

GUIDANCE



2021 Spring and Summer Update: Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic

Asterisks () indicate new or revised material added since the previous version of this document.

The Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act require school districts to provide special education and related services to students with exceptionalities. The Kansas State Department of Education's (KSDE) Special Education and Title Services (SETS) team developed this document to provide a response to new questions we have received regarding special education requirements relevant to the circumstances that exist in Spring 2021. SETS originally developed COVID-19 guidance on March 16, 2020 and frequently issued updates to that guidance throughout the end of the 2019-2020 school year into the beginning of the 2020-2021 school year. Those previous guidance documents are archived on the KSDE [Special Education Services webpage](#)¹ because some of the questions addressed context that is no longer relevant to the current circumstances of Spring 2021.

Special education timelines and requirements are set forth in statute, which was written and enacted by the United States Congress and the Kansas Legislature. KSDE does not have the authority to alter or waive these statutory requirements and timelines.

The [Navigating Next](#)² document, released by the Kansas State Department of Education, is guidance. When a district creates its own plan for completing the 2020–21 school year and preparing for the start of the 2021-2022 school year, it must balance this guidance with the requirements of special education law, and the context for its staff and students, including any guidance or requirements issued by health officials.

This document is not intended to provide legal advice. For legal advice, consult with your attorney. Kansas State Department of Education staff are not permitted to provide legal advice.

¹ <https://www.ksde.org/Agency/Division-of-Learning-Services/Special-Education-and-Title-Services/Special-Education>

² <https://www.ksde.org/Teaching-Learning/Resources/Navigating-Change-Kansas-Guide-to-Learning-and-School-Safety-Operations/Navigating-Next>

A. Special Education Legal Questions

***Question A-1.** If a school district closes school buildings and does not offer live academic instruction (whether in-person or remotely) to any students on a particular day(s), but instead provides required independent work for students to do at their own pace, does this count as a school day and what considerations for students with IEPs should be kept in mind?

***Answer A-1.** Some specific examples where the answers below would apply might include: a day(s) when the weather is bad and school would normally be cancelled for a “snow day”; a day(s) when school would normally be cancelled because of a COVID-19 outbreak; a day(s) when teachers participate in training and school would normally be cancelled for a “professional development day”; a day(s) when students only spend time learning about social/emotional skills, general rules, and procedures rather than normal academic instruction.

1. The U.S. Department of Education’s Office of Special Education Programs (OSEP) issued [guidance on March 12, 2020](#)³ that stated, “If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE [free appropriate public education]. [S]chools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA, or a plan developed under Section 504.”
2. If a school district closes school buildings and does not offer classes on a particular day(s), but requires students to do independent work at their own pace on that day(s), KSDE considers that day(s) to be a “school day” (“any day, including a partial day, that children are at school for instructional purposes” 34 C.F.R. § 300.11(c)(1); K.A.R. 91-40-1(eee)). This means that the special education and related services specified in each student’s IEP must be implemented on that day(s).
3. If a school decides that all students will only spend time learning about social/emotional skills, general rules, and procedures rather than participating in normal academic instruction on a particular day(s), KSDE considers that day(s) to be a “school day” (“any day, including a partial day, that children are at school for instructional purposes” 34 C.F.R. § 300.11(c)(1); K.A.R. 91-40-1(eee)). This means that the special education and related services specified in each student’s IEP must be implemented on that day(s).

Question A-2. If a student with a disability is participating in remote or hybrid learning during the 2020-21 school year but the student is absent and not accessing the special education services made available online, what should be done? What is the parent responsibility and what is the school responsibility in this situation?

Answer A-2. There is a shared responsibility in this situation. The parent has a legal duty to make sure the student with a disability attends school to receive the services specified in their IEP, or to provide for those services privately [K.S.A. 72-3421(a)]. However, the parent obligation is not the only consideration when absence involves a student with a disability. There may be reasons connected with the disability or

³ <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/#Q-A-1>

a deficiency in the IEP that contribute to the student's absence. For that reason, when a student with a disability is missing school on a regular basis, the student's IEP team has a duty to assess the educational detriment the student is experiencing, any relationship between the absence and the disability, and whether additional IEP supports are needed to successfully address the absence. There is no formula for this process. It is a case-by-case individualized determination. The best single statement of this process is found in *Letter to Clarke* (48 IDELR 77, 2007) from OSEP. OSEP was asked how schools should handle absences, either absences of school staff members or absences of students. OSEP answered with the following:

[Y]ou requested written guidance on the need to use substitutes and to schedule **make-up sessions** when speech-language pathology sessions are missed due to **a child's absence** from school, cancellation for a class or school activity, or absence of the speech language pathologist. IDEA and the regulations do not address these issues. States and local educational agencies (LEAs) are required to ensure that all children with disabilities have available to them FAPE, consistent with the child's individualized education program (IEP) [see 34 C.F.R. § 300.101]. We encourage public agencies to **consider the impact of a provider's absence or a child's absence on the child's progress and performance** and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. **Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis.** [Emphasis added.]

The word "consider" in this guidance from OSEP is important. To "consider" means the IEP Team or school district must at least ask why the student is absent and whether additional IEP supports are needed to improve the student's attendance. It is not enough for a school district to simply put the parent on notice that the student is not attending or to take the position that absence is purely a parental responsibility.

Question A-3. What are the requirements for measuring and reporting a student's progress toward meeting the annual goals in the IEP if COVID-19 restrictions, such as social distancing or remote learning, make it difficult to assess the student?

***Answer A-3.** Schools must prioritize measuring and reporting student progress, regardless of the way in which instruction is provided (in-person, remotely, hybrid, virtual school). Each student's IEP includes a description of how the student's progress toward meeting the annual goals will be measured, and a description of when periodic reports on the progress the student is making toward meeting the annual goals will be provided [34 C.F.R. § 300.320(a)(3)(i)-(ii); K.S.A. 72-3429(c)(3)]. Note these laws provide for two different requirements regarding progress reports. First, the when: "*when periodic reports . . . will be provided.*" [Emphasis added.] Also, the what: "*reports on the progress the child is making toward meeting the annual goals.*" [Emphasis added.]

IEP goal progress must be measured and reported as specified in each student's IEP. If COVID-19 restrictions or alternative instructional models make it difficult to measure or report progress in the manner specified in the IEP, the student's IEP Team must determine how to appropriately measure and report progress and revise the IEP accordingly. Changes to IEP goals and descriptions of progress measurement and reporting do not require parent consent. However, any change to an IEP must be made in an IEP Team meeting or through agreement with the parent to amend the IEP without a meeting. A prior written notice (PWN) must also be provided to the parent any time the IEP is changed.

Question A-4. In an effort to reduce the spread of COVID-19 in school buildings, may a school district group students into cohorts that stay together all day without changing classrooms and interacting with other students, or would this practice be in conflict with the educational placements of students with disabilities? What is the implication if all students with disabilities are grouped together in a cohort? What is the implication if a student is grouped in a regular education cohort, but his/her IEP states that he/she must receive specially designed instruction in the resource/special education classroom during a portion of the day (e.g. math class)?

Answer A-4. Educational placement and least restrictive environment (LRE) are about the extent to which a student with a disability participates with students who do not have a disability. The less a student participates with students who do not have a disability, the more restrictive their educational placement is, and vice versa. The educational placement of a student with a disability on the LRE continuum a) is made by a group of persons knowledgeable about the student, the meaning of evaluation data, and the placement options (typically the student's IEP team) and b) is based upon the services and supports required by the student's IEP. Further, the law requires that to the maximum extent appropriate, students with disabilities must be educated with students who do not have disabilities. The law also requires that special classes, such as a resource/special education environment, or other removal of students with disabilities from the regular education environment must occur only if the nature or severity of the disability is such that education in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. [See 34 C.F.R. §§ 300.114 and 300.116]. This is to say that LRE is determined based on the student's disability and the needs that result from that disability, not from unrelated universal factors such as a pandemic. In addition, each student's IEP must include an explanation of the extent, if any, to which the student will not participate with students who do not have disabilities in the regular class and in extracurricular and other nonacademic activities. [See 34 C.F.R. § 300.320(a)(5)]. All of these requirements mean the following:

1. Each student's IEP is individualized and requires a specific educational placement. One IEP might place a student in the regular education environment (participating with students who do not have disabilities) for the entire school day. Another IEP might place a different student in the special education environment (not participating with students who do not have disabilities) for the entire school day. Yet another IEP might place a third student in the regular education environment for part of the school day and in the special education environment for the other part of the school day. Schools must ensure that each student with a disability is placed in the educational environment required by their IEP. Thus, grouping all students with IEPs together for the entire school day is likely to conflict with the educational placement required by at least some, if not most, of those students' IEPs.
2. If an administrator, parent, or other member of a student's IEP Team wants to change the educational placement required by the student's IEP (to a more restrictive or less restrictive environment), then the IEP Team must make that determination based on the nature or severity of the student's disability. It would be inappropriate and inconsistent with the law [34 C.F.R. § 300.114 through 300.117] to change the student's placement because of parental preference or other factors unrelated to the nature or severity of the student's disability, such as administrative convenience or social distancing protocol.
3. If a student's IEP requires that the student will not participate with students who do not have disabilities during a portion of the day (e.g. math class), then that student must not participate with students who do not have disabilities during that time period (e.g. math class). With that said, walls do not make educational placements or environments. It is not necessary that a

student with an IEP that requires a special education environment during math class be in another room separate from students without disabilities during math. For example, during math class, this student could stay in the regular education classroom if a special education teacher works with this student and other students with disabilities in a different area of the classroom. The important points here are that, although in the same physical room, the student with a disability is working with a special education teacher and other students with disabilities for math instruction, and this student is not participating with students who do not have disabilities for math instruction.

4. If a school or IEP Team refuses a parent's requests to change their student's educational placement, the parent must be provided with prior written notice of the refusal within 15 school days of receiving the parent's request. Further, if an IEP Team determines that it is appropriate to change the educational placement of a student based on the nature or severity of the student's disability, the parent must be provided with prior written notice of the proposed change a reasonable time before the change in placement is implemented [see 34 C.F.R. § 300.503(a)(1)-(2)]. In addition, if the change in educational placement is a "substantial change in placement", parent consent must be obtained before the change can be made [see K.S.A. 72-3430(b)(6)]. A "substantial change in placement" means "the movement of an exceptional child, for more than 25% of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment" [see K.A.R. 91-40-1(sss)].

Question A-5. Should IEP Teams add extended school year services (ESY) to every student's IEP as a way to make up for learning loss that was caused by COVID-19 school closures and service interruptions?

Answer A-5. No. Not every student with a disability will need ESY. KSDE's guidance on extended school year is located in Chapters 4 and 5 of the [Kansas Special Education Process Handbook](#)⁴. Families and school staff are encouraged to review this guidance; it has not changed due to circumstances related to COVID-19. **Extended school year services are** defined in both federal and state special education regulations as "special education and related services that are provided to a child with a disability **beyond the normal school year** of the public agency **in accordance with the child's IEP** and at no cost to the parents of the child" [34 C.F.R. § 300.106(b); K.A.R. 91-40-1(x)]. ESY must be provided only if an IEP team determines, on an individual basis when developing, revising, or reviewing the IEP, that the services are necessary for the provision of FAPE to the student with a disability [34 C.F.R. § 300.106(a)(2); K.A.R. 91-40-3(e)]. The need for ESY is not triggered by an interruption or gap in providing IEP services. Rather, the purpose of ESY is to provide special education and related services beyond the duration of a school year or school day to a student with a disability who would be likely to regress significantly when school is not in session. Typically, a student's IEP team determines whether ESY services should be included in the IEP during an annual IEP review meeting. This determination is made based on factors set forth in federal special education case law. Schools in Kansas are under the jurisdiction of and bound by the 10th Circuit Court of Appeals. The 10th Circuit, in *Johnson v. Bixby Independent School District 4*, 921 F.2d 1022 (10th Cir. 1990), established the standards and considerations that IEP teams must use in making ESY eligibility determinations. See Chapter 5, Section F. of the [Kansas Special Education Process Handbook](#)⁵

⁴ <https://www.ksde.org/Default.aspx?tabid=598>

⁵ <https://www.ksde.org/Default.aspx?tabid=598>

for a full description of this case law and how IEP teams must determine whether ESY is needed in the IEP of a student with a disability.

Question A-6. If a school district offers summer education programming to all students, what must be offered to students with disabilities who have IEPs that do not include ESY?

Answer A-6. Providing summer school to all students, including students with disabilities, is not the same as ESY. If a student with a disability whose IEP does not include ESY is attending a summer program for general education purposes, the school shall consider what reasonable accommodations/modifications may be necessary for the student to have an equal opportunity to participate in the summer program. The necessary supports can be provided through a 504 plan. (This answer is taken from Chapter 5, Section F, of the [Kansas Special Education Process Handbook⁶](#).)

Question A-7. If a district is part of an interlocal or cooperative, is the district or the cooperative/interlocal responsible for providing the supports a student with a disability will need in order to have an equal opportunity to participate in a district summer program for all students (when the program is not ESY and not additional special education and related services that the IEP Team determined the student needs to get back on track toward achieving IEP goals)?

Answer A-7. The district providing the summer program for all students is responsible. If the district is looking to the cooperative or interlocal to provide these supports, staff involved will need to look to their cooperative or interlocal agreement to see if a summer program is covered, when it is not needed for ESY or for compensatory kinds of services. If staff have questions on how to interpret their cooperative or interlocal agreement, they should contact the attorney that represents their district, cooperative, or interlocal.

Question A-8. What should school districts keep in mind when making decisions about participation of students with disabilities in summer programs and ESY?

Answer A-8.

- a. As school districts are planning for supporting students with disabilities over the summer, both with the district's summer programs and ESY, the district should work toward integration so that these efforts do not operate in isolation and so that a student whose IEP requires ESY also has the opportunity to participate in the summer programs offered to all students.
- b. IEP Teams should make individualized decisions about what a student needs and where the student will be served, based on those needs [K.S.A. 72-3429(c)(7); K.A.R. 91-40-3(e)]. Districts must provide nonacademic and extracurricular services and activities in the manner necessary to provide a student with a disability an equal opportunity to participate in those services and activities, including the provision of supplementary aids and services as determined to be necessary by the student's IEP team [K.A.R. 91-40-3(b)(1)].
- c. IEP Teams must, as always, listen to parent input regarding student needs [K.S.A. 72-3429(d)(1)].
- d. School officials have an obligation not to discriminate on the basis of disability under Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973,

⁶ <https://www.ksde.org/Default.aspx?tabid=598>

while cooperating with public health authorities to ensure that students with disabilities have access to the school's education program. This guidance is consistent with and based upon the OCR [Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students](#)⁷. Work to ensure that your district is not discriminating in its summer program offerings.

- e. If a parent expresses concern about how ESY will be provided, try to be flexible. For example, the IEP Team for a student decides that the student would benefit from receiving services in a school building during ESY, but the parent is uncomfortable bringing the student into a building, but would like to continue with remote services. Districts should work to be flexible in how they serve a student during ESY so that the parent will feel comfortable to make the student available to receive services.

***Question A-9.** What factors should IEP Teams consider when determining whether a student with an IEP needs additional special education and related services to address a lack of appropriate progress due to the COVID-19 pandemic? When should these determinations be made?

***Answer A-9.** Where, due to the COVID-19 pandemic, there was an interruption in providing IEP services, IEP teams must make an individualized determination about whether and to what extent additional special education and related services are needed for a student to address a lack of appropriate progress. A student's IEP team should consider the extent to which the student failed to make appropriate progress both toward attaining their IEP goals and in the general education curriculum (or advanced curriculum for gifted students). The IEP team should compare the last source of data prior to the COVID-19 service interruption with the student's current levels of academic achievement and functional performance. The team could use progress monitoring results, or information from informal assessments or screenings. Additional special education and related services may be necessary if the student's lack of appropriate progress occurred as a result of not receiving appropriate access to IEP services due to school building closure(s), changes in instructional model, or other factors due to COVID-19 (such as student absence or provider absence).

To determine whether the student failed to make appropriate progress, compare the progress the student was expected to make (had school continued as normal without COVID-19 interruptions) to the progress the student actually made during the time period when COVID-19 interruptions occurred. If progress is slower than expected for a particular student in light of their unique circumstances, then the student likely requires additional special education and related service. The IEP team should also consider the amount of review and other remedial activities that will be provided to all students to address the loss of instructional time as well as consideration of information from the district's multi-tiered system of supports.

IEP teams must make these determinations on an on-going basis and should not wait for schools to return to normal operations. The IEP team determines whether the student needs additional services, the type and amount of services needed, and how those services will be delivered. Any services provided to address a lack of appropriate progress during school building closure(s) or during remote or hybrid instruction should not supplant the current IEP services. The IEP team should document the offer of services via a prior written notice (PWN). Additionally, the IEP team must determine whether any changes to the student's current IEP services are needed as a result of extended absences from school

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>

or changes in the model of instruction (remote/hybrid). Finally, IEP teams should consider whether any student with an IEP who graduated with a regular high school diploma or reached age 21 during the 2019-20 or 2020-21 school year needs additional services to address a lack of appropriate progress due to COVID-19 interruptions.

***Question A-10.** Can a student with an IEP who needs additional special education and related services to make up for a lack of appropriate progress caused by COVID-19 interruptions receive those additional services through the summer program offered to all students?

***Answer A-10.** Whether a student with an IEP needs additional special education and related services to make up for a lack of appropriate progress caused by COVID-19 interruptions is an individualized determination to be made by the student's IEP Team (see A-9 above). Districts absolutely can and should integrate additional special education and related services into summer programs for all students, when appropriate for an individual student. This should be done in such a way that gives the student an equal opportunity to participate in the summer program for all students and to receive additional special education and related services, when needed. A student with a disability and an IEP who wants to participate in the summer program for all students must be permitted to do so, even if that student is also participating in ESY or receiving some other additional special education and related services to make up for a lack of appropriate progress.

***Question A-11.** What if a district offers additional special education and related services to a student with an IEP during the summer and the parents decline those additional services?

***Answer A-11.** If a student needs additional special education and related services to make up for a lack of appropriate progress caused by COVID-19 interruptions and the district proposes to offer those services in the summer, this offer should be made in a prior written notice (PWN). If the parents refuse the services, the district should document this refusal and could do so in a letter to the parents indicating the district is ready, willing, and able to provide these services over the summer. Because of the very unusual circumstances created by the COVID-19 pandemic and the variety of reasons a parent may decline additional services over the summer, the district should consider offering these additional services again during the school year. As always, the IEP Team would have to consider lack of appropriate progress when applicable and that may lead an IEP Team to recommend additional services next school year to ensure a student receives FAPE.

***Question A-12.** If a school district does not have a virtual school/program, are they required to create one for next school year (2021-2022) when remote learning is no longer allowed? What if a parent wants their student with an IEP to attend a virtual school/program but their home district does not have one?

Answer A-12. No, school districts are not required to create virtual schools/programs. A virtual school/program is an alternative instructional delivery model; it is not an educational placement on the least restrictive environment (LRE) continuum.

As stated in the Learning Environment Considerations section of the KSDE [Navigating Next](#)⁸ document, remote learning will not be an option for students who do not wish to attend an on-site learning environment for the 2021-2022 school year. A parent who lives in a school district without a virtual

⁸ <https://www.ksde.org/Teaching-Learning/Resources/Navigating-Change-Kansas-Guide-to-Learning-and-School-Safety-Operations/Navigating-Next>

school/program and wants their student to attend a virtual school/program next school year has the option to apply to any existing Kansas virtual schools/programs that accept out-of-district students. A downloadable directory of virtual schools/programs in the state can be found on the KSDE [virtual schools and programs webpage](#)⁹.

Question A-13. If a parent wants their student with a disability to participate in a virtual school or virtual program for the 2021-22 school year but school administrators or the other members of the student's IEP Team believe the student could or should attend school onsite in a school building instead, how should this be addressed?

Answer A-13. If a parent wishes for their student to participate in a virtual school or virtual program, the student meets the non-discriminatory admissions criteria that apply to all students, and the other members of the student's IEP Team do not believe that the parent's choice will provide the student with FAPE in the LRE, then the offer of FAPE should be kept intact in the student's IEP. However, the IEP Team should also create a temporary plan for services and supports within the IEP needed for the student to participate in the alternative option chosen by the parent. Here are some guidelines to consider when creating such a plan:

1. Categorical aid is only available for services that are listed within a student's IEP. With that in mind, the IEP Team should include the temporary plan within the IEP document, rather than in a PWN or other separate document.
2. This temporary plan should include language indicating that the IEP Team does not believe the student's participation in the parent's chosen alternative option provides the student with a FAPE. However, because the student meets the non-discriminatory admissions criteria that applies to all students, the student will participate in the alternative option at the parent's request.
3. The plan should also indicate that the change in services and supports articulated for the student's participation in the virtual school or virtual program are temporary and will apply only until such time as the student leaves the virtual school or virtual program, at which time the original set of services and supports in the IEP developed prior to the student's participation in the virtual school or virtual program will resume automatically without any action of the IEP team and without any additional notice or parent consent.
4. If there are any services and supports that the IEP Team determines cannot reasonably be provided in the virtual setting, the IEP Team should make that clear to the parent and state in the plan that those services and supports will be provided on site at the school building. Note that this should not be an "all or nothing" offer, meaning that all of the services and supports that can be reasonably provided in the virtual setting should be provided; then only the remaining services and supports that cannot be reasonably provided should be made available on site.
5. To the extent these temporary services and supports are a change from what is currently stated in the IEP, a PWN is needed; parent consent is also needed if the temporary services constitute a material change in services.

⁹ <https://www.ksde.org/Agency/Division-of-Learning-Services/Career-Standards-and-Assessment-Services/CSAS-Home/Graduation-and-Schools-of-Choice/Virtual-Schools-and-Programs>

6. Making these temporary changes to the IEP can be accomplished by convening an IEP Team meeting (virtually, if needed) or by the parent and school agreeing to amend the IEP without a meeting.

Discipline Questions

The COVID-19 pandemic has presented many novel scenarios, even in regards to school discipline. The questions regarding discipline may be quite varied in the context of the COVID-19 pandemic and differ from previous school years due to the unusual circumstances we are experiencing. However, the analysis of whether an incident is a disciplinary removal under special education law has not changed.

Question A-14. If a student with a disability is sent home from school for not following social distancing protocol or for refusing to wear a mask consistently, is this a disciplinary removal under special education law? Similarly, if a student with a disability is attending a live session in the remote learning environment and the educator tells the student to log off or uses the platform functions to remove the student from the live session, is this a disciplinary removal under special education law?

Answer A-14. Any time a student is removed from the learning environment for failing to comply with district or school code of conduct requirements, that is a disciplinary removal. A disciplinary removal without educational services is considered a suspension. Removal for any part of a school day is considered a whole day of suspension. For guidance on steps to take depending on the number of school days the student has been suspended during the current school year, see Chapter 13 of the [Kansas Special Education Process Handbook¹⁰](#).

Question A-15. When a student with a disability does not follow social distancing protocol, refuses to wear a mask consistently, or violates other school district rules imposed due to the COVID-19 pandemic and the district requires the student to attend school remotely rather than onsite as a result of these behaviors, is this a disciplinary removal under special education law?

Answer A-15. Determining whether an in-school-suspension (ISS) is a disciplinary removal, when considering the remote learning environment, is considerably more complex than considering the on-site environment. The United States Department of Education's Office of Special Education Programs (OSEP) has carved out an ISS exception to the 10 school-day rule for counting days of disciplinary removal. On page 46715 of the *Federal Register* from August 14, 2006, OSEP repeats what it calls "the Department's long-term policy" that an "in-school" suspension would not be part of the days of disciplinary removal if during ISS the student is given the opportunity to: (1) participate in the general curriculum; (2) continue to receive the services in the IEP; and (3) continue to participate with students who do not have disabilities to the extent they would have in their current placement.

If a school district can show that a student with a disability is provided with all three of these opportunities during ISS, then the ISS days do not count as days of disciplinary removal. That means when a student with a disability is placed in ISS for a period of 11 or more consecutive school days, it would not be considered a change of placement, and a manifestation determination review would not be necessary. However, if the ISS does not meet all three conditions, it is considered a disciplinary removal and is subject to the requirement that on the 11th school day of suspension in a school year, and each school day of suspension thereafter, the special education and related services needed for the

¹⁰ <https://www.ksde.org/Default.aspx?tabid=598>

student must be provided to enable the student to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. Additionally, when ISS does not meet all three conditions, and the removal is for a period of 11 or more consecutive school days, this would require a manifestation determination review. If the result of the manifestation determination review is that the behavior is a manifestation of the disability, the student must be immediately returned to the placement from which the student was removed.

The third condition is the most problematic of the three conditions necessary for ISS days to be exempt from the 10 school-day disciplinary removal rule. When school is in session in a school building, the third condition is met when a student serves ISS in the environment specified in the student's IEP. Thus, if a student is educated in a resource room all day without access to students who do not have disabilities, the ISS could be served in a resource room. If a student is educated in regular education classrooms all day with access to students who do not have disabilities, the ISS would need to be served in the room where students who do not have disabilities serve an ISS. When a student is educated in a mixture of educational environments (60% regular education and 40% special education for example), the ISS would need to be served in the room where students who do not have disabilities serve an ISS for at least 60% of the suspension time.

OSEP originally announced this three-condition ISS exception to the length limitations for disciplinary removals in its comments to the 1999 federal regulations implementing the IDEA (Federal Register, March 12, 1999, P. 12619), and it remains as current OSEP guidance. However, in 1999, OSEP likely could not have foreseen how education has been disrupted during the COVID-19 pandemic and how it was forced to introduce remote learning to the majority of its student-body. Accordingly, there may be no reasonable way to apply the third condition (or any of the conditions) of this exception to students who are in a remote learning program and who are removed from that program for disciplinary reasons.

For additional guidance on disciplinary requirements, see Chapter 13 of the [Kansas Special Education Process Handbook](#)¹¹. Also note the legal requirement that in the case of a student whose behavior impedes the student's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior. The focus of behavioral interventions and supports in the IEP is prevention of the behavior, not just provision for consequences subsequent to the behavior. Finally, districts have an obligation to ensure that information about disciplinary removals reaches all, especially educators who may be engaging in disciplinary removals. A district also has an obligation to track disciplinary removals to ensure it is meeting special education legal requirements and discipline data reporting requirements.

Question A-16. If a student with a disability is attending school in the remote learning environment and engages in behavior that violates the school code of conduct, may the school district require the student to attend school onsite in order to place the student in a physical location used for ISS?

Answer A-16. Federal regulations, at 34 C.F.R. § 300.530(b), permit school authorities, within specified limits, to place students with disabilities in alternative educational settings for disciplinary reasons, "to the extent those alternatives are applied to children without disabilities." Accordingly, in order to have the option to require a student with a disability to attend school onsite for in-school suspension, that alternative must also be applied to general education students. Requiring a student with a disability who is participating in remote learning to attend school onsite for the purpose of serving an in-school

¹¹ <https://www.ksde.org/Default.aspx?tabid=598>

suspension (ISS) *could* be considered a disciplinary removal and count toward the 10-school day rule, but it would ultimately depend on the nature of the ISS. As described in the question and answer above, OSEP has established a policy that ISS does not count as a day of removal toward the 10-day rule as long as the student is given the opportunity to: (1) participate in the general curriculum; (2) continue to receive the services in the IEP; and (3) continue to participate with students who do not have disabilities to the extent they would have in their current placement.

Question A-17. If a school/district administrator or a family member is concerned that an incident involving a student with disability was not properly counted as a day of disciplinary removal, what should they do?

Answer A-17. School or district administrators should ensure that information on disciplinary removals for students with disabilities reaches any staff member who may have removed a student from the learning environment this school year and not followed required steps for a disciplinary removal of a student with a disability. Think expansively about educators who need this information in light of the remote environment and consider educators who had the ability to remove a student from the remote learning environment (e.g., teachers, paras, substitutes, related services providers, etc.). If a school or district administrator is aware of an incident that did not follow required steps for a disciplinary removal of a student with a disability, the administrator should ensure required steps are followed, even after the fact. These steps could include, but are not limited to, appropriately recording the incident as a suspension in the district's student information system, support staff in addressing the behavior that resulted in the suspension, determine whether a manifestation determination review should have been conducted, determine whether a student was entitled to educational services (on and after the 11th cumulative school day of disciplinary removal in the school year), and report the incident to KSDE in the [Discipline Data Collection](#)¹².

A family member who is concerned that an incident with a student was not properly considered a disciplinary removal can contact the student's principal, the district special education director, or the district superintendent. If a family member believes that the district violated special education law, they can discuss the issue with these individuals and/or [file a formal complaint with KSDE](#)¹³.

¹² <https://www.ksde.org/Agency/Division-of-Learning-Services/Special-Education-and-Title-Services/KIAS-Kansas-Integrated-Accountability-System/Discipline-Data-Collection>

¹³ <https://www.ksde.org/Agency/Division-of-Learning-Services/Special-Education-and-Title-Services/Special-Education/Legal-Special-Education-Law/Dispute-Resolution>

For more information, contact:

Tiffany Hester, JD
Dispute Resolution Coordinator
Special Education and Title Services
(785) 296-7262
thester@ksde.org

Mark Ward, JD
Attorney
Special Education and Title Services
(785) 296-0920
mward@ksde.org

Brian Dempsey, JD
Attorney
Special Education and Title Services
(785) 296-6518
bdempsey@ksde.org

Laura N. Jurgensen, JD
Assistant Director
Special Education and Title Services
(785) 296-5522
ljurgensen@ksde.org



Kansas State Department of Education
900 S.W. Jackson Street, Suite 102
Topeka, Kansas 66612-1212
(785) 296-3201
www.ksde.org