

**SPECIAL EDUCATION LAW  
UPDATE**



Barbara Drayton, Deputy General Counsel  
Office of General Counsel  
South Carolina Department of Education

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**TRANSFER OF RIGHTS AT AGE  
OF MAJORITY**  
34 C.F.R § 300.320(c)

**Prior to the passage of the Adult Students With Disabilities Educational Rights Consent Act (Consent Act), there was only one exception to the transfer of rights to a student with a disability at age eighteen:**

Seeking a determination through the Probate Court that the student is incompetent.

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**ADULT STUDENTS WITH  
DISABILITIES EDUCATIONAL  
RIGHTS CONSENT ACT  
(CONSENT ACT)**  
S.C. Code Ann. § 59-33-310 et seq.

- Effective June 5, 2016.
- Five options relative to students with disabilities when they turn age eighteen:
  - 1) All Rights Transfer To The Student;
  - 2) The Student Makes Decisions With Support And Assistance (Supported Decision Making);

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**3) Delegation of Rights**

A student with the capacity to do so may sign a power of attorney and delegate his or her rights to an agent (such as a parent) or delegate his or her rights using the form developed by the SCDE.

**4) Certification of an Educational Representative**

A student who is unable to communicate his or her wishes, interests, or preferences with respect to an educational program may have an educational representative certified to act on his or her behalf.

**5) Guardianship of the Student**

If a student is incapacitated, the parents or other appropriate person may seek guardianship of the adult child through the Probate Court process. The Consent Act does not apply if the student has a court-appointed guardian.

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**WHAT IS THE PROCESS FOR THE APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE? (OPTION 4)**

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**Step 1 – A Medical Examination**

- The student first needs a medical examination that must be conducted by one of the following medical professionals:
  - Physician;
  - Nurse practitioner;
  - Physician’s assistant;
  - Psychologist; or
  - Psychiatrist
- The licensed medical professional may not be an employee of the school district.

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**Step 2 –The Medical Professional Must Examine the Student and Certify in Writing that the Student is Incapable of Communicating, With or Without Reasonable Accommodations, the Student’s Wishes, Interests, or Preferences Regarding His or Her Educational Program.**

- The Certification may be informal, but it must include the following information:
  - The date of the examination;
  - The basis for the determination that the student is not able to communicate his or her wishes; and
  - A statement of whether the inability to communicate is likely to last until age twenty-one.

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**Step 3 – The Medical Professional Must Send the Letter to the Superintendent or Other Designated School Official**

- Upon receipt of a certification letter, there is a requirement to notify the student in writing that a medical professional certified that he or she is incapable of communicating and an educational representative will be designated to represent him or her.
- The notice must inform the student that he or she may challenge the designation of the educational representative.
- If the student challenges the certification of an educational representative, the school district may not rely upon the educational representative for any decision-making purpose.

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**R.61-103, RESIDENTIAL TREATMENT FACILITIES FOR CHILDREN AND ADOLESCENTS**

Effective June 24, 2016

- An education program, including a program for students with disabilities, that meets all applicable federal and state requirements, as defined by the South Carolina Department of Education (SCDE).
- The education program may be provided at the facility, if appropriate space is available to provide a free appropriate public education in the least restrictive environment, or an alternate location.

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- A facility shall be planned, designed, and equipped to provide and promote the health, safety, and well-being of each resident.
- Spaces within or associated with the facility provided educational program, whether dedicated solely to education or shared with other activities, shall meet the requirements of the most recent edition of the South Carolina School Facilities Planning and Construction Guide.
- If the facility will provide space for the educational program, plans and specifications shall be submitted to the SCDE, Office of School Facilities (OSF) for approval. Submittal and other requirements listed in Section 1900 for the Department shall be required for the SCDE, OSF.

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**PROVISO 1.42 - SDE: RESIDENTIAL TREATMENT FACILITIES STUDENT ENROLLMENT AND FUNDING**

Each South Carolina resident of lawful school age residing in licensed residential treatment facilities (RTFs) for children and adolescents as defined under Section 44-7-130 of the 1976 Code, ("students") shall be entitled to receive educational services from the school district in which the RTF is located ("facility school district"). **The responsibility for providing appropriate educational programs and services for these students, both with and without disabilities, who are referred or placed by the State is vested in the facility school districts.**

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**WHAT ARE THE STEPS TO COLLECT PAYMENT AND THE TIMELINES?**

- Facility school districts providing the educational services shall notify the resident district in writing within forty-five calendar days that a student from the resident district is receiving educational services pursuant to the provisions of the proviso.
- Reimbursements shall be paid within sixty days of billing, provided the facility district has sent a copy of the invoice to both the district superintendent and the finance office of the resident district being invoiced.

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### HOW MUCH CAN YOU COLLECT?

- The facility school districts are entitled to receive the base student cost multiplied by the Education Finance Act pupil weighting for Homebound pupils of 2.10, as set forth in Section 59-20-40 of the 1976 Code and any eligible categorical and federal funds.
- A facility school district is entitled to reimbursement from a resident school district for the difference between (1) the reasonable costs expended for the educational services provided directly by the facility school district or the amount paid to the RTF and (2) the aggregate amount of federal and state funding received by the facility school district for that student. However, the reimbursement rate may not exceed \$45 per student per day.

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### RTF LOCATIONS

- Charleston
- Pickens
- Dorchester Two
- Richland One
- Florence One
- Williamsburg
- Greenville
- York Three  
(Rock Hill)
- Horry
- Lexington Two

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### OUT-OF-STATE RTF PLACEMENTS (New Provision)

- RTF facilities on the State Qualified Provider List not located within the boundaries of the state shall be reimbursed at a rate that may not exceed \$45 per student per day for education services and school districts shall be eligible to receive a base student cost weighted funding of 2.10 provided that the student remains enrolled in the school district.
- Facilities providing the educational services shall notify the resident district in writing within forty-five calendar days that a student from the resident district is receiving educational services pursuant to the provisions of the proviso.

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**REQUIREMENTS FOR OUT-OF-STATE  
RTF EDUCATION PROGRAMS?**

Qualified RTF providers' general education curriculum must be aligned to the South Carolina academic standards in the core content areas. All students with disabilities who are eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA), as amended, and the State Board of Education (SBE) regulations, as amended, shall receive special education and related services in the least restrictive environment by appropriately certified personnel.

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- Students in a qualified RTF will at all times be eligible to receive the educational credits (e.g., Carnegie Units) earned through their educational efforts.
- The resident school district and the RTF should develop a memorandum of understanding to outline the responsibilities of the RTF in providing the educational services and responsibilities, if any, of the resident school district while the student is housed in the RTF.
- If a child is placed in a RTF by the child's parent or guardian and is not referred, authorized, or placed by the State, the facility school district may choose to provide the educational program to the child, and upon doing so, must negotiate with the resident school district for services through medical homebound procedures.

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**MEDICAID**

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**GENERAL APPROPRIATION ACT  
PROVISO 1.2**

(SDE: DHEC - Comprehensive Health Assessment)

All school districts shall participate, to the fullest extent possible, in the Medicaid program by seeking appropriate reimbursement for services and administration of health and social services. Reimbursements to the school districts shall not be used to supplant funds currently being spent on health and social services.

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**ARE THERE SPENDING  
RESTRICTIONS ON MEDICAID  
REIMBURSEMENTS?**

- There are no specific state-level or federal restrictions on the school districts' use of Medicaid reimbursement funds. How the funds should be expended is a matter for your school district to decide.
- **Best Practice:** Use the funding to replace money from the fund source used to pay for the Medicaid-reimbursable service. If the services were paid out of special services, the funds should go back to the special services budget.

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**REHABILITATIVE BEHAVIORAL  
HEALTH SERVICES (RBHS)**

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## APPROVED RBHS PROGRAMS

- Anderson Three
- Anderson Five
- Bamberg One
- Berkeley
- Charleston
- Florence One
- Florence Two
- Florence Four
- Georgetown
- Horry
- Kershaw
- Marion
- Oconee
- Pickens
- Spartanburg Six
- Spartanburg Seven
- Sumter
- Williamsburg
- York Three (Rock Hill)
- York Four (Fort Mill)

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## RBHS – IN THE SCHOOL ENVIRONMENT

- Offered to students in kindergarten through twelfth grade, who are currently identified as needing additional behavioral support services to succeed in a general educational environment.
- Serves students with behaviors that are inappropriate or undesirable in the school environment.
- Provides students with regularly-scheduled interventions designed to optimize emotional and behavioral functioning in the natural environment through the application of clinically-planned techniques that promote the development of healthy coping skills, adaptive interactions with others, and appropriate responses to environmental stimuli.

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## RBHS

- Before services can be rendered in the RBHS program, a diagnostic assessment (DA) must be rendered to the child to establish or confirm a diagnosis, to assist in the development of a individualized plan of care (IPOC) based upon the child's strengths, needs, and/or to assess progress in treatment and confirm the need for continued treatment.
- This assessment includes a comprehensive bio-psychosocial interview, review of relevant psychosocial history, medical, and education records.

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**LIST OF RISK FACTORS**

(Medical Necessity - At Risk Of Being Placed Out Of The Home)

- Involvement with the Department of Social Services (DSS);
- In-school suspension, out-of-school suspension, alternative educational placement, or expulsion;
- Lack of parenting supervision or guidance in the home that results in the student being left to his or her own devices, increasing the likelihood of confinement in the Department of Juvenile Justice (DJJ) or another state placement; or
- The student has mental health issues and engages in behaviors that increase the probability of being placed in a psychiatric residential treatment facility (PRTF), group home, or other types of treatment centers.

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**HOW SCHOOL DISTRICTS PROVIDE BEHAVIORAL HEALTH SERVICES**

Must have an approved contract with the South Carolina Department of Health and Human Services (SCDHHS).

- A contract with the Department of Mental Health (DMH) – where DMH comes into the school setting and provides behavioral health services;
- Utilizing school district personnel;
- Referrals to private providers; or
- A combination of all three.

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**RBHS**

(CHANGES FOR THE 2016-17 SCHOOL YEAR)

To continue billing Medicaid for RBHS and other services that fall under the umbrella of RBHS, as of July 1, 2016, school districts must complete certain requirements.

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**School districts must:**

- 1) Complete the packet with the Certificate of Ownership, Credentialing Documentation, Certificate of Occupancy, and other required documents;
- 2) Contract with Managed Care Organizations (MCOs) by September 30, 2016, to continue billing Medicaid;
- 3) Obtain a prior authorization before billing the MCO for Medicaid reimbursement;

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- 4) Obtain parental consent on the revised Medicaid RBHS consent form regardless of whether the student has an individualized education program (IEP);
- 5) Provide the Medicaid General Consent Annual Notification of the intent to bill third-party insurance companies and Medicaid and obtain parental consent to bill Medicaid on the revised Medicaid General Consent form;
- 6) Bill any third-party insurer; and then
- 7) Bill the MCO for any Medicaid reimbursement.

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**THIRD-PARTY LIABILITY**

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**EFFECTIVE JANUARY 1, 2017**

To bill and receive payment from Medicaid, the DHHS is requiring school districts to **first bill any third-party insurer** for diagnostic and psychological evaluation services, behavioral health services, and other health-related screenings and treatment.

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**THIS INCLUDES  
SCHOOL-BASED REHABILITATIVE SERVICES**

- Audiological services;
- Speech-language services;
- Physical therapy services;
- Occupational therapy services;
- Orientation and mobility services; and
- School district administrative claiming, which does not equate to administration and billing costs.

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- The school district cannot bill Medicaid or the student's private insurance if it will decrease available lifetime coverage or any other insurance benefit, result in the family paying for services that would otherwise be covered, increase insurance premiums, or risk loss of eligibility for waived programs.
- The family is not responsible for paying any outstanding deductibles, co-payments, or co-insurance related to the school district billing Medicaid or the student's insurance program for services provided by the school district.
- If there is a deductible that is not met, bill Medicaid. If there is a co-payment or co-insurance, bill Medicaid.

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**WORKFORCE INNOVATION AND OPPORTUNITY ACT OF 2014 (WIOA)**

- The most recent amendments to the Rehabilitation Act, now part of WIOA, are expected to push to the integrated employment agenda for youth transitioning from school to work.
- *Competitive integrated employment* is identified as the optimal employment outcome of VR services.

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- **Competitive integrated employment** refers to jobs held by people with disabilities in workplaces in which the majority of employees do not have disabilities.
- In these jobs, employees with disabilities are paid directly by their employers and earn wages consistent with those paid to employees without disabilities performing the same or similar work.

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**ELIGIBILITY**

In-school youth must be aged 14-21, attending school, low income, and meet one or more additional conditions, which could include:

- Basic skills deficient
- English language learner
- An offender
- Homeless, runaway, in foster care or aged out of the foster care system
- Pregnant or parenting
- **An individual with a disability**
- **Person who requires additional assistance to enter or complete an educational program or to secure and hold employment**

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**MAINTENANCE STATE FISCAL SUPPORT (MSFS)**

**In the Matter of  
The S.C. Department of Education  
(SCDE)  
v.  
The United States Education  
Department (USED)**

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- On September 17, 2015, the U.S. Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) issued an amended proposed determination that the State of South Carolina.
- The determination found the State was not eligible for **\$51,336,578** of its section 611 grant under Part B of the Individuals with Disabilities Education ACT (IDEA) because of its failure to maintain State financial support for special education and related serviced by that amount in State fiscal year (SFY) 2010 (July 1, 2009-June 20, 2010) under 20 U.S.C. 1412(a)(18) (A) and 34 CFR § 300,163(a).

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**SETTLEMENT AGREEMENT**

- Throughout a series of negotiations with staff from OSERS and the South Carolina Department of Education (SCDE), a settlement agreement was reached.
- As required of the settlement agreement, the SCDE must ensure that additional State funds are appropriated either as a new or supplemental appropriation for special education and related services, totaling **\$51,336,578**. In addition, the SCDE must provide a spending plan to the U.S. Department of Education, Office of Special Education Programs (OSEP), and receive approval prior to implementation.

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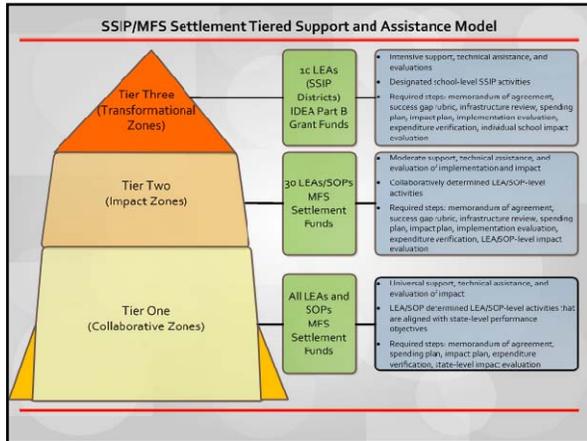
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**PROPOSED ALLOCATION/PAYMENT METHODOLOGY**

- The State will allocate **\$51,336,578** in State funds beginning in fiscal year 2016–17, through a tiered-system and funding calculation.
- Each local educational agency (LEA) will sign a memorandum of agreement that outlines both programmatic and financial requirements.
- Funds will be allocated using a tiered-model:
  - Tier I will include all school districts and special schools.
  - Tier II will include thirty specified LEAs identified with high poverty and/or targeted through SCDE monitoring.

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- Funds will be allocated based on the child count figures reported by LEAs to the OSES in October 2015.
  - Funds will be disbursed to LEAs from the SCDE using a specific revenue code. All expenditures must be recorded in the required sub-fund. As part of the settlement agreement, the SCDE will track these expenditures for state reporting.
  - Tier One funds will be disbursed over a three-month period once we receive approval of the spending plan.
  - Tier Two funds will be disbursed over a three-month period at a later date in 2017.

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- The Tier Three - Transformational Zone - includes the ten LEAs currently committed to working with the State as part of its State Systemic Improvement Plan (SSIP).
- Given that Phase III is currently underway and federal IDEA funds from State-level activities are being used, in part, to support this Tier, the MFS funds will not be used in support of Tier Three.

Transformational Zone LEAs	
Aiken	Lexington Two
Charleston	Orangeburg Five
Florence Two	Pickens
Georgetown	Richland Two
Greenwood Fifty	Spartanburg Five

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- The funds will be used by LEAs and SOPs to augment, and not replace, federal, State, and local funding that has already been allocated for, or is being used to support, South Carolina's Results Driven Accountability (RDA) and SSIP programs and initiatives.
- The SCDE will require LEAs to attend intensive training related to the spending plan prior to fund dispersal. Ongoing training and technical assistance will be provided.

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- The evaluation of the plan will be conducted by an external evaluation team from the University of South Carolina (USC) with assistance from SCDE staff.
- The additional targeted funds will not increase the LEA's maintenance of effort (MOE) or excess cost requirements.

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**PROHIBITED USES OF FUNDS**

- New teachers or staff for existing programs
- Salaries for current staff members
- Construction or expansion of facilities
- General education personnel
- Indirect or administrative costs
- Renting extra classroom space
- Superintendents or principals salary and fringe benefits
- Non-educational expenditures (i.e. games, movies, bowling etc.)
- Medicaid school-based services
- Equipment (unless approved by OSES in spending plan)

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- The SCDE will reserve the right to withdraw funding issued pursuant to the memorandum of agreement if the SCDE determines that the LEA is not utilizing funding in a manner consistent with use of funds and responsibilities as outlined in the approved LEA's spending plan.
- There will be very specific funding requirements.
- There will be very specific, comprehensive fiscal monitoring.
- All funds must be expended by June 30, 2018.

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**The failure to appropriately implement the settlement agreement will result in a reduction of funding in the amount of **\$85,397,967**.**

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### REMINDER

#### Service animals

– The Department of Justice (DOJ) guidance:

When it is not obvious what service an animal provides staff may only ask two questions:

- (1) is the service animal required because of a disability, and
- (2) what work or task has the animal been trained to perform. Staff cannot require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.

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- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example in a school classroom, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.
- People (students or personnel) with disabilities who use service animals cannot be isolated from others, treated less favorably than others, or charged fees that are not charged to other people without animals.

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- The Americans with Disabilities Act (ADA) does not require service animals to wear a vest, ID tag, or specific harness.
- The LEA may ask parents to show that the animal has been vaccinated, spayed or neutered, and treated for fleas and ticks.
- The LEA should develop a policy before receiving a request or a complaint from the DOJ.

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**Monitoring Schedule  
2016-17 SCHEDULE**

LEA Name	Date of Visit
Calhoun	September 6-8
Newberry	September 20-22
Spartanburg Two	October 4-6
Florence Four	October 17-19
Florence Three	November 2-4
SC School for the Deaf and the Blind	November 15-17
York Three/Rock Hill	December 5-8
Richland One	January 9-12

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**2016-17 SCHEDULE  
(CONTINUED)**

LEA Name	Date of Visit
Saluda	January 24-26
Marlboro	February 7-9
Chester	February 21-23
Aiken	March 6-9
Anderson Four	March 21-23
Greenwood Fifty -One	April 4-6
Bamberg Two	April 18-20

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