

What NOW? THE DEPARTMENT OF EDUCATION CONTINUES TO BARRAGE SCHOOL DISTRICTS WITH GUIDANCE

Beth Morris and Reagan Sauls, Harben, Hartley & Hawkins LLC

Over the past few years school districts have been inundated with "Dear Colleague" Letters. In fact, over the last eight years, the DOE and DOJ have sent out an unprecedented number of letters. Now, while they are titled and addressed, "Dear Colleague," these are not letters from an old friend wanting to see what you are doing or just a friendly note checking in and telling you about their day. No. These letters give "guidance" (which reads more like directives) to districts and schools as to how to respond to certain issues that arise in the school district setting. They have covered everything from homeless students to sexual harassment to bullying to transgender students. This summer, many "Dear Colleague" Letters were sent out that address issues that would impact students with disabilities (those with IEPS and those found to be qualified for protection under Section 504), plus those students that will potentially be evaluated.

Understandably, many school districts have become both wary and concerned about how to implement the guidance due to all the recommendations contained in these letters. Moreover, these letters do not have the force of law so it becomes difficult to know what to implement and what you can ignore. What we do know about the letters is that, if nothing else, they give school districts insight into how the Office

for Civil Rights (an administrative arm of the US DOE) would rule and what they would expect when investigating complaints in the areas covered by their letters. There have also been a few rare instances where courts have looked to the stance provided in these letters in their rulings.

Please note this article is our attempt to highlight certain letters and certain areas of the letters, but it in no way serves as a replacement for the letters themselves. We suggest you review these and other relevant letters. You know, in your spare time.

On August 1, the Department of Education released a "Dear Colleague" Letter that continues to promote the move toward positive behavior interventions. Moreover, the Letter implies that schools should move away from any sort of discipline that would remove a student from instruction. According to the Letter, "research shows that school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior and reinforce positive behaviors, are associated with increases in academic engagement, academic achievement, and few suspensions and dropouts." While this Letter admits districts have the authority and flexibility to use short term removals for students with disabilities for discipline purposes, it warns that doing so may impede the District's provision of a free appropriate public education teachers and administrators already know. However, the tone is very clear. The Department of Education does not like the fact that schools use the ten allowed days as "free days." It is important to note that most districts do not use short term removals from school as free days, but as actual punishment for discipline incidents not related to a student's disability, but the shift at the federal level could not be more explicit.

The Letter suggests the data shows "many children with disabilities may not be receiving appropriate behavioral interventions and supports and other strategies, in their IEPs." This goes to the point that if a student with an IEP is using up the ten allowed days for out of school suspension, the IEP team needs to meet and consider if changes or additions need to be made to the IEP. Clearly, IEP teams should look at whether a student's behavior is impeding his or her learning, or that of others. This is not new. It is imperative for districts where there is a pattern of removals to show what strategies have been implemented, whether those strategies worked, changes made to the plan to address behaviors and data to support the student's progress, academically and behaviorally.

What are some examples of scenarios that could potentially get a district in trouble?

- A pattern of behavior that is not addressed;
- Refusing to meet with a parent regarding a student's behavior even if the removal does not reach the ten day mark;
- Using behavioral supports not evidence based on peer-reviewed research;
- Not training or providing tools to teachers on the behavioral supports included in students' IEPs;
- Not offering a wide range of behavioral supports and strategies;
- Behavioral supports in the IEP not appropriate or not implemented; and
- The student lack of progress due to behavior.

Please know that every situation must be analyzed on a case-by-case basis. If you are addressing behavior that may impede a student's learning and can show that with data, you are complying with your obligations under IDEA. It is clear from the Letter, however, that there continues to be increased scrutiny on all issues related to behavior, behavioral interventions and discipline.

On July 26, 2016, the "Dear Colleague" Letter sent to districts included guidance for working with students with ADHD. This Letter was written to provide more guidance to districts due to the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act) clarifying the broad scope and definition of the term "disability." With this broad definition, more students with ADHD are now "clearly entitled to protections under Section 504." OCR indicates that one in nine of its investigations have involved students with ADHD over the past several years. The Letter states that through OCR's enforcement efforts, it believes many students with ADHD are still experiencing academic and behavioral challenges and guidance is required to ensure those students are receiving FAPE as defined in the Department's regulations implementing Section 504.

The guidance attached to the Letter sets forth OCR's position that districts should treat students going through the Section 504 evaluation and those found qualified under Section 504 as though IDEA applies even though it is not legally required. Initially, the guidance talks generally about students that are evaluated and those determined to be eligible under Section 504 and IDEA. For example, the resource reiterates the position that if a student is found not to be eligible for services under IDEA, the District must assess whether that same student is qualified under Section 504. The lack of this procedure has gotten many school districts in trouble with OCR complaints.

The remaining pages of the guidance are focused on students with a diagnosis of ADHD: OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities. *U.S. Department of Education, Office for Civil Rights, Students with ADHD and Section 504: A Resource Guide (July 2016).* You may want to read that sentence again – regardless of an individualized determination, there seems to be a presumption of eligibility.

OCR emphasizes with notice of a diagnosis of ADHD, it is the District's obligation to evaluate that student without regard to the student's performance academically. "In OCR's investigative experience, school districts sometimes rely on a student's average, or better-than-average, grade point average (GPA) and make inappropriate decisions." In explaining this process, OCR states that when making the determination whether to evaluate, the District should look at how difficult it is for the student to complete tasks or how much time it takes for a student with ADHD to plan, start and complete assignments or tests. OCR further indicates that a student's performance grade wise is not a factor when determining eligibility. Typically, this would all be part of the discussion when determining whether a student is eligible under Section 504 or, if eligible, what accommodations are needed to provide access to the curriculum. Thus, it is that much more important to carefully assess – and document – the student's capabilities and needs when considering eligibly and need for an accommodations plan.

The guidance becomes a little more complicated when dealing with RTI interventions, but again supports the move toward broader coverage under Section 504. OCR warns that intervention strategies used for any student that may be struggling could violate Section 504 "when you delay an evaluation of a student suspected of a disability" by using those strategies (despite the fact that those could be beneficial). Districts can certainly evaluate students suspected to qualify as disabled under Section 504 while implementing RTI strategies. The problem comes when schools rigidly insist on implementing interventions before conducting an evaluation or requiring data from interventions as a necessary piece of the evaluation.

Further, while the team can request information from the parents regarding the student's disability, it cannot require the parent to provide such information, even medical information. OCR makes it clear that it is a district's obligation to evaluate and schools "cannot shift the burden of that cost or obligation onto the parent." If the team determines a medical assessment is necessary in determining whether a student is disabled under Section 504, OCR's position is that this assessment must be at no cost to the parents. Parents can voluntarily pay for this assessment, and this should be documented properly. It is important to note that a medical assessment is not necessary in order to determine whether or not a student is disabled.

Do not forget that a student is qualified as disabled under Section 504 if his or her disability impacts any major life activity, not just learning. There still seems to be a tendency for teams to talk about what the educational impact is during the eligibility process. While this discussion is important during the development of a Section 504 plan, when determining if a student qualifies as disabled the discussion needs to focus on the impact to any major life activity.

The guidance gives more information that is familiar to districts regarding the importance of creating plans for the student, implementing plans that are developed, providing FAPE and the due process obligations of districts. In fact, we know that these are the most common bases for OCR complaints. Much of the information contained in this guidance is not new information, but a reminder of what districts have been told in the past few years regarding broad coverage and the move toward IDEA-like protections for students qualified as disabled under Section 504.

Lastly, on April 28, 2016 a Dear Colleague Letter was sent to all Head Start Directors regarding the use of Response to Intervention (RTI) and it is simply reiterating the law that districts already know. This letter restates that districts cannot delay the evaluation of a student in order to implement RTI. The Letter explains that IDEA "does not require or encourage" districts to use RTI prior to a referral for evaluation or as a part of eligibility determination. Remember that if a district denies the request for an initial evaluation, it must provide prior written notice to parents explaining the decision. While this Letter is aimed at the child find and referral procedures that occur at the pre-school programs, attempting to ensure that a delay does not occur at that level, it should be noted that this premise applies to all grades as mentioned above.

Remember, these letters are purely guidance and not to be viewed as the law. However, districts that have been involved in OCR complaints know that the positions set forth in these letters are the standard to which districts will be held to during the course of an investigation. The key is to be informed about new guidance and to use them proactively to create best practices and defensible programs as you review district procedures to ensure all legal obligations are being met. That said, the old adage that "the only constant is change," is never truer than when dealing with special education – so, as soon as you are up to speed on the current letters, you can be rest assured there will a handful of new ones to review.

Points to Ponder from the President

Stronger Together By Jimmy Pitzer

Amidst all of the campaigning in this presidential election the words *Stronger Together* resonates with me when I think about G-CASE and what the organization does for its members. By no means should you imply that by borrowing this slo-

gan I am endorsing a particular candidate in the campaign. G-CASE brings together a group of educational leaders that experience similar problems and challenges in their field of work every day. Trying to problem solve and bring change on our own often results in little success or gain. G-CASE unifies us through networking, professional learning, and advocacy. This unity makes us stronger together. Being stronger together we can bring about change that results in better outcomes for our students with disabilities in Georgia. Below I highlight some of the most recent activities that G-CASE has engaged in that I believe make us stronger together.

On June 10th and 11th the G-CASE Executive Board held our annual planning retreat at Cuscowilla Resort on Lake Oconee. I would like to personally thank our now Past President Allison Oxford for making this happen at no cost to G-CASE for accommodations. During the retreat our Executive Board approved our FY17 budget, proposed support and topics for SELDA, proposed two drive-in conferences for the year, discussed legislative priorities including planned participation in Day at the Capitol 2017, finalized plans for our upcoming fall conference. Most of our planning for professional learning and legislative advocacy involves direct input from you through your Advisory Board Representative and conference surveys.

In July, our Vice President, Greg McElwee, and I attended the Special Education Legislative Summit sponsored by CEC/CASE in Washington, DC. This was a

great opportunity to represent G-CASE at a national summit. Altogether there were 42 states represented. *Stronger Together* we were able to visit 188 congressional offices to share CEC's legislative recommendations and issue briefs. I would like to thank other G-CASE members that were a part of our Georgia Delegation: Luann Purcell, Mikki Garcia, Suzanne Korngold, and Tammy Pitzer.

By now you should have received multiple email blasts about registering for our annual fall conference in Savannah, November 2-4 at the Hyatt Regency. The theme this year is Make It Happen! Improving Outcomes for Students with Disabilities. Three outstanding keynote speakers are lined up for the conference:

On Wednesday afternoon, Jonathan Mooney will kick-off our conference with a motivational presentation. If you are not familiar with Jonathan Mooney, he is the author of The Short Bus and co-author of Learning Outside the Lines. Jonathan is a dyslexic and did not learn to read







until he was twelve years old. However, he graduated from Brown with a honors degree in English and was a recipient of the distinguished Truman Fellowship for graduate study in the fields of creative writing and disability studies. He is president of Project Eye-to-Eye, a nonprofit mentoring and advocacy organization for students with learning disabilities.

On Thursday, Ruth Herman Wells of Youth Change will deliver her keynote entitled "Doing the Impossible Just Takes a Little Bit Longer." Youth Change has been the nation's leader in providing practical, ready-to-use, information-packed professional development for those who work with challenged or problem students. Ruth's presentation and breakouts are sure to inspire and reinvigorate you.

On Friday, Dr. Robert Pasternack will talk about Results Driven Accountability (RDA) and what it means for special ed leaders in Georgia. Dr. Pasternack served as Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS) at the U.S. Department of Education from 2001 to 2004. And, finally, Dr. Stuart Robertshaw "a.k.a. Dr. Humor" will empower us with The Healing Power of Humor to close out our conference. We are sure to drive home happy! Dr. Robertshaw served as a professor of Psychology and Special Education at the University of Wisconsin-La Crosse, and is now President and CEO of the National Association for the Humor Impaired.

Before the fall conference in November, please mark your calendar for the Fall Drive-In Conference on October 25th titled **Students with Disabilities: What Building Administrators Need to Know**. The one day conference will be held in Perry. The presenter for this conference is Janet Peeler. Janet is an independent consultant helping school districts develop capacity to enhance student achievement. She works with school leaders designing implementation plans, modeling individual instruction, creating evaluation criteria, measuring achievement toward goals and delivering executive and instructional coaching services. Educating students with disabilities in the least restrictive environment is a cornerstone of Janet's practice. Be on the lookout for an email blast with registration information. Be sure to encourage your school leaders—principals, assistant principals, counselors, and teacher leaders to register for this event.

Again this year, G-CASE will work with our GAEL affiliates to hone our legislative priorities for the 2017 legislative session. We will join our GAEL affiliates for PAGE Day at the Capitol in February, and encourage you to register for that event as more information comes out. Also, plans are currently underway for our spring conference scheduled for March 27-29 at the Classic Center in Athens. Again, the spring conference will be a legal forum. Julie Weatherly and Harben, Hartley, & Hawkins have already committed to present.



Keeping Stronger Together in mind – I think we are always stronger together when we give recognition to our members. We do this through multiple awards given at various times throughout the year. At our fall conference we will present the Lillie N. Moncus Special Education Administrator of the Year Award and the Distinguished Service Award. You will receive an email blast soon with nomination information including deadlines, and we encourage you to submit nominees of those that you feel exemplify the qualifications of these two awards. Our most recent award recipient went to Audrey Walters, Special Education Director for Montgomery County Schools. Audrey serves on our Advisory Board and the Communications Committee. Audrey was presented the **Jim Puckett Outstanding Educator Award** during the

Audrey Walters

Summer GAEL Conference.

In closing, the success of G-CASE is because of your dedication and support of the organizations efforts. The Executive Board and Advisory Board continues to need your voice and input to make it strong. We welcome any suggestions on how G-CASE can better serve you and improve services and outcomes for students with disabilities in Georgia. Remember stronger together we can make Georgia great (again)! Now I have really thrown you. Don't forget to vote in November.



Notes from the Executive Director

G-CASE is busy planning for the 2016 Fall Conference - *Make It Happen for Students with Disabilities.* It will start on Wednesday, November 2, at 1:00 PM and end at noon on Friday, November 4, 2016, at the Hyatt Regency Savannah.

Keynote speaker **Ruth Herman Wells**, Director of *Youth Change*, will share her expertise on how to deal with difficult students. If your staff feels that "nothing works" to control some youngsters, Ruth has solutions. If your teachers are frustrated by work refusers, apathy, bad attitudes, and disrespect, Ruth will address these issues. She will do a keynote session followed by breakouts to address the challenges of troubled and problem children.

The 2016 Fall G-CASE Conference will also feature

Jonathan Mooney, founder and president of Project Eye to Eye, a mentoring and advocacy program for students with learning differences. Author of *Learning Outside the Lines* and *The Short Bus*, Jonathan is a (dyslexic) writer and activist who did not learn to read until he was 12 years old. He graduated from Brown University and has a degree in English Literature.

Also at our fall conference you will meet **Dr. Robert Pasternack**, who served as Asst. Secretary for OSERS from 2001 to 2004 and served on two Presidential Commissions including one on Excellence in Special Education. Dr. Pasternack is thrilled to see that we are focusing on improving outcomes for SWDs and he wants to help our cause. And, finally, you will be inspired by **Stuart Robertshaw** *aka* **Dr. Humor**. Dr. Robertshaw is Professor Emeritus of Psychology and Education at the University of Wisconsin-La Crosse, an attorney and he currently serves as the President and CEO of the National Association for the Humor Impaired. The daily prayer for the Association:

God, grant me the laughter to see the past with perspective, to face the future with hope, and to celebrate today... without taking myself too seriously. *And*... Our new State Director of Special Education, **Dr. Zelphine Smith-Dixon** will give an update on what's going on in Georgia. There will be a plethora (such a fun word - *plethora*) of breakout sessions on topics such as interactive notebooks, collaborative support, data collection, behavior strategies, SLDS, transition resources for students and staff and much more. There will also be a session on IEP team meeting facilitation by Jamila Pollard and a legal session by Harben, Hartley & Hawkins.

This year, in addition to the conference sessions, each registrant is invited to the **President's Recep**tion sponsored by TeachTown – a Savannah Riverboat Cruise! On Thursday evening a chartered riverboat will leave the dock at 7 pm for a two hour cruise on the Savannah River. Dinner is included with the cruise. You will need to register for the event, but cost is included with your conference registration – thanks to TeachTown. What a great time to relax and enjoy your colleagues!

If you haven't registered yet, go to the G-CASE website at <u>www.gcase.schoolinsites.com</u> or to the GAEL website at <u>www.gael.org</u> to complete your registration. You don't want to miss this one! The Fall Conference is a time for learning and sharing and maybe the only place you can talk about special education all day long and no one is bored or changing the subject. You can use all the acronyms you want and everyone will understand. You can ask questions and get real answers to the oddest of situations. You can meet new people and reconnect with friends. We hope you will take advantage of this opportunity to share your knowledge with others and learn what's new in Georgia special education.

In case you haven't been out of your office all summer, or you've been under water with legal battles, a reminder that this is an important election year and we hope that everyone will go to the poll to vote. On Georgia's ballot, in addition to the candidates – will be an important constitutional amendment concerning the *Opportunity School District*. As educators in Georgia, each one of us needs to be informed about what this amendment means and how it will impact schools and communities. The preamble and question will be:

Provides greater flexibility and state accountability to fix failing schools through increasing community involvement,

Shall the Constitution of Georgia be amended to allow the state to intervene in chronically failing public schools in order to improve student performance?

The actual change to the constitution will be:

"Paragraph VIII. Opportunity School District. Notwithstanding the provisions of Paragraph II of this section, the General Assembly may provide by general law for the creation of an Opportunity School District and authorize the state to assume the supervision, management, and operation of public elementary and secondary schools which have been determined to be failing through any governance model allowed by law. Such authorization shall include the power to receive, control, and expend state, federal, and local funds appropriated for schools under the current or prior supervision, management, or operation of the Opportunity School District, all in the manner provided by and in accordance with general law."

If you would like more information about this amendment, please check the G-CASE website. Remember, it's your responsibility to be an informed voter – especially on issues concerning public education.

Thank you for all you do for the children in Georgia! *Dr. Sarah West, Executive Director*

News from the National CEC Convention and Expo By Katie Lowry



On Tuesday, April 12th, in St. Louis, Missouri there was a gathering of Special Education teachers, administrators and others vested in ensuring equal educational opportunities for students with disabilities. Georgia was well represented by a group of five G-CASE members, excited to collaborate and connect with other educators. Being a second year Special Director (and a 1st time visitor to St. Louis) I was eager to attend a sundry of sessions, visit the arches, devour the Bar-B-Que and enjoy meeting other CASE members from across the country.

Ultimately, I not only was able to complete my conference goals, but I was also able to see Temple Grandin, meet a new Sesame Street character who has autism, and address a panel of distinguished teachers, practition-

ers and researchers about special education today. The panel was led by Ed Martin, first director of the U.S. Bureau of Education for the Handicapped, and one of the original contributors of PL 94-142, the predecessor of IDEA. The room was packed, as we listened to all four panelists speak about the original intent of PL 94-142, and other policy issues that have evolved over the past forty years. As I listened intently, I found myself becoming more and more frustrated by the constrained progress that the panel seemed to accept, as they spoke about the plodding progress of special education effectiveness. With only fifteen minutes left in the session, Mr. Martin opened the floor up for comments or questions, which instinctively prompted me to frantically flap my hand in the air. After I was given the microphone, I acknowledged the validity of the original intent of the law, but then



began to express the realities of my experience in the implementation over the past ten years.

I articulated the pressure special educators experience with the contradictory expectation of near full inclusion for all students served with an IEP, as measured by the Federal Government. Significant placement disproportionality can result in major funding issues. I expressed that while I agree that full inclusion is the most restrictive environment for some of our students, the reality is that the media and others, focus on the "numbers." We feel trapped between policies that, while we never want to admit it, have sadly driven placement decisions. The panelist all appeared a bit taken back by my comments, allowing a brief moment of silence, which was soon filled by our G-CASE President, Allison Oxford. She eloquently summarized what I was trying to say and added further realities we face in public education.

After the session was over, a young lady walked up to me. She simply said, "Thank you." As I looked at her puzzled she said, "I'm a 3rd year special education teacher and I didn't know district-level administration knew that we feel this pressure in the classroom." As I reflect back on her comment, I can't help but encourage all of us as leaders in Special Education to never forget that the impact of policy and procedure not only matters in the interactions with the students. We should never stop advocating for our teachers to facilitate the success of those interactions.

From Around the State



White County Director of Student Services, Dr. Mary Kay Berry received the 2016 Outstanding New Director Award at the annual G-CASE Spring conference in Savannah on March 8-10, 2016.

Each year G-CASE recognizes a Special Education Director with five or less years of experience who has demonstrated exemplary leadership and service as a special education administrator. This individual characterizes resourcefulness, compassion and professionalism as a leader.

Nominators described Dr. Berry saying, "She leads

with a genuine understanding of and respect for each co-worker, teacher, student and parent she meets." Another nominator commented, "Dr. Berry demonstrates the qualities of compassion and support with a servant's heart as she leads the White County Student Services Department. For children who can't speak and advocate for themselves, their parents feel such an overwhelming need to protect them. Through constant communication, Dr. Berry makes sure the parents of our special needs students feel supported and heard."

Although the 2015-16 school year is her second as director, Dr. Berry has 20 years of experience in education, serving as a teacher and assistant special education director. Respected by her peers and coworkers at the local level, she supervises school counselors, school social workers, a parent mentor, school nurses, Section 504, RTI and all special education programs. She also supports the Title III program. At the state level, she has served on the G-CASE advisory board representing the North Ga. GLRS and recently was elected Georgia's CEC state representative. Said one nominator, "Dr. Berry exemplifies the qualities this award was intended to highlight: resourcefulness, compassion and professionalism as a special education leader."

> G-CASE Drive In Conference Students with Disabilities: What Building Administrators Need to Know

Presenter Janet Peeler will help building administrators with the information they need to serve students with disabilities.

Target Audience: principals, asst. principals, counselors, lead teachers, coordinators, and special education staff.

Cost: \$57 (G-CASE members) \$77 Non members Register: <u>www.gael.org/events</u> or <u>G-CASE Drive In</u>



1600 Macon Rd, Suite A Perry, GA 31069 Topics: SWD—Who are they? Staffing Instruction & Accountability Discipline Communication

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Special Education Deadlines for FY17

Oct 1	Budget Submissions Deadline—All budgets
Oct 1	MOE Reconciliation Deadline
Oct 4	FTE Cycle 1 Count Day
Oct 25	CPI Cycle 1 Final Sign off
Oct 25	FTE Cycle 1 Final Sign off
Oct 30	Budget Completion Reports Deadline for IDEA grants for FY16
Oct 30	Suggested guideline that 25% of grant funds are drawn down from the GaDOE
Nov 14	Transition Planning Opens for Data Entry
Dec 9	Transition Planning Collection 1 Deadline for Submission
Dec 31	Budget Submission Grace Period ends
Jan 1	High Cost Grant (HCG) applications available
Jan 1	Grant for Residential and Reintegration Ser- vices (GRRS) grant applications available
Jan 9	Uploading Individual Student Transition Plan Documents Begins
Jan 23	Deadline for Uploading Individual Student Transition Plan Documents Collection 2
Jan 31	Suggested guideline that 50% of grant funds are drawn down from the GaDOE





The voice and vision of special education

September 25-27 NASCE / CASE Fall Conference Hyatt Regency Milwaukee, WI

October 19-20 SELDA Marriott Conference Center Macon, GA

October 25 Fall Drive-In Conference: Students with Disabilities: What Building Administrators Need to Know Perry, GA

November 2 SELDA Hyatt Regency Savannah, GA

November 2-4 Fall G-CASE Conference Hyatt Regency Savannah, GA

December 15 SELDA Atlanta, GA

March 27-29, 2017 Spring G-CASE Legal Forum Classic Center Athens, GA





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An Affiliate of The Georgia Association of Educational Leaders

Tyrene Neil, Editor Georgia Academy for the Blind 2895 Vineville Avenue Macon, GA 31204 tneil@doe.k12.ga.us

G-CASE serves the members of CASE who live and work in Georgia! Our major goal is to improve services to children with special needs. We strive to provide leadership and support to members by providing input into the policies and practices in Georgia which impact the quality of education and by providing support to the professionals who serve the students of Georgia.