

FAPE and Staffing Shortages: Bridging the Gap

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Agenda

- 💧 Statistics on Staffing Shortages
- 💧 Impact of Recent Staffing Shortages
- 💧 Obligation to Provide FAPE
- 💧 Thinking Outside the Box:
 - 💧 Small Group Discussion
 - 💧 Strategies to meet FAPE Obligation

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Statistics on Staffing Shortages

SOURCES:

National Center for Education Statistics. (2023). *Condition of Education*. U.S. Department of Education, Institute of Education Sciences, <https://nces.ed.gov/programs/coe>.



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Teaching Staff Vacancies

In 2020-2021, higher percentages of public schools reported difficulties filling open teaching positions.

- 💧 37% of districts operating with at least 1 vacancy.
 - 💧 Down from 44% in October 2022
- 💧 Nationally, 3% of all teaching positions were vacant.
 - 💧 Highest percentage of vacancy was in special education

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Teacher Vacancies

One of the most difficult teaching positions to fill:

- 💧 Special Education
 - 💧 40% of public schools hiring for special education in 2020-2021 reported having difficulties filling the opening, compared with 17% in 2011-2012.

Others include:

- 💧 Career or Technical Education
- 💧 ESL

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Why the Teacher Vacancies?

Research shows there are less people enrolling in traditional teaching preparation programs.

- 💧 Between 2012-2013 and 2019-2020, enrollment in traditional teaching preparation programs decreased by 30%
- 💧 Completion of such programs decreased by 28%
- 💧 However, public school teachers had a higher educational attainment in 2020-21 than 2011-12

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Non-Teaching Staff Vacancies

45% of districts operating with at least 1 non-teaching staff vacancy.

- 💧 Not statistically different from the 40% in October 2022.

Nationally, 6% of all non-teaching staff positions were vacant.

- 💧 The highest percentage of vacant positions included tutors, aides, and transportation staff.

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Substitute Teachers

In addition to teacher vacancies, schools across the country have also seen a rise in teacher absenteeism.

- 💧 72% of U.S. public schools report an increase in teacher absences during the 2021-2022 school year.
- 💧 77% report having more difficulty finding substitute teachers.
- 💧 59% of public schools indicate that they very frequently to always have to rely on administrators, non-teaching staff, other teachers on their prep time, and combining of classes due to an inability to find substitute teacher coverage.

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Impact From Staff Vacancies

The most common staffing issues reported during the 2023-2024 school year include:

- 💧 Increased need to use non-teaching staff outside of intended duties (42%).
- 💧 Increased need to use teachers outside of intended duties (40%).
- 💧 Increased class size (28%).
- 💧 Sharing of teachers and/or staff with other schools (24%).

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Student Enrollment

Despite the decrease in available staff, the percentage of students with disabilities under the IDEA has increased since 2010.

- 💧 Percentage of students receiving special education services:
 - 💧 2010-2011: 13% of public school students
 - 💧 2021-2022: 15% of public school students
 - 💧 Among these students, the largest reported disability type was Specific Learning Disabilities (32%).

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Impact of Recent Staffing Shortages



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Use of Sub during Sped Teacher's Maturity Leave Cost District

Hempfield Sch. Dist. v. S.C., 124 LRP 3142 (E.D. Pa. 01/31/24).

- 💧 The IEP for an elementary student with autism and a speech and language impairment required academic instruction in an autism support classroom.
- 💧 In October 2020, the classroom teacher took maternity leave and then resigned. Additionally, the following school year, two aides resigned.
 - 💧 The district never hired a long-term substitute and staffed the classroom with multiple day-to-day substitute teachers.
 - 💧 The substitute teachers could not carry out the programming.
- 💧 When parents learned of the ongoing staffing issues, they decided to enroll S.C. in an out-of-district public school upon agreement to pay out-of-pocket tuition rate.
- 💧 The Court ordered the district to reimburse the parents for the \$15,407 they paid out-of-pocket to enroll their son in the neighboring school district, along with compensatory education.

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Case Law: IEP Implementation: Ruling Rationale

Hempfield Sch. Dist. v. S.C., 124 LRP 3142 (E.D. Pa. 01/31/24).

- 💧 The District Court ordered the district to reimburse the parents for the \$15,407 they paid out-of-pocket to enroll their son in a neighboring LEA along with compensatory education.
- 💧 The ALJ noted that the IDEA authorizes reimbursement for unilateral private placements if the district denies the student FAPE and the unilateral placement is appropriate.
- 💧 Here, the ALJ observed the district denied the student FAPE in KG and 1st Grade by failing to implement portions of his IEP.

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Implications of Staffing Shortages that can Deny FAPE

- 💧 Not implementing IEP services due to lack of staff.
- 💧 Reducing services on the IEP because a special education position cannot be filled.
- 💧 Changing child's LRE because staff not available in less restrictive setting.
- 💧 Using substitute teachers to provide sped services.
 - 💧 Not providing adequate supervision and training to long-term subs (and expecting them to do tasks outside of their training/ knowledge).

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Staff Shortage Did Not Excuse Lack of IEP Implementation

Student with a Disability, In re, 121 LRP 38674 (SEA KS 10/20/21).

- 💧 State Administrative Complaint filed for a 13-year-old (8th grade) boy with a tic disorder.
 - 💧 Parent claimed that special education personnel informed her during parent teacher conferences that not all her child's sped services were being provided due to staffing shortages.
 - 💧 District admitted to State that not all of the students' (or other 8th graders') IEP services were being provided due to staffing shortages.
- 💧 The district attempted to cover services by changing student's schedule to classes with inclusion support, but the coverage was inconsistent due to staff vacancies.
- 💧 Corrective Action: Comp Ed for student & all other students who lost services.

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Implementation Failure Mitigated By Other Staff Services

District of Columbia Pub. Schs., 123 LRP 13723 (SEA DC 03/18/23).

- 💧 Student's IEP included 27 hours/week with a dedicated aide
- 💧 Student was without a dedicated aide from 10/2021 until 1/2022 (missing 350 hours of support) due to staffing shortages.
 - 💧 Was only student in self-contained behavioral class with sped teacher and behavior tech 15 hr/wk.
 - 💧 Was in gen ed without support 12 hr/wk.
- 💧 IHO found no denial of FAPE for sped setting because teacher and behavior tech could provide same service as dedicated aide.
- 💧 IHO found a denial of FAPE for 12 hour per week in general education.
- 💧 District ordered to pay for 150 hours of 1:1 private academic tutoring.

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Lack of Nurse Does not Justify Change of Placement

Elmira City Sch. Dist. v. New York State Educ. Dep't, 80 IDELR 294 (N.Y.S.C. Apr. 7, 2022).

- 💧 IEP for KG with significant medical issues required “1:1 supervision from a nurse for suctioning, feeding, transfers, toileting, and overall care.”
- 💧 Dispute between the school and parent regarding the nurse’s qualifications to suction resulting in parent’s refused to send child to school.
- 💧 Then, district could not fill position when nurse resigned in February, so IEP team proposed home instruction or residential placement for student (parent disagreed).
- 💧 Court found a denial of FAPE because placement changed was based on staffing issues not because it was child’s LRE—impossibility of performance defense is generally at odds with purpose of the IDEA.

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Long-Term Substitute Not Qualified for Special Education

In re: Student with a Disability, 123 LRP 15403 (SEA NV 03/24/23).

- 💧 State administrative complaint filed against public charter school by a former substitute special education teacher.
- 💧 State ED determined that 7 of the 13 special education substitute teachers employed did not meet the requirements of the IDEA.
- 💧 Substitutes led special education classes, developed IEPs, and participated in IEP meetings.
- 💧 State ED determined that the preparation and training provided by the charter school was not sufficient to provide the substitutes with knowledge needed to teach students with disabilities or draft IEPs.
- 💧 State ED required staff training on IDEA requirements, enhanced staff recruiting and retention actions, and oversight on staff qualifications.

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No Exceptions to Personnel Qualification

Memorandum to State Dirs. of Special Educ., 81 IDELR 287 (OSEP 10/04/22).

- 💧 Regardless of personnel shortages State Departments cannot waive IDEA's qualification requirements for teachers, related service providers, or paraprofessionals.
- 💧 Department of Education provides information regarding resources and grants for higher education funding to assist districts with staffing shortages.

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Obligation to Provide FAPE



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FAPE

What is a free appropriate public education (FAPE)?

- **Rowley Standard:** For a student who is fully integrated into the regular education setting, the student's IEP should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).
- **Endrew F. Standard:** For a student who is not fully integrated into the regular education setting, the student's IEP should be "appropriately ambitious" and give the student a "chance to meet challenging objectives" – goals must be "appropriately ambitious in light of [the child's] circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

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FAPE

Endrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174, 137 S.Ct. 988 (2017).

- A school must offer an IEP that is reasonably calculated to enable a child to make progress "appropriate in light of the child's circumstances."
- When a child is "fully integrated" into a regular classroom, providing FAPE that meets the unique needs of a child with a disability typically means providing a level of instruction reasonably calculated to permit advancement through the general curriculum (Rowley Standard)
- If progressing smoothly through the general curriculum is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement but must be "appropriately ambitious in light of his circumstances."

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Thinking Outside the Box: Small Group Discussion



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Small Group Discussion

- 💧 Discuss with your colleagues: What strategies has your district used to meet your FAPE obligation despite staffing shortages?
 - 💧 While strategies worked?
 - 💧 Which strategies did not work?

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Thinking Outside the Box: Strategies to Meet Your FAPE Obligation



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Thinking Outside the Box

- 💧 Provide staff training!
 - 💧 For intervention programs
 - 💧 For expertise (behavior, autism, reading, etc.)
 - 💧 For IEP compliance
- 💧 Increase group size.
 - 💧 Is a 1:1 necessary?
- 💧 Decreasing the amount of direct service (maybe adding consultation services instead).
- 💧 Use staff mapping (as opposed to student numbers) to determine staffing needs.

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Thinking Outside the Box

- 💧 Use data (including previous rate of progress) to make decisions!
 - 💧 If progressing, slowly move towards less restrictive and less support.
 - 💧 If data does not support the need, don't provide it.
- 💧 Use computer-based intervention programs.
- 💧 Use teletherapy (with an on-site aide) for related services.

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Thinking Outside the Box

- 💧 What other ideas came up in your group discussions?

- 💧 _____
- 💧 _____
- 💧 _____
- 💧 _____

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