

# CHAPTER 5

## SPECIAL EDUCATION AND RELATED SERVICES

### INTRODUCTION

Each school district must make a free, appropriate public education (FAPE) available to all children with exceptionalities. One of the most important considerations for individualized education program (IEP) teams is the special education, related services, and supplementary aids and services to be provided to the child or on behalf of the child. The IEP team must also consider the program modifications or supports for school personnel that will be provided on behalf of the child. All services and supports are provided to enable the child: (1) To advance appropriately toward attaining the annual goals; (2) to be involved in and make progress in the general education curriculum, or appropriate activities for children ages 3–5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled peers to the maximum extent appropriate, in all of these activities. (See Chapter 4, The Individualized Education Program.)

Federal law emphasizes having high expectations for each child and enabling each child to participate and progress in the general education curriculum. Given those foundations, resulting educational placement decisions must be based upon providing services within the least restrictive environment. (See also Chapter 6, Educational Placement and Least Restrictive Environment.) The IEP team must consider special education and related services required to meet the individual needs of children with exceptionalities (including those who are gifted).

This chapter addresses these services and is organized according to the following headings:

- A. Special Education Services
- B. Related Services
- C. Supplementary Aids and Services
- D. Program Modifications and Supports for School Personnel
- E. Permissive Use of Funds (previously Incidental Benefit)
- F. Extended School Year/Day Services
- G. Frequency, Location and Duration of Services
- H. Home Schooling
- I. Services In Local Detention Facilities and Department of Corrections Facilities
- J. Facilities
- K. Qualified Special Education Personnel

### A. SPECIAL EDUCATION SERVICES

#### 1. Local Authority

Each school district is responsible for ensuring that all children with exceptionalities receive the special education, related services, and supplementary aids and services that are specified in their individualized education program (IEP). State law gives local agencies the authority to provide services in numerous ways:

- In the schools;
- In the home, hospital, or other facilities;
- Through a contract with another district;
- Through a cooperative agreement with other districts; or
- Through a contract with a public or private institution.  
(K.S.A. 72-3410 to -3411).

Regardless of the method used for service delivery, providers must meet the standards and criteria set by the Kansas State Board of Education.

Additionally, when a child with an exceptionality is admitted to a hospital, treatment center, or other health care institution or facility, a group boarding home or other care facility, upon a referral by a person licensed to practice

medicine and surgery, and the institution or facility is located outside the school district in which the child resides, the district of residence remains responsible for the provision of a free appropriate public education (FAPE) for the child. Special education and related services required may be provided pursuant to a contract entered into between the school district of which the child is a resident and the school district in which the child is housed. If a contract is not entered into between the two school districts, the child shall be deemed to be a pupil of the school district which is providing special education and related services to the child (K.S.A. 72-3410(b)).

**K.S.A. 72-3410. Duties of boards of education in meeting requirements of law; responsibilities of state board of education and other state agencies; interagency agreements; dispute resolution.**

- (a) (1) Each board shall adopt and implement procedures to assure that all exceptional children residing in the school district, including homeless children, foster care children and children enrolled in private schools, who are in need of special education and related services, are identified, located and evaluated.
- (2) Each board shall provide a free appropriate public education for exceptional children enrolled in the school district and for children with disabilities who are placed in a private school or facility by the school district as the means of carrying out the board's obligation to provide a free appropriate public education under this act and for children with disabilities who have been suspended for an extended term or expelled from school.
- (3) Each board shall provide exceptional children who are enrolled by their parents in private schools with special education and related services in accordance with state law and federal law.
- (b) If an exceptional child, upon referral by a person licensed to practice medicine and surgery, 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 in which the institution or facility is located may contract with the district in which a parent of the child resides to provide special education or related services, if such services are necessary for the child. Special education and related services required by this subsection may be provided pursuant to a contract entered into between the board of the school district of which the child is a resident and the board of the school district in which the child is housed. Any such contract shall be subject to the provisions of subsections (a)(3) and (c) of K.S.A. 72-967, and amendments thereto. If a contract is not entered into between the school districts, the child shall be deemed to be a pupil of the school district which is providing special education and related services to the child. 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), but shall operate as a comity of school districts in assuring the provision of special education services for each exceptional child in the state.
- (c) (1) Special education and related services required by this section shall meet standards and criteria set by the state board.

**K.S.A. 72-3411. Methods of compliance with requirements of act; powers and duties of boards of education.**

- (a) Each board, in order to comply with the requirements of this act, shall have the authority to:
- (1) Provide appropriate special education and related services for exceptional children within its schools.
- (2) Provide for appropriate special education and related services in the home, in a hospital or in other facilities.
- (3) Contract with another school district for special education and related services. Any such contract may provide for the payment of tuition and other costs by the school district in which the child is enrolled.
- (4) Enter into cooperative agreements with one or more other school districts for special education and related services.
- (5) Contract with any private nonprofit corporation or any public or private institution, within or outside the state, which has proper special education or related services for exceptional children. Whenever an exceptional child is educated by a private nonprofit corporation or a public or private institution as provided under this paragraph, such child shall be considered a pupil of the school district contracting for such education to the same extent as other pupils of such school district for the purpose of determining entitlements and participation in all state, federal and other financial assistance or payments to such school district.
- (6) Furnish transportation for exceptional children, whether such children are residents or nonresidents of such school district, for the provision of special education or related services. In lieu of paying for transportation, the board of the school district in which an exceptional child resides may pay all or part of the cost of room and board for such exceptional child at the place where the special education or related services are provided.
- (b) Special education and related services which are provided for exceptional children shall meet standards and criteria set by the state board and shall be subject to approval by the state board.
- (c) Any contract entered into by a board under the provisions of this section shall be subject to change or termination by the legislature.

## 2. Provision of Special Education Services

Children with exceptionalities are entitled to receive special education and related services. This term means specially designed instruction to meet the unique needs of a child with an exceptionality, and includes physical education, travel training, and vocational education. Special education and related services must be provided at no cost to the parents.

All special education services, related services, and supplementary aids and services are to be based on peer-reviewed research, to the extent practicable (K.S.A. 72-3429(c)(4)). Peer-reviewed research is research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. It may be important to note that the U.S. Department of Education's Office of Special Education Programs comments to the federal special education regulations, state that special education services that are based on "peer-reviewed research" are to be provided to the extent that it is possible, given the availability of the research. If no such research exists, the service may still be provided if the IEP team determines that such services are appropriate. Further, OSEP states that failure to base services on peer-reviewed research is not necessarily a violation of FAPE, because the IEP team determines what services the child will receive based on the child's individual needs. The IEP is not required to include specific instructional methodologies unless the IEP team determines that a certain instructional methodology is necessary for a child to receive FAPE (Federal Register, August 14, 2006, pp. 466-65).

Each IEP team makes decisions about the special education instruction and related services, as well as supplementary aids and services to be provided to the child, or on behalf of the child, so that the child will advance appropriately toward meeting the child's annual goals, advance in the general curriculum, and be educated with the child's peers.

The IEP must also include any services needed to support school personnel. For example, if the general education teacher needs instruction to learn how to use an assistive technology device that the child will use in the classroom, or if the general education teacher may need training in order to carry out a behavior intervention plan in the classroom, or the teacher is being sent to receiving training to work with a child with autism, these services would be included in the IEP for the child.

The decision about what services, the amount of services, and the setting of services necessary to meet the unique needs of an exceptional child is based on a variety of factors. The IEP team must identify the child's present levels of academic achievement and functional performance (PLAAFPs) and determine the annual goals and, if appropriate, benchmarks/short-term objectives. Once the PLAAFPs and goals are established, the IEP team decides what services are to be provided. The IEP team decides the specific services and the amount of services that will be needed for the child to make the necessary progress to achieve the measurable annual goals. After the IEP team determines which services and the amount of services are necessary the team next needs to decide where those services will be provided, and the amount of time the child will spend in general education settings, special educational settings, or in a combination of settings. All special education and related services must be individually determined in light of each child's unique abilities and needs to meet the annual goals in the IEP and make progress in the general education curriculum.

### 3. Paraeducator

The State of Kansas has no statewide requirements for employment as a paraeducator or paraprofessional in a school; however, state and federal funding for certain positions may have requirements pertaining to those positions. Individual local education agencies (LEAs) may set requirements for employment. Paraeducators (paras) cannot be given responsibility for designing or be the primary person in charge of delivering classroom content. Paras working in non-KSDE licensed fields (speech-language pathology, occupational therapy, nursing, etc.) may need to meet specific requirements for training, supervision, and allowable duties. The "Special Education Reimbursement Guide: State Categorical Aid", found on the Categorical Aid Reimbursement page at <https://www.ksde.org/Default.aspx?tabid=538>, outlines these requirements as well as overall minimum requirements for para time to be claimed for reimbursement, however each supervising professional's licensing body is the final authority.

When reporting IEP services in the Management Information System (MIS), paras are not to be reported separately from the special teacher supervising the para in providing services listed on a student's IEP. Paras are included in and reported as part of the supervising teacher's special education service time.

### 4. Related Services As Special Education Services

The IEP team may determine that the only special education service needed for a child with a disability is a related service, in certain circumstances:

- if it consists of specially designed instruction to meet the unique needs of the child, any related service, including para support or speech-language pathology, is considered special education  
or
- if a child needs OT, PT, or interpreter services for deaf children in order to be educated in the least restrictive environment, that service is considered special education

The provision of any such services to a child with a disability should be determined based on the child's individual unique needs, not based on the child's disability category.

State regulations identify the following related services as special education services:

*"(kkk) 'Special education' means the following: (2) Paraeducator services, speech/language pathology services, and any other related services, if it consists of specially designed instruction to meet the unique needs of a child with a disability;*

*(3) occupational or physical therapy and interpreter services for deaf children if, without any of these services, a child would have to be educated in a more restrictive environment"*

*(K.A.R. 91-40-1(kkk)(2), (3))*

## 5. Special Education for Children Identified as Gifted

Each child identified as gifted shall be permitted to test out of, or work at an individual rate, and receive credit for required or prerequisite courses, or both, at all grade levels, if so specified in that child's IEP. Each gifted child may receive credit for college study at the college or high school level, or both. If a gifted child chooses to receive college credit, however, the student shall be responsible for the college tuition costs (K.A.R. 91-40-3(g), (h)).

### **K.S.A. 72-3429. Individualized education program or family service plan; contents.**

(c) The IEP for each exceptional child shall include:

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

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

(B) to be involved in and make progress in the general education curriculum in accordance with provision (1) and to participate in extracurricular and other nonacademic activities; and

(C) to be educated and participate with other exceptional and nonexceptional children in the activities described in this paragraph;

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

(6) (A) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and districtwide assessments; and

(B) if the IEP team determines that the child shall take an alternate assessment on a particular state or district-wide assessment of student achievement or part of such an assessment, a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child;

(7) the projected date for the beginning of the services and modifications described in provision (4), and the anticipated frequency, location, and duration of those services and modifications;

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

(kkk) "Special education" means the following:

(1) Specially designed instruction, at no cost to the parents, to meet the unique needs of an exceptional child, including the following:

(A) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) Instruction in physical education;

(2) paraeducator services, speech-language pathology services and any other related service, if the service consists of specially designed instruction to meet the unique needs of a child with a disability;

(3) occupational or physical therapy and interpreter services for deaf children, if without any of these services, a child would have to be educated in a more restrictive environment;

(4) travel training; and

(5) vocational education.

(lll) "Specially designed instruction" means adapting, as appropriate to the needs of each exceptional child, the content, methodology or delivery of instruction for the following purposes:

(1) To address the unique needs of the child that result from the child's exceptionality; and

(2) to ensure access of any child with a disability to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children.

### **K.A.R. 91-40-3. Ancillary FAPE requirements.**

(g) Each gifted child shall be permitted to test out of, or work at an individual rate, and receive credit for required or prerequisite courses, or both, at all grade levels, if so specified in that child's individualized education program.

(h) Any gifted child may receive credit for college study at the college or high school level, or both. If a gifted child chooses to receive college credit, however, the student shall be responsible for the college tuition costs.

## B. RELATED SERVICES

Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with an exceptionality, to benefit from special education services. Generally, when needed, related services are provided in addition to special education instruction. Once the child has been identified as a child with an exceptionality the child need not meet the eligibility criteria for another area of exceptionality in order to receive related services. The individualized education program (IEP) team determines what additional services are necessary for the child to benefit from the special education services. The IEP team must consider each child's goals and the services or supports needed to assist the child to achieve them.

Related services are available for exceptional children; however, not all related services are available to children identified as gifted. To distinguish which related services are or are not available to children identified as gifted refer to the definitions of a particular related services in K.A.R. 91-40-1.

K.A.R. 91-40-1(ccc) includes the following as related services, which is not an all-inclusive list. Where additional definitions appear in state regulations, citations are provided with the term.

A. Art therapy

B. Assistive technology devices and services, K.A.R. 91-40-1(c), (d)

- C. Audiology, K.A.R. 91-40-1(e)
- D. Counseling services, K.A.R. 91-40-1(m)
- E. Dance movement therapy
- F. Early identification and assessment of disabilities, K.A.R. 91-40-1(s)
- G. interpreting services, K.A.R. 91-40-1(kk)
- H. Medical services for diagnostic or evaluation purposes, K.A.R. 91-40-1(nn)
- I. Music therapy
- J. Occupational therapy, K.A.R. 91-40-1(rr)
- K. Orientation and mobility services, K.A.R. 91-40-1(ss)
- L. Parent counseling and training, K.A.R. 91-40-1(ww)
- M. Physical therapy, K.A.R. 91-40-1(yy)
- N. Recreation, including therapeutic recreation, K.A.R. 91-40-1(aaa)
- O. Rehabilitation counseling services, K.A.R. 91-40-1(bbb)
- P. School health services, K.A.R. 91-40-1(fff)
- Q. School nurse services, K.A.R. 91-40-1(ggg)
- R. School psychological services, K.A.R. 91-40-1(hhh)
- S. School social work services, K.A.R. 91-40-1(iii)
- T. Speech and language, K.A.R. 91-40-1(nnn)
- U. Transportation, K.A.R. 91-40-1(vvv)
- V. Other developmental, corrective or supportive services

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

(ccc) "Related services" means developmental, corrective, and supportive services that are required to assist an exceptional child to benefit from special education.

(1) Related services shall include the following:

- (A) Art therapy;
- (B) assistive technology devices and services;
- (C) audiology;
- (D) counseling services;
- (E) dance movement therapy;
- (F) early identification and assessment of disabilities;
- (G) interpreting services;
- (H) medical services for diagnostic or evaluation purposes;
- (I) music therapy;
- (J) occupational therapy;
- (K) orientation and mobility services;
- (L) parent counseling and training;
- (M) physical therapy;
- (N) recreation, including therapeutic recreation;
- (O) rehabilitation counseling services;
- (P) school health services;
- (Q) school nurse services;
- (R) school psychological services;
- (S) school social work services;
- (T) special education administration and supervision;
- (U) special music education;
- (V) speech and language services;
- (W) transportation; and
- (X) other developmental, corrective, or supportive services.

(2) Related services shall not include the provision of any medical device that is surgically implanted, including a cochlear implant, the optimization of the device's functioning, including mapping and maintenance of the device, and replacement of the device.

(kkk) "Special education" means the following:

- (2) paraeducator services, speech-language pathology services, and any other related service, if the service consists of specially designed instruction to meet the unique needs of a child with a disability;
- (3) occupational or physical therapy and interpreter services for deaf children if, without any of these services, a child would have to be educated in a more restrictive environment;

## 1. Surgically Implanted Devices

Related services do not include a medical device that is surgically implanted, including cochlear implants. They also do not include the optimization of that device's functioning (e.g., mapping), maintenance, or the replacement of that device. However, the child with a surgically implanted device may receive any of the related services that the IEP team determines is necessary for the child to receive a free appropriate public education (FAPE) (K.A.R. 91-40-1(ccc)(2)).

The school must appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school. The school must also routinely check external components of a surgically implanted device to make sure it is functioning properly. (K.A.R. 91-40-3(f)(2); 34 C.F.R. 300.34(b); 34 C.F.R. 300.113(b), (c))

## 2. Medical Services and School Health Services

There is an important distinction between "medical services" and "school health services." According to K.A.R. 91-40-1(nn) and 34 C.F.R. 300.34(c)(5), medical services are defined as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." Schools are required to provide medical services only for diagnostic or evaluation purposes (34 C.F.R. 300.34(a)).

On the other hand, school health services are to be specified on the IEP of a child with a disability and are provided by a school nurse or other qualified person (K.A.R. 91-40-1(fff)). School nurse services are services provided by a qualified school nurse (K.A.R. 91-40-1(ggg)). School health services and school nurse services are related services, which must be provided whenever needed to assist a child with a disability to benefit from special education (K.A.R. 91-40-1(ccc); 34 C.F.R. 300.34(a)).

The United States Supreme Court has clarified the distinction between medical services and health services. According to the Supreme Court, medical services are services that must be performed by a physician. It is only those services that require the skills of a physician, therefore, that are limited to diagnostic or evaluation purposes. Health services that may be performed by persons who are not physicians (nurses or other qualified persons) are related services which must be provided by the school when needed to assist a child with a disability to benefit from special education. In so holding, the Court stated that Clean Intermittent Catheterization, a procedure involving the insertion of a catheter into the urethra to drain the bladder, was a related service the school must provide to a student who needs it to benefit from special education (*Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984)).

The US Supreme Court reviewed the *Tatro* decision in 1999. See *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). In *Garret F.*, the Supreme Court reaffirmed its decision in *Tatro*. The *Garret F.* Court stated Clean Intermittent Catheterization, continuous one-on-one nursing services, and operation of a ventilator for life support were not medical services because they did not "demand the training, knowledge, and judgment of a licensed physician." The Court found these services to be related services, and that the school was required to provide these services to Garret because he needed such services in order to benefit from his special education services.

In summary, medical services may be a related service only when it involves a procedure requiring the training, knowledge, and judgment of a licensed physician. Even then, it is limited to diagnostic or evaluation purposes. Federal regulations and US Supreme Court cases indicate any health-related procedure that does not require the services of a physician is a related service (school health service), which must be provided by the school when needed to assist a child with a disability to benefit from special education.

The Kansas Nurse Practice Act addresses the need for appropriate supervision and training for personnel providing services such as medication administration. Some procedures may not be delegated to personnel other than a nurse under any circumstances. For additional information, please consult the Kansas Nurse Practice Act Statutes & Administrative Regulations, <https://www.ksbn.org/npa/npa.pdf>.

The Individuals with Disabilities Education Act (IDEA) is clear that parents cannot be required to obtain a prescription for medication for a child as a condition of attending school, receiving an evaluation, or receiving special education and related services (K.S.A. 72-3410(e); 34 C.F.R. 300.174a)).

### ***Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).**

When a school district refused to provide certain services to a medically fragile student, the parent requested a due process hearing. The disputed services were: urinary bladder catheterization, suctioning of tracheotomy, ventilator setting checks, ambu bag administrations as a back up to the ventilator, blood pressure monitoring, observation to determine if the student was in respiratory distress or autonomic hyperreflexia, and disimpation in the event of autonomic hyperreflexia. At due process, an administrative law judge [ALJ] ruled that the district was required to furnish the disputed health care services, as the services were related services. The school district appealed, and a federal district Court agreed with the ALJ that the district was required to provide the disputed services under the IDEA. On appeal to the 8th Circuit, the circuit court concluded the services were necessary for the student to attend school. Since the disputed services were not for diagnostic or evaluative reasons and did not need to be administered by a physician, the district was obligated by the "bright-line" test to furnish them, according to the circuit court. The school district appealed to the Supreme Court.

#### **HELD: for the parent.**

The Supreme Court agreed with the lower courts, finding the district was obligated to provide the disputed services. Looking to the IDEA definition of "related services" first, the court noted that the district admitted the disputed services were incorporated within the statutory definition of related services. The disputed services were deemed supportive services, as they were necessary for the student to attend school. In examining whether the medical services exclusion applied, the court noted that medical services are not explicitly defined within the statute, but an exclusion exists which

limits the required medical services to services for "diagnostic and evaluation purposes." The scope of this exclusion was addressed by the Supreme Court in the *Tatro* decision, which held medical services are those services that must be performed by a physician. Applying the reasoning from *Tatro* to the current dispute, because the requested services did not have to be provided by a physician, the district was required to provide them. The court rejected the proposed multi-factor approach favored by the district as unsupported by the applicable judicial and statutory precedent. Neither the IDEA nor the IDEA regulations enumerate any type of multi-factor approach. The district's assertion that the continuous nature of the services required by the student made them medical services was also rejected. The cost factor, which the district claimed would result in an undue burden, was deemed inconsistent with the purposes of the IDEA. The purpose of the IDEA was to ensure access to public schools for students with disabilities. The court stated that if it adopted the district's cost-based standard it would be engaging in inappropriate judicial rule making. For these reasons, the court concluded the IDEA, *Tatro*, and the intent behind the IDEA, all supported the conclusion that the district was required to furnish the student with the requested services.

**K.S.A. 72-3410. Duties of boards of education in meeting requirements of law; responsibilities of state board of education and other state agencies; interagency agreements; dispute resolution.**

(e) Each school board and state agency is prohibited from requiring any child to obtain a prescription for a substance covered by the federal controlled substances act, 21 U.S.C. 801 et seq., as a condition for the child to attend school or be evaluated or receive special education services under this act.

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

(nn) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(fff) "School health services" means health services that are specified in the IEP of a child with a disability and that are provided by a school nurse or other qualified person.

(ggg) "School nurse services" means nursing services that are provided by a qualified nurse in accordance with the child's IEP.

**K.A.R. 91-40-3. Ancillary FAPE requirements.**

(f) (1) Each agency shall ensure that hearing aids worn in school by children with hearing impairments or deafness are functioning properly.

(2) Each agency shall ensure that the external components of surgically implanted medical devices of children with disabilities are functioning properly. However, an agency shall not be responsible for the maintenance, programming, or replacement of any surgically implanted medical device or any external component of the device.

### 3. Transportation

Transportation is a related service when it is needed in order for the child to benefit from special education. There is no requirement that the need for transportation be related to the student's disability. If the IEP team determines that a child will not be able to access special education services without transportation being provided by the school district, the IEP team needs to add transportation to the IEP as a related service, even if the need for transportation is not related to the disability. IEP teams may take into account the parent's ability to transport the student, the student's ability to walk to school, and whether public transportation is available. Each situation is considered individually, and if for a particular child, transportation is required, then the school must provide it or make other arrangements for the child to be transported. In addition to travel to and from school, transportation, as a related service, also includes travel between schools as well as travel in and around school buildings. Thus, the IEP team may need to also assess a child's ability to access school facilities. Like all related services, when an IEP team determines it is needed, transportation services will be included on the child's IEP.

Generally, a school district is not required to transport a child to a location out of the district of residence. This would apply if a child attends a child care, preschool program, or after school program that is located in another district or if the child is attending a private school located in another district and requires special education and related services from the district of residence. (See more about transportation of private school students in Chapter 14.) Of course there are always exceptions, one of which would include when a child is placed by the school district in a school or facility outside of the district boundaries. In this case, the school district would be required to transport the child to the out-of-district location.

If the IEP team determines that the parent will provide transportation that should be indicated on the IEP. For some children, special considerations for transportation may be necessary. For example, if a child uses a wheelchair, a bus with a lift may be needed. The IEP for a child with severe asthma who requires air conditioning may need to specify an air-conditioned bus. A child may need a paraeducator on the bus for the child's safety and well-being. In determining who should attend the IEP meeting, the IEP team may consider the need to invite the bus driver, if there are special transportation needs. Behavioral considerations could be an example. Certainly, if a driver was included in a behavioral intervention plan, the driver could be involved in the development of that plan.

A service somewhat related to transportation is Driver's Education, which is a course some secondary schools provide for students. If the class is offered for students in the general education curriculum, it must be available for students receiving special education services, if appropriate. A student with physical disabilities may require an adapted car to drive. The IEP team should consider what transportation services and supports are needed for each individual child.

## 4. Interpreting Services

If a child is deaf or hard of hearing and the IEP team determines that the child needs a sign language interpreter to receive FAPE, then that service is required and must be written in the IEP as a special education service or a related service. The IEP team should also address the need for a sign language interpreter in nonacademic and extracurricular activities.

Interpreting services include oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell. Interpreting services would also include special interpreting services for children who are deaf-blind (K.A.R. 91-40-1(kk); 34 C.F.R. 300.34(c)(4)).

As any other special education service provider, sign language interpreters must be qualified to provide the related service. See the "Special Education Reimbursement Guide: State Categorical Aid", on the Categorical Aid Reimbursement page at <https://www.ksde.org/Default.aspx?tabid=538>.

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## C. SUPPLEMENTARY AIDS AND SERVICES

The individualized education program (IEP) team determines what supplementary aids and services and other supports, are to be provided to the child with a disability or on behalf of the child in general education classes or other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate (the least restrictive environment) (K.A.R. 91-40-1(ttt)). The supplementary aids and services are to be based on peer-reviewed research to the extent that they are available. Examples of supplementary aids and services include paraeducator services, assistive technology devices and services, and other accommodations as appropriate.

### 1. Assistive Technology Devices and Services

An example of a supplementary aid or service is assistive technology, which may also be considered a related service. An IEP team may determine an evaluation is needed to assess the need for assistive technology devices and services. If a child needs assistive technology to remain in the general education class or other education-related setting to enable the child to be educated with children without exceptionalities to the maximum extent appropriate, then assistive technology must be listed as a supplementary aid or service on the IEP including the frequency, location, and duration. (See useful publications at the Wisconsin Assistive Technology Initiative website (<http://www.wati.org/>))

Questions may arise about the responsibility for maintaining, servicing, repairing, or insuring an assistive technology device. The definition in the federal special education regulations makes it clear that the school is responsible for maintaining, repairing, and replacing these devices identified on the IEP. The school may want to revise the district's insurance to cover such equipment, both on and off campus. If a device is used in the child's home or another location away from the school, the home insurance, school insurance, or other coverage may be used. In some cases, it may be worthwhile to purchase special insurance for some devices. For example, if the school has purchased an augmentative communication device or a hearing aid for a preschool-aged child, the nominal insurance fee may be worth considering, especially if the child is very active.

Another issue to consider is the need for the assistive technology device at home or in other settings (K.A.R. 91-40-3(d)(2)). Federal and state special education regulations make it clear that if the child needs access to the device at home or in other settings in order to receive a free appropriate public education, then it must be allowed and the IEP should state that the device is necessary in the non-school setting(s). An important consideration by the IEP team regarding this issue is that homework and extracurricular activities are an important component of the child's educational experiences.

The school is required to provide the needed assistive technology in a timely manner. Other resources may be available to loan devices or to help pay for them. Medicaid, the Program for Children with Special Health Care Needs, private health insurance, service clubs, and other funding sources may be able to pay for equipment. The Assistive Technology for Kansans regional Access Sites may also be helpful to schools in locating evaluation and funding resources; call 800-KAN-DO IT to reach the office nearest your school.

If a child who needs an assistive technology device is covered by Medicaid insurance, and Medicaid pays for the device, the device is owned by the child and family. This ownership requirement is consistent with Medicaid rules. Likewise, if other resources (Special Health Services, civic groups, other organizations) have purchased the assistive technology device, it belongs to the child and family. Member districts may access the Kansas Infinitec Coalition at <http://www.myinfinitec.org/home>.

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

- (c) "Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term shall not include any medical device that is surgically implanted or the replacement of the device.
- (d) "Assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. This term shall include the following:
- (1) Evaluating the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
  - (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
  - (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
  - (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
  - (5) providing training or technical assistance for a child with a disability or, if appropriate, that child's family; and
  - (6) providing training or technical assistance for professionals including individuals providing education or rehabilitation services, employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of a child.
- (kk) "Interpreting services" means the following:
- (1) For children who are deaf or hard of hearing, oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, including communication access real-time translation (CART), C-Print, and TypeWell; and
  - (2) special interpreting services for children who are deaf-blind.
- (ttt) "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes, or other education-related settings, and extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

**K.A.R. 91-40-3(d). Ancillary FAPE requirements.**

- (1) Each agency shall ensure that assistive technology devices or assistive technology services, or both, are made available to a child with a disability if required as a part of the child's special education or related services, or the child's supplementary aids and services.
- (2) Each agency, on a case-by-case basis, shall allow the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices at home or in other settings in order to receive FAPE.

**2. Nonacademic and Extracurricular Services**

The IEP team must determine whether the child requires supplementary aids and services, that are appropriate and necessary, to afford the child an equal opportunity for participation in nonacademic and extracurricular services and activities. These are nonacademic and extracurricular activities that are school sponsored during the regular school year.

Nonacademic and extracurricular services may include counseling services, athletics, transportation, health services, recreational activities, referrals to agencies that provide assistance to individuals with exceptionalities, and employment of students, including employment by the school (K.A.R. 91-40-3(b)(2); 34 C.F.R. 300.107).

Nonacademic and extracurricular activities may include meals, recess, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with exceptionalities, both employment by the school and assistance in making outside employment available. Some other school-sponsored events or activities include Student Council, school dances, school sporting events, school newspaper or yearbook, school plays and musicals, school music concerts, academically related events like spelling or math bees, and nonacademic events like pep rallies. This list is not all-inclusive; many options exist within each school. Appropriate involvement in such activities and events can enrich the lives of children with disabilities, just as they do for children without disabilities.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, field trips and the services specified above, the school must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate and to the needs of the child (K.A.R. 91-40-3(b)(1); 34 C.F.R. 300.117).

For example, the IEP team might consider if the child could attend an after-school activity, a club, or group meetings in which other students would participate. Another example might be a football game. If the school district is sponsoring the freshman class to go to a school football game on a bus, then the IEP team needs to provide an equal opportunity for that student to participate in that school-sponsored activity. However, if a child simply wishes to attend a football game in which there is no school-sponsored activity for the class, then that child would not necessarily require any accommodations provided through the IEP. If a child's IEP states that the child needs a sign language interpreter and if this school-sponsored event is after school or on the weekend, then the school needs to arrange for an interpreter to be available.

**K.A.R. 91-40-3. Ancillary FAPE requirements.**

- (a) Each agency shall ensure that children with disabilities have available to them the same variety of educational programs and services that are available to nondisabled children served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

- (b) (1) Each agency shall provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities, including the provision of supplementary aids and services as determined to be necessary by the child's IEP team.
- (2) Nonacademic and extracurricular services and activities shall include the following:
- (A) Counseling services;
  - (B) athletics;
  - (C) transportation;
  - (D) health services;
  - (E) recreational activities;
  - (F) special interest groups or clubs sponsored by the agency;
  - (G) referrals to agencies that provide assistance to individuals with disabilities; and
  - (H) employment of students, including both employment by the agency and assistance in making outside employment available.
- (c) (1) Each agency shall make physical education services, specially designed if necessary, available to every child with a disability, unless the agency does not provide physical education to any children who are enrolled in the same grade.

### 3. Access to Instructional Materials

Kansas has adopted the National Instructional Materials Accessibility Standard (NIMAS), for the purposes of providing instructional materials to blind persons, or other persons with print disabilities, in a timely manner. Further, all public agencies, including the school, shall ensure children with disabilities who need instructional materials in accessible formats, but are not included in the definition of blind, or other persons with print disabilities, or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner (34 C.F.R. 300.172(a)(b); 34 C.F.R. 300.210). A "timely manner" means that the responsible public agency shall take all reasonable steps to ensure needed instructional materials, including instructional materials that cannot be produced from NIMAS files, are provided in accessible formats at the same time as other children receive instructional materials. More information on how to access the National Instructional Materials Center can be found at <https://www.ksde.org/Default.aspx?tabid=551>.

## D. PROGRAM MODIFICATIONS AND SUPPORTS FOR SCHOOL PERSONNEL

Each IEP for a child with an exceptionality must include a statement of the program modifications, or supports for school personnel that will be provided to the child, or on behalf of the child, to enable the child to participate with nonexceptional peers to the maximum extent appropriate and to enable the child to advance appropriately toward the annual goals. The modifications may address various areas including environmental and structural changes, how the child will participate in direct instruction, learning activities, collaborative work groups, large-group discussions, and other events occurring in their general education classroom. Necessary modifications for children with exceptionalities must be documented on the child's IEP. (K.S.A. 72-3429(c)(4); 34 C.F.R. 300.320(a)(4)(i))

The IEP should also include a statement of the supports for school personnel that need to be provided for each child to enable him/her to advance appropriately toward attaining their measurable annual goals and to be involved and progress in the general education curriculum. These supports may include specialized staff development (e.g., learn sign language, learn a software program the child will use), consultation by a special teacher, or materials or modifications to the environment.

The program modification and/or supports for school personnel in the IEP must indicate the projected date for the beginning of the services or supports, including the frequency, location, and duration.

## E. PERMISSIVE USE OF FUNDS

Permissive use of funds refers to the benefits one or more children with or without exceptionalities receives from the special education and related services and supplementary aids and services that are provided to a child with an exceptionality in inclusive settings including the classroom and other educational related settings. This situation may also apply to other education-related settings, such as community-based job sites, the school bus, and other settings. Schools may deliver special education services in the general education classroom with nonexceptional children even if one or more children without exceptionalities benefit from such services as long as the service being provided is designed to meet the unique needs as described on the IEP of a child with an exceptionality.

### 20 USC 1413. Local educational agency eligibility.

- (a) In general a local educational agency is eligible for assistance under this subchapter for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions:
- (4) Permissive use of funds
- (A) . . . [f]unds provided to the local education agency under this subchapter may be used for the following activities:

(i) Services and aids that also benefit nondisabled children. For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a child with a disability in accordance with the individualized education program of the child, even if one or more nondisabled children benefit from such services.

## F. EXTENDED SCHOOL YEAR/DAY SERVICE

### 1. Extended School Year Services

When the IEP is developed initially or reviewed annually, the IEP team shall consider the need for extended school year (ESY) services for children with disabilities. Children identified as gifted are not eligible for extended school year services. ESY services are different from general education summer school. ESY may or may not be provided in conjunction with the general education summer school. ESY may be needed by a child even though summer school is not offered for general education children. In fact, for certain children, services over winter or spring breaks may be needed. The reason for these services is to ensure the provision of FAPE so that the child can make progress toward the goals specified on the child's IEP and to prevent regression, which would impede such progress.

However, if a child with a disability is attending a summer school program for general education purposes, (not extended school year) the school shall consider what reasonable accommodations/modifications may be necessary for the child to have an equal opportunity to participate in the general education environment and curriculum. The necessary supports can be provided through a 504 plan.

The need for ESY is to be decided individually. Therefore, a district shall not have a policy that no ESY services will be provided, that they are only available to a certain group or age of children, or that services are only provided for a set amount of time or a specified number of days.

#### a. Determining whether ESY is needed

In Kansas, ESY eligibility does not require that a child first experience regression when predictive data indicate that regression is likely. There is a 10th Circuit Court of Appeals case that must guide the discussion of a Kansas IEP team on whether a student with a disability (not students who are gifted) needs ESY services. Kansas is within the 10th Circuit and is bound by the decisions of the 10th Circuit Court of Appeals. *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990) directs schools districts to first consider "whether the benefits accrued to the child during the regular school year will be significantly jeopardized if [the child] is not provided an educational program during the summer months. . . . The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community." IEP teams cannot just stop after a regression-recoupment analysis. IEP teams must also consider:

1. The degree of impairment,
2. The degree of regression suffered by the child,
3. The recovery time from this regression,
4. The ability of the child's parents to provide the educational structure at home,
5. The child's rate of progress,
6. The child's behavioral and physical problems,
7. The availability of alternative resources,
8. The ability of the child to interact with [nondisabled] children,
9. The areas of the child's curriculum which need continuous attention,
10. The child's vocational needs, and
11. Whether the requested services is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition.

This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP.

#### b. Gathering relevant data for the ESY discussion

The *Johnson* case specifies that determining whether ESY is needed should be done in consultation with the parents. Additionally, the IEP team should gather information and data relevant to the criteria listed in the *Johnson* case. The following information and data may be useful in determining the need for ESY services:

1. Teacher assessment of the student’s success with various instructional interventions;
  2. Criterion-referenced and standardized test data;
  3. Health and health-related factors, including physical and social/emotional functioning;
  4. Past educational history, as appropriate, including any ESY services;
  5. Direct observation of the student’s classroom performance;
  6. IEP goals and objectives;
  7. Student performance (pretest and posttest data);
  8. Behavior checklists; and
  9. Student interviews where appropriate.
- c. **Addressing ESY in the IEP.** Once the IEP team has gathered relevant data and determined that the student needs ESY services, it is important for the IEP Team to address the educational needs of each student and how they might be addressed through ESY services and documented in the student’s IEP, such as:
1. Scope of the special education instructional services including the duration and content of the program;
  2. Which current goals and objectives will be addressed to maintain present skills and behaviors;
  3. Implementer(s) of the ESY services;
  4. What related services will be made available; and
  5. If contracting with other schools or private agencies is needed.

State regulations set forth the following stipulations for ESY:

**K.A.R. 91-40-1. Extended school year services.**

(x) Extended school year services means special education and related services that are provided to a child with a disability under the following conditions:

- (1) Beyond the school term provided to nondisabled children;
- (2) in accordance with the child's IEP; and
- (3) at no cost to the parents of the child.

**K.A.R. 91-40-3. Ancillary FAPE requirements**

- (e) (1) Each agency shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.  
 (2) An agency shall be required to provide extended school year services only if a child’s IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.  
 (3) An agency shall neither limit extended school year services to particular categories of disability nor unilaterally limit the type, amount, or duration of those services.

## 2. Extended School Day Services

In addition to services provided outside the typical school year (number of specified days), children may also need more hours per day than are typically provided. Such decisions must be made by the IEP team, based upon the decision making process described above.

## G. FREQUENCY, LOCATION, AND DURATION OF SERVICES

Each IEP shall indicate the projected beginning date and the anticipated frequency, location, and duration for the special education and related services (including transition activities that are a special education or related service), supplementary aids and services, and modifications. It is possible that beginning and ending service dates may vary throughout the year and should be indicated as such on the IEP.

For data collection purposes KSDE requires that the frequency of the services and modifications be reported as minutes/days/weeks. This would indicate how many minutes per day, how many days per week, and how many weeks per school year the services would be provided. This information would be determined at the IEP team meeting when decisions are being made about what services will be provided.

Sometimes it is difficult to be precise in determining just how much service will be required throughout the year. Sometimes services are provided on a situational basis, such as “reading the math test to the child.” The IEP should not indicate these services are “as needed.” The IEP has to describe when and how the service will be provided throughout the year. For example, the IEP might say that the math teacher gives a weekly math test over work covered each week, gives a chapter test at the end of each chapter, and the student is taking the State math assessment during the year. The student will go to the resource room to have each of these math tests read to the student. For reporting purposes you might estimate based on historical events or current information (use of existing data) that the total anticipated amount of time would be 1.5 hours per week over 36 weeks—or 90 minutes 1 day per week for 36 weeks.

In the context of an IEP, the location of services does not refer to the physical location where services will be provided, rather, location refers to the type of educational environment where the services will be provided. This should be described in the IEP so that the parents and the IEP team members will know, for example, whether the child is to receive services, in a regular classroom or a resource room (64 Fed. Reg. 12406, 12594 (Mar. 12, 1999)). KSDE requires the use of specific building codes and placement settings for reporting purposes. (For information on reporting frequency, location, and duration of services to KSDE see the "Data Dictionary" (revised annually) at <https://www.ksde.org/Default.aspx?tabid=519>.)

The amount of services to be provided must be stated in the IEP so that the level of the school's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP (Federal Register, August 14, 2006, p. 46667). In addition, the IEP team addresses the extent, if any, to which the child will not participate with children without disabilities in the general education curriculum and nonacademic activities.

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## H. HOME SCHOOLING

School districts are required through their Child Find duties to locate, identify, and evaluate all children residing in the school district, including those who are home schooled. However, public schools are not required to make a free appropriate public education (FAPE) available to home-schooled children unless their parents choose to enroll them in the public schools. Therefore, if a home-schooled child is found to be a child with an exceptionality, parents should be informed, in writing, that special education and related services are available if the child is enrolled in the public schools and that the school district "stands ready, willing, and able to provide a free appropriate public education" to the child upon enrollment.

Under Kansas law, it is the duty of the parent of a child with a disability (does not include gifted) to require their child to attend school to receive special education and related services in the child's IEP or the parent must provide such services privately (K.S.A. 72-3421). This requirement is in addition to and goes beyond the standard Kansas compulsory attendance statute at K.S.A. 72-3120. Thus, if the school district is aware that an eligible child is not receiving needed special education and related services due to the parents' refusal to provide or accept the needed services, the school must determine if it is necessary to report the child as a child in need of care as a result of truancy to the Kansas Department of Children and Families (DCF), if the child is under age 13, and to the District or County Attorney if the child is between the ages of 13 and 18. When making this determination, school districts should examine whether the parent has exercised their right to refuse consent for initiation of services or to revoke consent for all services.

Under the definition in State law, home schools are not elementary or secondary schools or "educational institutions." Home schools also do not fit the definition of a private school, which means "an organization which regularly offers education at the elementary or secondary level, which is exempt from federal income taxation under section 501 of the federal internal revenue code of 1954, as amended, which conforms to the civil rights act of 1964, and attendance at which satisfies any compulsory school attendance laws of this state" (K.S.A. 72-3461(c)). Public schools are also not required to permit part-time enrollment of home-schooled children for purposes of receiving special education and related services; however, whatever policy on part-time enrollment a local school district adopts must treat home-schooled children in a non-discriminatory manner. Although public schools are not required to provide special education and related services for home-schooled children, they may elect to do so. Children with disabilities in home schools also do not qualify for special education services under the rules regarding services to private school children.

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## I. SERVICES IN LOCAL DETENTION FACILITIES AND DEPARTMENT OF CORRECTIONS FACILITIES

The local school district is required to provide FAPE according to an IEP that meets the requirements of federal and state laws and regulations to each student with a disability detained or incarcerated in a local juvenile or adult detention facility located within its jurisdiction. The requirements concerning placement and LRE may be modified in accordance with the student's detention or incarceration.

If a student is in a juvenile correctional facility, the Secretary of Corrections (Kansas Department of Corrections (DOC)) is obligated to make FAPE available according to an IEP that meets the requirements of federal and state statutes and regulations for each student with a disability. Requirements concerning parental rights, placement, and LRE may be modified in accordance with state and federal laws and the student's conditions of detention or incarceration.

If a student is in a State adult correctional facility, the Secretary of Corrections (DOC) is obligated to make FAPE available according to an IEP that meets the requirements of federal and state laws and regulations for each student with a disability. However, the correctional institution or facility may modify the student's IEP or placement if it can demonstrate a bona fide security or compelling penological interest that cannot otherwise be accommodated. The following statutes and regulations are not required for students in adult correctional facilities:

- participation of students in state or local assessments; and
- transition planning and services with respect to any disabled student whose eligibility for special education services will end, because of the student's age, before the student is eligible to be released from the correctional facility based on consideration of the student's sentence and eligibility for early release.

A student previously identified as gifted only is not entitled to receive special education services while incarcerated. A student age 18 or over, who is incarcerated in an adult correctional institution or facility and was not identified as a student with a disability and did not have an IEP in their educational placement prior to incarceration, is not entitled to FAPE (K.A.R. 91-40-5).

**K.A.R. 91-40-5. FAPE for detained or incarcerated children with disabilities.**

(a) Local detention facilities.

(1) Subject to the provisions of K.S.A. 72-3122 and amendments thereto, each board shall provide FAPE to each child with a disability detained or incarcerated in a local juvenile or adult detention facility located within its jurisdiction.

(2) The requirements in this article concerning placement and LRE may be modified in accordance with the child's detention or incarceration.

(b) State juvenile correctional facilities.

(1) The commissioner of the juvenile justice authority shall make provision for FAPE for each child with a disability detained or incarcerated in any state juvenile correctional facility or other facility at the direction of the commissioner.

(2) The requirements in this article concerning parental rights, placement, and LRE may be modified in accordance with state and federal laws and the child's conditions of detention or incarceration.

(c) State adult correctional facilities.

(1) Except as otherwise provided in this regulation, provision for FAPE shall be made by the secretary of corrections for each child with a disability incarcerated in any state correctional institution or facility.

(2) In making provision for FAPE under paragraph (1) of this subsection, compliance with state or federal laws or regulations relating to the following shall not be required of the secretary of corrections:

(A) Participation of children with disabilities in state or local assessments; and

(B) transition planning and services with respect to any disabled child whose eligibility for special education services will end, because of the child's age, before the child is eligible to be released from the secretary's custody based on consideration of the child's sentence and eligibility for early release.

(3) Provision of FAPE to any person incarcerated in a state correctional institution or facility shall not be required by the secretary of corrections if the person meets both of the following criteria:

(A) The incarcerated person is at least 18 years of age.

(B) The incarcerated person, in the person's last educational placement before incarceration, was not identified as a child with a disability.

(4) (A) Except as otherwise provided in paragraph (4)(B) of this subsection, the IEP team of a child with a disability incarcerated in a state adult correctional institution or facility may modify the child's IEP or placement if personnel of the correctional institution or facility demonstrate a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(B) An IEP team of a child with a disability incarcerated in a state adult correctional institution or facility shall not modify the following requirements:

(i) That any decision regarding modifications to, and reviews and revisions of, any IEP shall be made by the IEP team; and

(ii) that, except as otherwise expressly provided in paragraph (c)(2), each IEP shall have the content specified in K.S.A. 72-987 and amendments thereto.

## J. FACILITIES

State regulations at K.A.R. 91-40-52(d), include specific provisions regarding the facilities provided for the education of children with exceptionalities. This regulation requires each agency to provide facilities for children with exceptionalities that are comparable to those for nonexceptional children. This could be within the same school building as children without exceptionalities or in a separate facility solely for children with exceptionalities. All facilities must be age-appropriate environments and be appropriate for the instructional program being provided.

**K.A.R. 91-40-52. School district eligibility for funding; facilities.**

(d) Each agency shall ensure that all of the following requirements concerning facilities are met:

(1) All facilities for exceptional children shall be comparable to those for non-exceptional children within the same school building.

(2) If an agency operates a facility solely for exceptional children, the facility and the services and activities provided in the facility shall be comparable to those provided to nonexceptional children.

(3) All facilities for exceptional children shall be age-appropriate environments, and each environment shall be appropriate for the instructional program being provided.

## K. QUALIFIED SPECIAL EDUCATION PERSONNEL

Each school district must ensure that all personnel necessary to carry out the requirements of IDEA are appropriately and adequately prepared and trained. All special education personnel, as appropriate, shall have the content knowledge and skills to serve children with exceptionalities. This includes special education teachers, related services personnel and paraeducators. School districts must take steps to actively recruit, hire, train, and retain qualified personnel to provide special education and related services to children with disabilities. (34 C.F.R. 300.156; 34 C.F.R. 300.207).

Related services personnel must meet the qualifications of the Kansas licensing agency that apply to the professional discipline in which those personnel are providing special education or related services. Paraeducators must meet the requirements outlined in the "Special Education Reimbursement Guide State Categorical Aid," at <https://www.ksde.org/Default.aspx?tabid=538>.

Each teacher employed by a public school as a special education teacher must meet KSDE qualifications (34 C.F.R. 300.156(c)). This requirement does not apply to teachers hired by private elementary schools and secondary schools including private school teachers hired or contracted by the school to provide equitable services to parentally-placed private school children with exceptionalities (K.A.R. 91-40-43(e)).

Special education teachers who provide "direct instruction" in one or more core content areas will need to meet State requirements for the content area(s). The content requirements pertain only to individuals who are coded as "special education" teachers in the Licensed Personnel Report and who provide direct instruction in a core content area(s) (English Language Arts, Science, Social Studies or Math) for one or more children. Direct instruction is defined as being either the teacher of record or the teacher responsible for introducing new content material and providing initial instruction.

Special education teachers who provide "direct instruction" in English Language Arts, Science, Social Studies, or Math have three different options available to use when demonstrating subject matter competency:

1. appropriate content endorsement on teaching license has been designated "HQ", or
2. pass the appropriate content test (PRAXIS II), or
3. document eleven or more checks on the Kansas HOUSSE document for special education teachers.

For additional information, and to obtain a copy of the Kansas HOUSSE document, go to the Teacher Licensure and Accreditation (TLA) website at <https://www.ksde.org/Default.aspx?tabid=388> (Special Education/ESOL Checklist).

### **K.A.R. 91-40-43. Services to private school children.**

(e) Each board shall ensure that the special education and related services provided to private school children are provided by personnel who meet the same standards as the standards for public school personnel, except that private school teachers who provide services to private school children shall not be required to be highly qualified under the federal law.

34 C.F.R. 300.156. Personnel qualifications. (a) General. The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(b) Related services personnel and paraprofessionals. The qualifications under paragraph (a) of this section must include qualifications for related services personnel and paraprofessionals that—

(1) Are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and

(2) Ensure that related services personnel who deliver services in their discipline or profession—

(i) Meet the requirements of paragraph (b)(1) of this section; and

(ii) Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services under this part to children with disabilities.

(c) Qualifications for special education teachers.

(1) The qualifications described in paragraph (a) of this section must ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school—

(i) Has obtained full State certification as a special education teacher (including certification obtained through an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in 34 CFR 200.56(a)(2)(ii) as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the teacher must meet the certification or licensing requirements, if any, set forth in the State's public charter school law;

(ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) Holds at least a bachelor's degree.

(2) A teacher will be considered to meet the standard in paragraph (c)(1)(i) of this section if that teacher is participating in an alternate route to special education certification program under which—

(i) The teacher—

- (A) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;
  - (B) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;
  - (C) Assumes functions as a teacher only for a specified period of time not to exceed three years; and
  - (D) Demonstrates satisfactory progress toward full certification as prescribed by the State; and
- (ii) The State ensures, through its certification and licensure process, that the provisions in paragraph (c)(2)(i) of this section are met.
- (d) Policy. In implementing this section, a State must adopt a policy that includes a requirement that LEAs in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in paragraph (c) of this section to provide special education and related services under this part to children with disabilities.
- (e) Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to meet the applicable requirements described in paragraph (c) of this section, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part.

**34 C.F.R. 300.146. Responsibility of SEA.**

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

- (a) Is provided special education and related services—
  - (1) In conformance with an IEP that meets the requirements of §§ 300.320 through 300.325; and
  - (2) At no cost to the parents;
- (b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for § 300.156(c); and
- (c) Has all of the rights of a child with a disability who is served by a public agency.

**34 C.F.R. 300.207 Personnel development.**

The LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of § 300.156 (related to personnel qualifications) and section 2102(b) of the ESEA.

## QUESTIONS AND ANSWERS ABOUT SPECIAL EDUCATION AND RELATED SERVICES

### 1. What does a "free appropriate public education" or "FAPE" mean?

The term "free appropriate public education (FAPE)" is defined in regulation as special education and related services that are provided at no cost to the parent and in conformity with an individualized education program (K.A.R. 91-40-1(z)). In Endrew F. v. Douglas County School District, 117 LRP 9767 (S.C. 2017), the United States Supreme Court refined the legal standard for a free appropriate public education established in Rowley. The Court said in order to provide a free appropriate public education, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Rowley outlined a two-part inquiry to be used to determine whether FAPE has been provided that is still followed: 1) Were the procedural requirements of IDEA met? and 2) Is the IEP reasonably calculated to provide some (more than trivial) educational benefit? The importance of the procedural requirements were diminished in the 2004 revision of the Individuals with Disabilities Education Act. The statutes were amended to limit a hearing officer's authority by stating that any determination of whether a child has received a FAPE must be based on substantive grounds. The amendment to the statutes further clarified that a hearing officer may determine that a procedural violation denies a child a FAPE only if the procedural violations: (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process; or (c) caused a deprivation of education benefit. 20 U.S.C. 1415(f)(3)(E)

### 2. What will a court consider in determining the adequacy of an IEP?

The adequacy of an IEP (whether it is reasonably calculated to enable the child to receive a meaningful educational benefit) is limited to an assessment of the terms in the written document itself. Only those services identified or described in the IEP will be considered in evaluating the appropriateness of the IEP. Oral agreements are not enforceable, so parents and school personnel should review the final IEP document to assure that it is written carefully and accurately reflects the decisions made at the meeting. See Sytsema v. Academy School District No. 20, 538 F.3d 1306, 50 IDELR 213, (10th Cir. 2008).

### 3. Once a child is determined eligible as gifted, what services is the child entitled to?

As with all children with exceptionalities, services for children who are gifted are determined on an individual basis by the IEP team. The IEP team will determine the special education, related services and supplementary aids and services necessary for the child to advance appropriately toward meeting the child's annual goals. There may be a need to expand, enrich, or accelerate the curriculum. Children may test out of certain required classes or prerequisites in order to enroll in more advanced subjects if so specified in their IEP. Advanced placement or honors classes may be appropriate. In many areas, high school students are allowed to enroll in classes at a nearby community college or university. If a gifted student chooses to receive college credit for such classes the student is

responsible for tuition costs (K.A.R. 91-40-3(h)). Students identified as gifted only are not entitled to extended school year or services in a correctional facility.

A child may be found eligible as having both giftedness as defined by KAR 91-40-1 and as having a disability area under IDEA. The child must meet the eligibility criteria for both the disability and giftedness. If a child is identified for both gifted and a disability, the disability should be entered as the primary exceptionality in the MIS system.

Children who are identified as both a child with a disability and gifted may receive any related services for which there is a documented need. Children identified only as gifted may receive only the related services of counseling services, parent counseling, school psychological services, school social work services, and transportation. Even if the child shows a weakness in an area (such as written language), the child cannot be provided with a related service to address the weakness unless the child meets the eligibility criteria for a disability under IDEA.

**4. Depending on the individual situation, could a school be required to provide a computer or other assistive technology for a child with a disability in order to allow that child to remain in the least restrictive environment?**

Yes. Children with disabilities are entitled to special education and related services, as well as supplementary aids and services. As such, if an assistive technology evaluation demonstrated that the child needs an assistive technology device (e.g., software, computer, writing aids, prone stander, etc.) to remain in the least restrictive environment, the IEP team would list that service on the IEP, and the school must provide it or ensure that it is provided.

**5. May an IEP include only related services?**

If a child with a disability only needs related services but does not need special education (specially designed instruction), the child does not meet prong 2 of the eligibility test and would not then qualify to have an IEP. However, in some instances a related service can be special education, rather than a related service. The federal regulations implementing the IDEA state that special education “includes any related service if the service is considered special education rather than a related service under State standards” (34 C.F.R. 300.39(a)(2)(i)). Accordingly, in Kansas, the state regulations provide that “special education means any related service if the service consists of specially designed instruction to meet the unique needs of a child with a disability” (K.A.R. 91-40-1(kkk)(2)). Further, the Kansas regulations also provide that “special education means occupational or physical therapy and interpreter services for deaf children if, without any of these services, a child would have to be educated in a more restrictive environment” (91-40-1(kkk)(3)).

Thus, if the team determines a child with a disability needs a service that meets these criteria, the child needs special education and meets the second prong of the eligibility test. As a result, that service should be included in the IEP with at least one annual goal. This determination must be made based on the child’s individual needs, not based on the child’s disability category.

**6. If providing transportation as a related service is not necessarily determined by the unique needs of a child’s disability, when must transportation be provided for a child with an exceptionality?**

Transportation must be provided if the IEP team determines it is necessary for a child with a disability to benefit from special education. In *Donald B. v. Bd. Of Sch. Comm. Of Mobile County, Ala.*, 26 IDELR 414 (11th Cir. 1997), the court said that the following factors may be considered when making this determination (1) the age of the student; (2) the distance that must be traveled; (3) the nature of the area through which the child must pass; (4) the child’s access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit. Safety was a primary concern for this court in each of the first three factors. This case involved a child with a speech impairment who was fully mobile. Though not at issue in this case, if the child had an intellectual disability, a court or investigator would likely also consider the capacity of the child to safely walk to school. This list is not exhaustive.

**7. If the school has a school-wide reading program, and the whole school is teaching reading during first hour, is it permissible for the special education teacher to teach reading during first hour?**

Yes. This is permitted under the IDEA, either in the special education class (no incidental benefit), or in the general education setting (with incidental benefit). In either situation, the IEP goals of children with disabilities must be addressed appropriately. According to Federal regulation 34 C.F.R. 300.206(b)(2), this proportionate share of funds may be used without regard for the requirements for expenditures for children with disabilities in the Act. This would include special education and related services and supplementary aids and services provided in a general education

class or other education-related setting to a child with a disability, in accordance with the IEP of the child, even if one or more children without disabilities benefit from these services.

**8. May special education paraeducators provide services to children outside of the classroom? For example, may they assist during recess, lunch, and other school activities?**

Yes. The IEP team is to determine and address needs of the child during nonacademic and extracurricular activities, as appropriate. If paraeducator services are needed at recess, lunch, club activities, and other times identified by the IEP team, they would be included on the child's IEP.

**9. May special education paraeducators be assigned to general school duties such as parking lot, recess, lunch, etc.?**

The answer to this question would depend on individual job requirements and district policy and expectations. This is also a funding issue. It may mean that the paraeducator working with general education for a period of time may not be reimbursed from special education funds for that period. The district may have State special education funds prorated. Categorical aid reimbursement is based on the percentage of the paraeducator's time being devoted to support activities that are directly related to implementing the child's IEP.

**10. May special education paraeducators be asked by their supervising teacher or other professional to assist with bulletin boards, duplication of materials, clerical duties, and the like?**

Again, the answer would depend on the activities related to the child's IEP, individual job requirements, and district policy and expectations. There may be funding considerations as in Question #9.

**11. Is secondary transition considered services or activities?**

Secondary transition can include both special education and related services and activities. Transition services are defined as a coordinated set of activities that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post school activities. Transition services that are special education and related services require a projected start date and specified frequency, location, and duration of those services or modifications. IEP teams should consider special education legal requirements to ensure that IEPs clearly delineate which transition services are special education and related services and require a projected start date and specified frequency, location, and duration and which transition services are activities that do not require a projected start date and specified frequency, location, and duration.

**12. May the IEP of a child include transition services at a job located outside of district boundaries?**

Yes, however, this would only apply if the child was placed in that job through a specific provision in the IEP. The district would need to provide support for the child on-the-job if it was indicated on the child's IEP. The district could contract with another entity for the support needed by the child. The district would not be required to provide job support outside of its district if the job placement was made by individuals other than school personnel and it was not a part of the IEP team decision.

**13. The law says that each child with an exceptionality must have an IEP in effect at the beginning of each school year. Does that mean that the child must begin to receive the special education and related services specified in the IEP on the very first day of school?**

It depends on the frequency, location, and duration of services documented in the child's IEP. The IEP team must make an individual determination regarding when special education and related services will begin and end for each child. Some services may not be provided to the child until the 2nd quarter or second semester of the school year. Some children with exceptionalities may benefit from having the first week of school in general education in order to acclimate to new general education teachers, classrooms, expectations, and routines. Other children, such as children with autism, may need services beginning the very first day of school. Decisions regarding when special education and related services will begin for a new school year are not to be based on convenience of school staff, but the individual needs of each child. If the IEP is silent regarding provision of services during the first and last weeks of a school year, parents often presume that services will be provided during that time. The IEP is to indicate when services begin and the frequency, location, and duration of the services. This is to be clear to the parents and the providers.

**14. Do special education and related services missed due to events beyond the control of the school (e.g., school closure due to weather, mandatory emergency drills, or absence of the child) have to be made up at a later date?**

As discussed within this chapter, the IEP team must consider the services needed for the child to address IEP goals, access the general curriculum, and participate in extracurricular and nonacademic activities with children without disabilities. In this context, the team should also discuss what is to be done when services are missed. For example, if a child with learning disabilities needs help taking tests, that service isn't needed if the school is closed. However, if regular, ongoing physical therapy is needed to maintain mobility, the team must find a way for the service to be provided if school is closed.

Another consideration for the IEP team is whether a number of missed services would constitute a denial of FAPE. Again, the team would create a plan for those circumstances.

**15. What level of involvement is allowed of the special education teacher in the general education classroom?**

A certified special education teacher cannot be the teacher of a general education classroom and be considered a special education teacher for full categorical aid reimbursement just because there are children with exceptionalities in the classroom. Special education teachers and related services personnel may co-teach with a general education teacher, or be in the general education classroom working with children with exceptionalities. The other children in the general education classroom could receive benefit from the instruction of the special education teacher when provided to exceptional children. In addition, special education staff may provide direct instruction to nondisabled children if it is part of a general education intervention plan (GEI). Under this GEI provision, special education or other related service personnel may be reimbursed for providing intensive direct instruction for up to but not more than 180 cumulative hours, per school year, **per position**. When using special education staff to provide general education interventions, there are additional documentation requirements for auditing purposes. See Special Education Reimbursement Guide State Categorical Aid, <https://www.ksde.org/Default.aspx?tabid=538>.

**16. What if the IEP team determines that a student is eligible for ESY services and the parent indicates the student will not be participating due to other summer commitments?**

If ESY is in the child's IEP and the parent refuses the services, then the parent may be in violation of the State's special education compulsory attendance statute. (K.S.A. 72-3421) A parent who wishes to revoke consent for the particular ESY services may only do so in accordance with the procedures outlined in K.A.R. 91-40-27, which requires the IEP team to certify in writing that the revocation of the particular service would not prevent the student from receiving FAPE.

**17. What are the district's obligations for ESY if the student moves into the district when school is not in session?**

Because ESY is to be decided individually, the school should be prepared to review IEPs of students transferring into the district when school is not in session. See Chapter 4, Section G. TRANSFER WITHIN THE STATE AND FROM OUT OF STATE for more information about a school's options when a student moves into the district with an IEP. The school should review the current IEP to be confident that ESY was considered. If the school chooses to adopt the current IEP, they will be responsible for ensuring the adequacy of the special education and related services and for providing those services.

If the parent requests ESY the school has an obligation to either schedule an IEP team meeting to discuss ESY or to send a prior written notice as to why the school is refusing the parents request. The basis of the PWN should not merely be that school is not in session.

**18. Could related services include supports or interventions for mental health?**

Yes. Related services are developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. While the IDEA and state special education laws include a list of specific related services, that list is illustrative and does not represent all of the possible services that could be related services. If the IEP Team determines that a particular supportive service, which may include mental health supports, is necessary to assist an eligible child with a disability to benefit from special education and has included that service in the child's IEP, then the school must provide that services. Note that services which must be performed only by a licensed physician are medical services, and schools are only required to provide medical services when the IEP Team determines they are necessary for diagnostic or evaluation purposes – not as ongoing services to assist the child to benefit from special education.

**19. Could “medical services required for diagnostic or evaluation purposes” include medical services related to mental health?**

Yes. Schools are required to provide medical services (services that must be performed only by a licensed physician) when the IEP Team determines that medical services are required to determine a child’s medically related disability that results in the child’s need for special education and related services (diagnostic and evaluation purposes).

Medical services could include mental health services if those services require the training, knowledge and judgment of a licensed physician and are needed for diagnostic and evaluation purposes.