.

<b>Gender</b>	<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
Male	843	764	1178
Female	171	135	231

The number of students physically restrained aggregated by gender.

<b>Gender</b>	<b>Number of Students Physically Restrained</b>
Male	1195
Female	280

The number of students placed in seclusion aggregated by gender.

<b>Gender</b>	<b>Number of Students Placed in Seclusion</b>
Male	912
Female	174

The maximum and median number of minutes a student was placed in seclusion aggregated by gender.

<b>Gender</b>	<b>Maximum Number of Minutes a Student was Placed in Seclusion</b>	<b>Median Number of Minutes a Student was Placed in Seclusion</b>
Male	233	7.0
Female	205	7.0

The maximum number of incidents in which emergency safety interventions were used on a student aggregated by gender.

<b>Gender</b>	<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
Male	727	531	814
Female	135	123	258

### **BY FREE AND REDUCED LUNCH**

The number of incidents in which emergency safety interventions were used on students who have an individualized education program (IEP) aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Physical Restraint Incidents with Students with an IEP</b>	<b>Number of Seclusion Incidents with Students with an IEP</b>	<b>Number of Emergency Safety Intervention Incidents with Students with an IEP</b>
Yes	5050	4886	9936
No	3499	3344	6843

The number of incidents in which emergency safety interventions were used on students who have a Section 504 plan aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Physical Restraint Incidents with Students with a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students with a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students with a Section 504 Plan</b>
Yes	33	15	48
No	52	13	65

The number of incidents in which emergency safety interventions were used on students who do not have an IEP or a Section 504 plan aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Physical Restraint Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Seclusion Incidents with Students without an IEP or a Section 504 Plan</b>	<b>Number of Emergency Safety Intervention Incidents with Students without an IEP or a Section 504 Plan</b>
Yes	418	408	826
No	163	70	233

The total number of incidents in which emergency safety interventions were used on students aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Physical Restraint Incidents</b>	<b>Number of Seclusion Incidents</b>	<b>Number of Emergency Safety Intervention Incidents</b>
Yes	5481	5306	10787
No	3669	3425	7094

The total number of students with behavior intervention plans (BIP) subjected to an emergency safety intervention aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Students with a BIP Physically Restrained</b>	<b>Number of Students with a BIP Placed in Seclusion</b>	<b>Number of Students with a BIP with which an Emergency Safety Intervention was Used</b>
Yes	732	660	1029
No	326	255	435

The number of students physically restrained aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Students Physically Restrained</b>
Yes	1070
No	444

The number of students placed in seclusion aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Number of Students Placed in Seclusion</b>
Yes	801
No	300

The maximum and median number of minutes a student was placed in seclusion aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Maximum Number of Minutes a Student was Placed in Seclusion</b>	<b>Median Number of Minutes a Student was Placed in Seclusion</b>
Yes	233	7.0
No	230	6.0

The maximum number of incidents in which emergency safety interventions were used on a student aggregated by free/reduced lunch.

<b>Free/Reduced Lunch</b>	<b>Maximum Number of Physical Restraint Incidents with a Student</b>	<b>Maximum Number of Seclusion Incidents with a Student</b>	<b>Maximum Number of Emergency Safety Intervention Incidents with a Student</b>
Yes	390	123	393
No	727	531	814

The Kansas State Department of Education does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The following person has been designated to handle inquiries regarding the non-discrimination policies: KSDE General Counsel, Office of General Counsel, KSDE, Landon State Office Building, 900 SW Jackson, Suite 102, Topeka, KS 66612, (785) 296-3201.



# Preparing and Retaining Effective Special Education Teachers: Short-Term Strategies for Long-Term Solutions

A Policy Brief

Prepared by:  
The CEEDAR Center  
The Center on Great Teachers and Leaders

Many states struggle with shortages of special education teachers (SET). To address the shortage problem in the long term, policymakers, preparation providers, and state and district administrators must ensure that any short-term strategies are combined with a comprehensive plan that includes long-term systemic strategies to strengthen the supply, preparation, and retention of special education teachers.

## Scope of the Special Education Teacher Shortage—Research Findings

- Forty-eight states and the District of Columbia currently report special education teacher shortages (Sutcher, Darling-Hammond, & Carver-Thomas, 2016).
- Certain populations of students are more disadvantaged by shortages—students in high-poverty urban schools, remote rural schools, and students with serious emotional and behavioral disorders (Albrecht, Johns, Mounstevan, & Oloraunda, 2009; McClesky, Tyler, & Flippin, 2003).
- The pipeline of novice special education teachers was never sufficient and dwindled further during America's Great Recession (Sutcher et al. 2016).
- Shortages are exacerbated by high rates of attrition of special education teachers found to be 2.5 times more likely to leave the profession as teachers in general education (Smith & Ingersoll, 2004).

## Some Short-Term Strategies May Be Counterproductive

- In response to the shortage, some states are reducing requirements for entry into teaching and are creating fast tracks into the classroom. States may have no other choice in the short term, but such strategies will not solve the shortage problem in the long term and could in fact create additional challenges associated with students not being educated by effective teachers.
- Because underprepared special education teachers are less effective and most likely to leave the field, fast tracks to the classroom create a revolving door. A more systemic approach to solving special education teacher shortages is needed to complement quick fixes.

## Comprehensive, Long-term Strategies across the Career Continuum are Needed

- **Preparation matters in special education.** Not only do fully qualified special education teachers improve outcomes for students with disabilities, but research has shown that fully prepared special education teachers are more likely to remain in teaching than are teachers prepared through fast-track routes (Feng & Sass, 2013; Miller, Brownell, & Smith, 1999).
- **States that prepare more special education teachers have fewer shortages.** States with the smallest SET shortages have more preparation programs and graduate more special education teachers than states with the highest SET shortages. (Peyton, Acosta, Pua, Harvey, Sindelar, Mason- Williams, Dewey, Fisher, & Crews, under review, “State Level Characteristics Influencing the Supply and Demand of Special Education Teachers”).
- **Alternative routes can be effective.** Alternate route programs that involve district and university partnerships and provide more comprehensive training produce teachers who stay in the field longer (Sindelar et al., 2012; Sindelar, Daunic, & Rennells, 2004).
- **Financial incentives can help.** Adjusted for cost of living, average teacher salaries in the lowest SET shortage states are nearly \$7,000 greater than salaries in the highest shortage states. (Peyton et al.). Districts paying beginning teachers more than \$40,000 a year are more likely to recruit and retain them. Loan forgiveness and tuition remission programs that provide \$2,500 or more in financial relief yield more prepared and effective special education teachers (Feng & Sass, 2015).
- **Positive school climates retain special education teachers.** Research has shown that retention is fostered when teachers work in positive school climates where general and special education teachers share responsibility for students’ achievement, have administrative support, and work with collaborative colleagues who value inclusive practice. Positive school climates also can mitigate the impact of role overload for beginning special education teachers (Bettini, Jones, Brownell, Conroy, & Leite, 2018; Miller et al., 1999).
- **Manageable workloads retain beginning teachers.** Administrators need to be clear about the roles beginning teachers will play and protect their time. This is especially true for special education teachers who are balancing diverse student caseloads with administrative duties related to the Individuals with Disabilities Education Act (Brownell, Bettini, Pua, Peyton, & Benedict, 2018; Youngs, Jones, and Low, 2011). Not assigning these teachers additional duties and helping general education teachers understand their workload, can be helpful.
- **Formal and informal induction strategies retain beginning teachers.** Strong induction programs that rely on well-trained mentors, provide systematic professional learning opportunities, and introduce new teachers into a collaborative school culture promote retention in the field and effective teaching, particularly when provided over a 2-year period (Billingsley, Griffin, Smith, Kamman, & Israel, 2009; Brownell et al., 2018). In special education, specific attention must be paid to ensuring beginning teachers have access to special education mentors who understand the unique needs of the students they are serving.
- **Leadership matters.** Special education teachers are more likely to stay in schools with supportive administration (Albrecht, Johns, Mounstevan, & Olorunda, 2009; Jones, Youngs, & Frank, 2013).
- **Access to quality curriculum.** Beginning teachers benefit from having access to curriculum, combined with high-quality professional development that supports them in delivering effective instruction (Leko & Brownell, 2011). It is important to note that many beginning special education teachers feel that they do not have the necessary curriculum materials to support them in their jobs (Youngs et al., 2011).

## Conclusion

Lowering standards and abbreviating training are stop-gap measures that will exacerbate attrition and contribute to poor student outcomes. Combining necessary stop-gap measures with comprehensive, long-term solutions are needed to address persistent shortages in special education. Policymakers, states, districts, and educator preparation programs should consider a three-pronged approach designed to address the full educator career continuum.

- Ensure that financial incentives are grounded in research and combined with other long-term solutions.
- Provide well-designed, extensive preparation combined with ongoing induction and instructionally focused professional learning. Comprehensive approaches to improving teaching are likely to have a more substantial and sustained impact on shortages than are quick fixes to increase supply.
- Assist school districts and their leaders in developing more supportive work environments that attend to issues of workload manageability, collaboration among general and special education teachers, effective curriculum combined with professional development, and administrative support.

## Talking Points

- Forty-eight states and the District of Columbia currently have a special education teacher shortage.
- Stop-gap measures used in isolation are likely to exacerbate the shortage problem and contribute to poor student outcomes.
- States faced with the prospect of teacher shortages need a combination of short-term solutions and a multipronged, long-term strategic approach to ensure that every student with a disability has a fully prepared teacher.
- Addressing this problem immediately will require short-term solutions combined with intermediate- and long-term solutions that address the systemic nature of the problem.

## Recommendations

### Enhance Supply

#### Short Term Solutions

- Offer financial incentives such as loan forgiveness or bonuses.
- Provide incentives for general education teachers to add special education licensure.

#### Intermediate- to Long-Term Solutions

- Create comprehensive recruitment strategies focused on identifying and developing local talent.
- Develop licensure and program approval standards that ensure general education teachers are prepared to educate students with disabilities and to contribute to a collaborative, inclusive school environment.
- Invest in the creation of expedited alternative licensure routes accompanied by more robust preparation for teaching students with disabilities (e.g., California State University Internship Program; teacher residencies).
- Develop grow your own programs founded in strong district–university collaboratives.



## Foster Retention

### Short Term Solutions

- Collect data on working conditions and develop a comprehensive, long-term plan to address identified needs
- Work with principals to reduce workload expectations for beginning special education teachers.
- Implement an intensive induction experience for teachers prepared in quick routes to the classroom.

### Intermediate- to Long-Term Solutions

- Offer professional learning opportunities that engage general and special education teachers in collaboratively designing and implementing instruction.
- Create high-quality induction and mentoring policies and programs.
- Provide principals with the ongoing support and development to provide high-quality instructional leadership and to establish an inclusive environment.
- Fund innovative preparation approaches that feature university and district partnerships.
- Strengthen data systems that collect information on the root causes for special education attrition allow administrators to identify and respond to the causes of special education teacher attrition in their schools or districts.

This brief was produced collaboratively through a partnership between the Collaborative for Effective Educator Development, Accountability, and Reform (CEEDAR) Center, and the Center on Great Teachers and Leaders at the American Institutes for Research.



Center on  
**GREAT TEACHERS & LEADERS**

at American Institutes for Research ■

## References

- Albrecht, S. F., Johns, B. H., Mounsteven, J., & Olorunda, O. (2009). Working conditions as risk or resiliency factors for teachers of students with emotional and behavioral disabilities. *Psychology in the Schools*, 46(10), 1006–1022.
- Bettini, E., Jones, N. D., Brownell, M. T., Conroy, M., & Leite, W. (2018). Relationships between novices' social resources and workload manageability. *Journal of Special Education*, 52, 113–126.
- Billingsley, B. S., Griffin, C. C., Smith, S. J., Kamman, M., & Israel, M. (2009). A review of teacher induction in special education: Research, practice, and technology solutions. (NCIPP Doc. No. RS-1). Gainesville, FL: University of Florida, National Center to Inform Policy and Practice in Special Education Professional Development. Retrieved from [http://ncipp.education.ufl.edu/files\\_6/NCIPP\\_Induc\\_010310.pdf](http://ncipp.education.ufl.edu/files_6/NCIPP_Induc_010310.pdf)
- Brownell, M. T., Bettini, E., Pua, D., Peyton, D., & Benedict, A. (2018). Special education teacher effectiveness in an era of reduced federal mandates and increasing teacher shortages. In J. Crockett, B. Billingsley, & M. L. Boscardin (Eds.), *Handbook of leadership and administration for special education* (pp. 260–280). New York, NY: Routledge.
- Feng, L., & Sass, T. R. (2013). What makes special-education teachers special? Teacher training and achievement of students with disabilities. *Economics of Education Review*, 36, 122–134.
- Feng, L., & Sass, T. (2015). The impact of incentives to recruit and retain teachers in “hard-to-staff” subjects: An analysis of the Florida Critical Teacher Shortage Program (No. 141). Calder Center Working Paper.
- Fisher, T., Sindelar, P., Pua, D., Peyton, D., & Acosta, K. (2017, November). How are states addressing shortage? A state-by-state context analysis. Presentation at the 40th Annual Teacher Education Division of the Council for Exceptional Children Conference, Savannah, GA.
- Jones, N. D., Youngs, P., & Frank, K. A. (2013). The role of school-based colleagues in shaping the commitment of novice special and general education teachers. *Exceptional Children*, 79(3), 365.
- Leko, M. M., & Brownell, M. T. (2011). Special education preservice teachers' appropriation of pedagogical tools for teaching reading. *Exception Children*, 77(2), 229–251. doi: 10.1177/001440291107700205
- Miller, M. D., Brownell, M. T., & Smith, S. W. (1999). Factors that predict teachers staying in, leaving, or transferring from the special education classroom. *Exceptional Children*, 65(2), 201–218.
- Sindelar, P. T., Daunic, A., & Rennells, M. S. (2004). Comparisons of traditionally and alternatively trained teachers. *Exceptionality*, 12(4), 209–223. [https://doi.org/10.1207/s15327035ex1204\\_3](https://doi.org/10.1207/s15327035ex1204_3)
- Sindelar, P. T., Dewey, J. F., Rosenberg, M. S., Corbett, N. L., Denslow, D., & Lotfinia, B. (2012). Cost effectiveness of alternative route special education teacher preparation. *Exceptional Children*, 79(1), 25–42. <https://doi.org/10.1177/001440291207900102>
- Sutcher, L., Darling-Hammond, L., & Carver-Thomas, D. (2016). A coming crisis in teaching? Teacher supply, demand, and shortages in the U.S. Palo Alto, CA: Learning Policy Institute.
- Youngs, P., Jones, N., & Low, M. (2011). How beginning general and special education elementary education teachers negotiate role expectations and access professional resources. *Teachers College Record*, 113, 1506–1540.



Office of Special Education Programs  
U.S. Department of Education

This content was produced under U.S. Department of Education, Office of Special Education Programs, Award No. H325A170003 and the Office of Elementary and Secondary Education Programs, Award No. S283B120021-12A. David Guardino and Kim Okahara serve as project officers. The views expressed herein do not necessarily represent the positions or policies of the U.S. Department of Education. No official endorsement by the U.S. Department of Education of any product, commodity, service, or enterprise mentioned in this content is intended or should be inferred.

# **Subcommittees – Transition Workgroup**

## **Listed in Order of Prioritization from Member Survey Results**

### **#1 - Improving the Transition Process for All students with Disabilities**

Areas of Focus Include:

- Greater navigation supports for parents/students to self-advocate in the Transition Process
- Improved engagement of students and parents
  - Topics include:
    - Making the entire system more parent and student friendly, more accessible, and less frustrating
    - Transition coordinators – More resources for more coordinators; Ensuring effective standards and consistency of coordinator services
    - Independent advocates to help parents/students navigate transition
    - True Student-led IEPs
    - 504 Plans – Students with mental health needs getting pushed into 504 plans instead of IEPs and ensuring effective transition for all – including students with disabilities without an IEP.
    - Making referrals to VR more automatic (more like opt-out)
    - Other issues (Child/Family Team process, Preventing Unnecessary Guardianship, benefits planning to bust myths and improve transition, pre-14 actions and activities to improve transition, etc.).

### **#2 - Delivering on the promise of Employment First to ensure transition to real jobs, at real wages in real places (focus on competitive and integrated employment)**

Areas of Focus Include:

- Better ensuring transition to competitive and integrated employment
  - Topics include:
    - Utilizing the Employment First Law to ensure schools are better transitioning students toward competitive, integrated employment
    - Examining existing recommendations on this topic
    - Policies to rebalance the types of referrals schools make to better ensure competitive, integrated employment.

### **#3 - Improve existing IEP and transition educational documents for parents/students and create a new summary rights document (examine Connecticut model).**

Areas of Focus Include:

- Re-write the current “Parent’s Rights” Document produced by the Kansas State Department of Education (much of which is written at a college reading level) to better ensure it is in plain language and written in a more universally accessible manner.
  - The subcommittee has already recommended that KSDE bring in the Self Advocate Coalition of Kansas (SACK) as a consultant to KSDE to take the current “Parent’s Guide” document and to have be written in plain language and universally accessible.
  - Two subcommittee members reviewed KSDE’s latest version of the “Parent’s Guide” and offered comments to KSDE. Both members also endorsed bringing in SACK as a consultant to ensure plain language and universal accessibility.
- Develop a new Summary document for parents/students about transition and IEP rights:
  - Examine Connecticut model and other state models to have an easy to understand document.

#### **#4 - Improving coordination, resources and communication in the system enabling transition (VR, Schools, State Agencies, Disability Service Providers, etc.)**

- Topics include:
  - Pre-service and in-service
  - Better braiding and more effective coordination of resources
  - Capacity Issues (including needed resources to improve transition)
  - Prevention services to increase independence
  - Coordinating services to improve transition services for students

#### **#5 - Better supporting students toward obtaining post-secondary education and training**

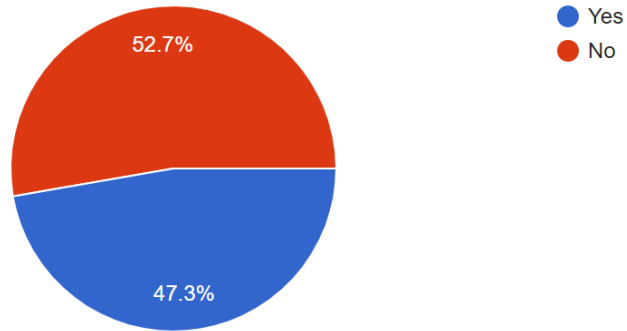
- Topics include:
  - Barriers to grants and loans (ex: don’t get accommodations, so they don’t have the required grades, so they lose the grant/loan)
  - Perkins, CTE and Tech Ed options
  - Providing better supports to help students consider and attend college and other post-high school training and education opportunities.

#### **#6 - Examining current transition outcomes and data and making improvements in future outcomes and data**

- Topics include:
  - Indicator 13 and 14. What they tell us? What they don’t tell us? What are the limitations of these?
  - What other outcomes and data sets need to be tracked?
  - Given the ESC Survey data, what other data does the state need to track each year to ensure transition support/services are both effective and improving (in what form? What standards?)

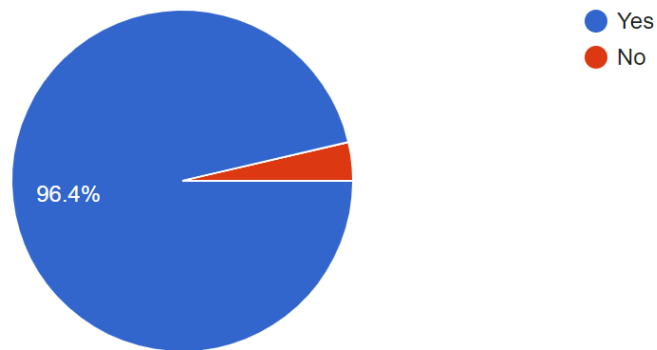
Did you include special education directors in your redesign process?

55 responses



Did you include parents in your redesign process?

55 responses



Did you include English Learner teachers and other special needs areas in your redesign process?

55 responses

