


**COMPLYING WITH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) WHILE PROVIDING SPECIAL EDUCATION AND RELATED SERVICES DURING THE ONGOING COVID-19 PANDEMIC**

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**Mission**

**The mission of the South Carolina Department of Education (SCDE) is to provide leadership and support so that all public education students graduate prepared for success.**

**Vision**

**All students graduate prepared for success in college, career, and citizenship. By 2018, at least one school in every district will have implemented personalized learning that supports students meeting the Profile of the South Carolina Graduate.**

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Molly M. Spearman – State Superintendent of Education

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## Profile of the South Carolina Graduate



### World Class Knowledge

- Rigorous standards in language arts and math for career and college readiness
- Multiple languages, science, technology, engineering, mathematics (STEM), arts and social sciences

### World Class Skills

- Creativity and innovation
- Critical thinking and problem solving
- Collaboration and teamwork
- Communication, information, media and technology
- Knowing how to learn

### Life and Career Characteristics

- Integrity
- Self-direction
- Global perspective
- Perseverance
- Work ethic
- Interpersonal skills

Approved by SCASA Superintendent's Roundtable and SC Chamber of Commerce.



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## RELEVANT LAWS

- **THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)**
- **SECTION 504 OF THE REHABILITATION ACT OF 1973 (SECTION 504)**
- **TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA)**

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## **HOW DOES COVID-19 IMPACT THE REQUIREMENTS IN THE IDEA?**

- **None of the requirements in the IDEA that relate to the obligation to provide students with disabilities a free appropriate public education (FAPE) in the least restrictive environment (LRE) were waived by the United States Department of Education (Education Department) or Congress.**
- **None of the requirements in the ADA or Section 504 that relate to the obligation to provide students with disabilities access to their educational programs were waived by the Education Department, the Department of Justice, or Congress.**

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## **EDUCATION DEPARTMENT GUIDANCE REGARDING THE PROVISION OF SERVICES AND ACCESS TO EDUCATION DURING THE PANDEMIC**

- **Letter to Education Leaders and Early Intervention Partners (August 24, 2021)**
  - Reiterates previous guidance
  - Outlines a series of question and answers (Q&As)
- **Letter to Education Leaders on Preventing and Addressing Potential Discrimination Associated with COVID-19 (March 4, 2020)**
- **Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak (March 12, 2020)**

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## **ADDITIONAL GUIDANCE**

- **Addressing the Risk of COVID-19 in Schools while Protecting the Civil Rights of Students (March 16, 2020)**
- **Providing Services to English Learners During the COVID-19 Outbreak (May 18, 2020)**
- **Supplemental Fact Sheet - Addressing Serving Children with Disabilities during COVID-19 National Emergency (March 21, 2020)**
- **Family Educational Rights and Privacy Act (FERPA) & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (March 30, 2020)**

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## **MOST COMMON ISSUES OF NONCOMPLIANCE RAISED IN COVID-RELATED LAWSUITS AND DUE PROCESS HEARINGS (2019-20 AND 2020-21 SCHOOL YEARS)**

- **Stay-Put**
  - Unilateral Change in Placement
  - LRE
- **Child Find - Failure to Evaluate**
- **Denial of a FAPE**
  - Method of delivery of instruction
  - Reduction in the amount and type of services
    - Failure to provide one-one-one assistance
    - Failure to provide autism-related services
    - Failure to provide other behavior related services
  - Failure to implement accommodations and modifications

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## STAY PUT

- Actions were filed in South Carolina, other states, and the United States territories alleging COVID-19 related school shutdowns were unilateral changes in placement for students with disabilities to a more restrictive environment and denied parents their rights to meaningfully participate in the decision-making process relative to changes in the amount, type, and location of services.
- In *J.C. v. Fernandez*, 77 IDELR 15 (D. Guam 2020), the U.S. District Court, District of Guam ruled that five students with disabilities were not entitled to a preliminary injunction during state-mandated school closures due to the pandemic. The court held the plaintiffs failed to establish they would suffer irreparable harm without an injunctive order requiring in-person instruction while schools were closed.
- This ruling is in line with determinations in Maryland, New York, Pennsylvania, and other jurisdictions that COVID-19 related closures did not trigger the stay-put provisions in the IDEA.

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## FAILURE TO EVALUATE

- Return to School Roadmap: Child Find under Part B of the Individuals with Disabilities Education Act (August 24, 2021).
- The Education Department has repeatedly stated local educational agencies (LEAs) must complete screenings and the implementation of interventions for students with academic and/or behavioral deficits.
- LEAs must clear any backlogs and complete initial evaluations and reevaluations for special education services.

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## **WHAT ABOUT THE REQUIREMENT TO CONDUCT OBSERVATIONS AS A PART OF THE EVALUATION PROCESS?**

- The Education Department takes the stance in its Q&A that where online and virtual instruction limits or prevents the teacher's interaction and contact with a child, the LEA should examine whether existing child find policies and procedures are effective in meeting the responsibilities of identifying, locating, and evaluating children who may need special education and related services.
- Child find procedures that rely mainly on informal teacher observation and referral may require additional consideration for such children.
- Consider other options to gather data and do not solely rely on parent referrals.
- Different times call for different measures.

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## **LONG COVID**

- Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families (July 26, 2021).
- Long COVID impacts children in a variety of ways. Therefore, the determination of whether a child who was previously not identified as a student with a disability is now eligible under the IDEA or Section 504 must be made on an individual basis.
- Some students who were already identified as having a disability and who have contracted COVID-19 may experience new or worsened symptoms related to their pre-existing disability, to COVID-19, or to both. If these symptoms persist in the form of long COVID, these students may need new or different related aids and services, specialized instruction, or reasonable accommodations and modifications.

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## **DENIAL OF A FAPE**

**Class Action Lawsuits v. Individual Student Lawsuits and Hearing Requests**

**General Allegations v. Specific Allegations about the Negative Impact of the LEA's Actions or Lack of Action upon the Student**

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### **L.V. v. New York City Dep't of Educ., 77 IDELR 13 (S.D.N.Y. 2020)**

**Ruling:**

**The U.S. District Court, Southern District of New York ordered a district to provide in-person services to a 5-year-old with autism to the extent it can safely do so during the COVID-19 pandemic. The court reasoned that the district failed to explain how delivering the child's applied behavior analysis therapy and other services via a tablet would provide him FAPE. The court also ordered the district to conduct an independent assistive technology evaluation to assess the child's individual needs and the software required to deliver his required services remotely.**

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## **TELEHEALTH SERVICES**

- **As a result of COVID-19, the South Carolina Department of Health and Human Services (SCDHHS) announced temporary modifications to policies related to telephonic and telehealth coverage.**
- **During the current pandemic, the SCDHHS will provide reimbursement for telehealth services provided by physical therapists, occupational therapists, and speech-language pathologists and therapists.**
- **The SCDHHS will also provide reimbursement for telephonic and telehealth behavioral health services.**
- **If the student is unable to access the services or benefit from the services, the student may be entitled to compensatory services.**

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## **COMPENSATORY SERVICES**

- **In the Education Department’s initial guidance concerning students with disabilities not receiving services due to school closures and/or COVID-19 illness, the guidance addresses the teams’ obligations under the IDEA and Section 504 to make individualized determinations as to whether compensatory services are needed under applicable standards and requirements when services were not provided students in accordance with students’ IEPs or Section 504 Plans.**
- **Later guidance characterizes the obligation as individually determining “whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.”**
- **These services are an equitable remedy and must be designed to put students back in the place where they would have been, but for LEAs’ failure to provide services.**

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## **CALIFORNIA'S PLANS TO DETER SPECIAL EDUCATION DISPUTES**

### **San Francisco Examiner - July 22, 2021**

- **The state budget, signed in July 2021, sets aside \$100 million for resolving special education conflicts between parents and school districts, which escalated during remote learning. None of the money can go to attorney fees.**
- **The money will go toward outreach, such as brochures, meetings and presentations, to help parents and school staff understand the rights outlined in the IDEA. The goal is to improve communication and build trust between parents and schools, so conflicts can be resolved quickly and more easily.**
- **In addition, the state set aside \$450 million for extra tutoring, therapy and other services that students with disabilities missed during remote learning. It also funded a facilitated IEP system.**

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## **COMPLAINTS OF CORONAVIRUS-RELATED DISCRIMINATION**

**In November 2020, attorneys in the United States Department of Education, Office for Civil Rights (OCR) said they are moving forward on the investigation of complaints that largely involve reports that students with disabilities were not able to access their instruction as a result of:**

- **Unilateral cuts in services when provided through a virtual platform.**
- **The lack of access, or benefit from, services through a virtual model.**
- **The failure to provide related services, such as occupational therapy, physical therapy, speech therapy, counseling, and behavior therapies.**
- **The failure to provide accommodations through virtual platforms.**

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## **FULLY IMPLEMENT IEPS AND 504 PLANS**

- Schools that provide distance learning, face-to-face instruction, or some combination of the two must comply with Section 504 and Title II of the ADA, including the provision of services, supports, strategies, accommodations, and modifications required by IEPs or Section 504 plans.
- This includes sending packets home for students with assignments.
- The OCR advises that district-wide or school policies that reduce or limit services specifically for students with disabilities, without regard to reasonable modifications or services that may be necessary to meet the individualized needs of the students, violate the provisions of Section 504 that guarantee equal access to educational programs and prohibit discrimination. In other words, such policies are discriminatory.

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## **OCR'S INVESTIGATION OF INDIANA'S SPECIAL EDUCATION SERVICES DURING COVID**

- In its January 2021 letter, the OCR said it is concerned that Indiana has failed to provide students with disabilities a FAPE since the onset of COVID-19 and is particularly troubled by reports that parents of students with disabilities have filed multiple complaints with the Indiana Department of Education alleging students were forced by local school districts into "one size fits all" remote learning programs, instead of individualized programs designed to meet the need laid out in their IEPs or 504 Plans.
- One family alleged their school district had not made a good faith attempt to provide their son a FAPE since schools closed in March 2020. The student is nonverbal, eats through a tube and has quadriplegia. When the school district decided to start the 2020-21 school year virtually, it denied the student a FAPE and harmed him developmentally, intellectually, socially, emotionally and physically.

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## **OCR'S INVESTIGATION OF SEATTLE'S SPECIAL EDUCATION SERVICES DURING COVID**

- **According to the OCR's January 2021 correspondence, last spring the school district told its special education teachers not to deliver specially-designed instruction and disallowed them from adapting lessons to each child's needs.**
- **The OCR states it is concerned that the school district failed to provide a FAPE to each qualified student with a disability as required by federal law and denied students with disabilities equal access to education.**

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## **MOST COMMON ISSUES RAISED THUS FAR DURING THE 2021-22 SCHOOL YEAR**

- **Denial of a FAPE as a result of the failure to make decisions based on a student's individual and unique needs**
- **Denial of access to instruction**
  - **Failure to implement mask mandates**
  - **Failure to grant requests for virtual instruction**
  - **Failure to provide qualified interpreters**
  - **Failure to provide transportation**
- **Denial of the opportunity for meaningfully parental participation in the IEP process**
- **Failure to provide qualified interpreters**

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## **IEP MEETINGS AND MANIFESTATION DETERMINATION REVIEWS (MDRs)**

- **Options for Conducting IEP meetings:**
  - In-person
  - Virtual
  - Via Telephone
- **LEAs must ensure meaningful parental participation regardless of the way they conduct IEP meetings.**
- **LEAs must ensure that the required members of the IEP teams participate in meetings.**
- **Do not forget to obtain a qualified interpreter prior to the meeting, if applicable.**

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## **WHAT IF THE IEP TEAM BELIEVES A STUDENT WITH A DISABILITY NEEDS A SERVICE-DELIVERY MODEL THAT IS DIFFERENT THAN THE OPTIONS OFFERED TO NON-DISABLED STUDENTS?**

- **Is it an across-the board policy, such as no student with autism or no student who receives services through a self-contained service-delivery model can enroll in a virtual platform for the 2021-22 school year, or is the decision based on data and the individual student's needs?**
- **The IEP team has the responsibility and authority to determine whether an individual student needs a service-delivery model that is different from what is offered to other students if those options will not provide the student a reasonable opportunity to receive a FAPE.**

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## SCENARIO

- The LEA is currently offering two options, total face-to-face or a total virtual program.
- Liberty, a student with a moderate intellectual disability, attention deficits, and behavioral challenges is unable to operate her assistive device, complete assignments, and benefit from instruction without supervised one-on-one adult assistance and hand-over-hand assistance.
- Liberty's IEP team determined at the end of the 2020-21 school year that she did not make meaningful progress through her virtual program. Therefore, she needs face-to-face instruction to receive a FAPE.

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## PARENTAL REQUESTS FOR VIRTUAL INSTRUCTION

Possible Loss of State Funding

v.

Individual and Unique Needs of the Student

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## **PARENTAL REQUESTS FOR MASK REQUIREMENT**

**Possible Loss of State Funding**

**v.**

**Individual and Unique Needs of the Student**

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## **COVID-19 MITIGATION STRATEGIES** **SCDE MEMORANDUM DATED AUGUST 18, 2021**

- **There are requirements under the IDEA, Title II of the ADA, and Section 504 that must be taken into consideration when determining whether mask mandates are necessary for certain individuals in an educational setting.**
- **There are instances where such consideration is necessary for specific individuals who provide instruction and related services to, or come into contact with, students who are medically fragile, have immunocompromised and immunodeficiency conditions, or are otherwise at significant risk for medical conditions that make them more likely to become seriously ill, consistent with the Centers for Disease Control and Prevention and the South Carolina Department of Health and Environmental Control.**

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## **ACCOMMODATIONS AND MODIFICATIONS**

- **Under federal law, public agencies, LEAs must make reasonable modifications to their policies, procedures, and practices to accommodate students with disabilities and ensure equal access to and the ability to benefit from education in the LRE.**
- **Not all students with disabilities have IEPs. In addition to students with IEPs and Section 504 accommodation plans, students with individual healthcare plans who need support services, nursing or other related services, and/or accommodations to assist in monitoring and managing their health-related issues in the educational setting are also protected under the ADA and Section 504.**

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## **INDIVIDUAL AND UNIQUE NEEDS**

- **When considering whether a mask mandate or other accommodation is necessary to meet a student's individual and unique needs and ensure equal access to and the ability to benefit from education, such decisions must be based on that particular student's impairment and circumstances.**
- **Decisions must be made on a case-by case basis by the student's IEP team, Section 504 team, and/or other group of individuals knowledgeable of the student and the student's impairment or condition.**
- **These decisions must not be based on state and/or local across-the-board policies, procedures, practices, and prohibitions.**

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## **STATEMENT REGARDING CIVIL RIGHTS INVESTIGATIONS AUGUST 19, 2021**

- **The federal government stands ready to investigate civil rights complaints from families concerned that restrictions on masking in schools violate their children’s rights to a FAPE.**
- **The OCR will also receive and respond as appropriate to complaints from the public, including parents, guardians, and others about students who may experience discrimination as a result of states not allowing local school districts to reduce virus transmission risk through masking requirements and other mitigation measures.**
- **The OCR may take action if state policies mean children with medical vulnerabilities, like respiratory illnesses or weakened immune systems cannot safely attend school during the COVID-19 pandemic.**

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## **ATTENDANCE GUIDANCE MEMORANDUM - AUGUST 19, 2021**

- **Confirming Attendance Status Memo 2021**
- **The South Carolina Department of Education (SCDE) recommends that districts make appropriate accommodations for students who may be required to quarantine or self-isolate in accordance with the South Carolina Department of Health and Environmental Control’s K-12 Schools Interim Guidance for Management of COVID-19 Cases.**
- **Accommodations may include temporarily moving the student(s) to a distance learning environment, such as electronic platforms or offsite environments (including home) utilizing instructional packets.**

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## **S.C. CODE REGS. ANN. 43-279**

- **Defines Lawful and Unlawful Absences**
- **Defines Truancy – Related Terms**
- **Establishes the Requirement to Develop Intervention Plans**
- **Sets the Parameters for Referrals to Family Court**
- **Provides for the Approval of Absences in Excess of Ten Days and Approval of Credit**
- **SBE R 43-274**

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## **REMOTE INSTRUCTION FOR ISOLATED AND QUARANTINING STUDENTS**

- **Special education and related services must be provided to students who are required or advised to stay home for a period of time by public health authorities or school officials because of COVID-19.**
- **If a student is not personally ill and unable to participate, remote services should be provided so the student can continue to access his or her instruction.**
- **If the student does not receive services, the IEP team must consider providing compensatory services. Make determinations based on the individual student's needs and data.**

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## **STUDENTS WITH DISABILITIES AND TRUANCY**

- **Determine the cause of the attendance problems.**
- **Keep in mind the LEA's child find responsibilities.**
  - **IDEA**
  - **Section 504**
- **Be aware of the role of the IEP or Section 504 team.**
  - **If attendance interferes with the student receiving a FAPE, it must be addressed**
  - **Are additional services and supports necessary**
- **Consider the possible need for medical homebound instruction, but do not push parents to seek medical homebound status to avoid addressing attendance problems and challenges related to mandates by the state legislature.**

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## **SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE (DOJ) AND THE CHARLESTON COUNTY SCHOOL DISTRICT (2021)**

- **The DOJ found the District deprived parents/guardians and their children of equal access to the District's education programs.**
- **The DOJ found the District failed to:**
  - **Implement effective policies and procedures for identifying and communicating with Spanish-speaking limited English parents (LEP) parents/guardians;**

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- **Ensure that Spanish-speaking LEP parents/guardians knowingly consent to or refuse special education programming for their children.**
- **The individual providing translation or interpretation services may not be a member of the IEP team, or otherwise have a conflict of interest that impairs his or her ability to provide translation or interpretation services to the parent/guardian.**
- **Provide sufficient interpretation services for Spanish-speaking LEP parents/guardians regarding their children's access to the District's general and special education programs; and**
- **Provide written translations of essential education documents to Spanish-speaking LEP parents/guardians.**

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## **INTERPRETERS AND TRANSLATORS**

- **Provide parents notice of the right to request translation and interpretation services.**
- **Provide oral interpretation or written translation of school-related information upon receiving reasonable, specific requests for such information from LEP parents/guardians.**
- **Except in an emergency, the District do not use students, family or friends of LEP parents/guardians, or unverified automated services for translation of District- or school-generated documents or for any other interpretation or translation services.**

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## QUALIFICATIONS

- The District will adopt qualifications generally accepted in the field of oral interpretation and written translation and will require that any individual who acts on behalf of the District as an interpreter or translator for parents/guardians or students meet those qualifications.
- At a minimum, anyone who acts on behalf of the District as an interpreter or translator for parents/guardians or students, whether paid District employee, contractor, or volunteer will be:
  - bilingual in the languages in which he or she is communicating;  
have a demonstrated competence to interpret or translate;

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## TRAINING REQUIREMENTS

- Trained in providing the interpretation they are asked to provide; sufficiently knowledgeable in both languages of any specialized terminology needed to provide the requested interpretation or translation accurately (e.g., special education terms); and
- Trained in the ethics of interpretation and translation (e.g., the need for accuracy and confidentiality).

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## **DOJ CORRECTIVE ACTIONS TYPICALLY REQUIRE THE TRANSLATION OF:**

- **The code of conduct and parent handbooks, including a notice of the right to request translation and interpretation services and how to file a complaint regarding language access services;**
- **Documents related to District programs and activities for which notice is needed to participate, or for which parent/guardian permission is required (e.g., gifted and talented courses); and**
- **Other written information provided to non-LEP parents/guardians describing their rights and responsibilities and the benefits and services available to parents/guardians and students (e.g., information regarding the IDEA, Section 504, vaccinations, the disciplinary process, free- and reduced-priced lunch, access to student records, graduation requirements).**

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## **SPECIAL EDUCATION COMMUNICATION**

- **The individual providing translation or interpretation services may not be a member of the IEP team, or otherwise have a conflict of interest that would impair his or her ability to provide translation or interpretation services to the parent/guardian.**
- **Spanish speaking LEP parents/guardians must receive up-to-date and accurately translated copies of the following documents when requested, or are necessary for parental participation:**
  - **Notice of meeting;**
  - **Parent evaluation forms, including surveys and family history/background forms;**
  - **Notice of procedural safeguards;**
  - **Parental consent forms; and**
  - **Prior written notice.**

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## PLAN AHEAD

- Upon request by an LEP parent/guardian, the District shall translate into Spanish an IEP or 504 Plan (or requested portions of these documents).
- The request for translation may be made before, at or after an IEP or 504 meeting, and the District shall provide the requested translation within a reasonable period of time.

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## STATES IN THE NEWS

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## **CHICAGO PUBLIC SCHOOLS PROMISES CASH PAYMENTS FOR FAMILIES DENIED SPECIAL EDUCATION SERVICES**

**Chicago Sun Times - August 12, 2021**

- Chicago Public Schools (CPS) plans to offer cash payments to families whose disabled children were wrongly denied special education services between 2016 and 2018.
- The announcement comes three years after the state found that the school district's actions were illegal. The State previously ordered CPS to provide remedies to harmed students.
- Reportedly, of the more than 10,000 students whom the school district acknowledged were harmed, only 2 percent received any remedy, such as free access to new therapies, tutoring or reimbursement for transportation.

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## **NEW YORK CITY TO INCREASE SPECIAL EDUCATION SERVICES FOR BRONX STUDENTS FOLLOWING SETTLEMENT**

**Chalkbeat - August 4, 2021**

- A federal district judge approved a settlement agreement between the NYC education department and disability rights advocates in the Bronx, resolving a four-year-old lawsuit that challenged the city's process for allocating certain special education services.
- The settlement, in effect for three years, requires the NYC education department to make a series of changes to the way it provides related services, which include OT, mental health counseling, and other supports for students with disabilities.
- Many schools do not have enough on-site staff to provide these services to all the students who are entitled to them. When that happens, schools can give parents a voucher to cover the cost of the service. But families sometimes struggle to find providers willing to travel to their neighborhoods, for example, and many providers are simply unresponsive or are not taking on more clients.

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**QUESTIONS**