

2023

**South Carolina School Boards Association
School Law Conference**



**Updates and Reminders Concerning the
Individuals with Disabilities Education
Act (IDEA) and Programs for Students
with Disabilities**

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Relevant Laws

Federal

- The Individuals With Disabilities Education Act (IDEA)
- Section 504 Of The Rehabilitation Act Of 1973 (Section 504)
- The Americans With Disabilities Act (ADA)

State Statutes

State Regulations

S.C. General Appropriations Act (Budget)



Proposed Amendments to Federal Regulations

Regulations to remove the requirement in the IDEA to obtain parental consent prior to accessing Medicaid for school-based services -
Comment Period Closed on August 1, 2023

General Appropriation Act (State Budget) - Proviso 1.2

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.



Other Proposed Amendments

- Regulations implementing Section 504 - Notice of Proposed Rulemaking expected August 2023

All students with disabilities who have individualized education programs (IEPs) receive the protections under Section 504

- Regulations implementing the Family Educational Rights and Privacy Act (FERPA) - Notice of Proposed Rulemaking expected November 2023

The IDEA regulations include the same confidentiality and access to education rights as the FERPA regulations



Guidance from the United States Department of Education, Office of Special Education Programs (OSEP)

On July 24, 2023, the OSEP released updated policy guidance to states on the IDEA's general supervision requirements at the state and local level. The OSEP states the intent is to further clarify and expand its position that:

- A state must not ignore credible allegations of noncompliance made outside its monitoring cycle;
- States must monitor each LEA program at least once every six-years;
- States must issue a timely finding of noncompliance, generally within three months of the state's identification of the noncompliance; and
- States and LEAs programs or providers must verify the correction of each individual case of child specific identified noncompliance, rather than a subset.



Monitoring

- The SCDE was monitored by the United States Department of Education, (OSEP) in 2022 (June - November)
- Possible release of the report in November 2023
- The SCDE has reinstated local educational agency (LEA) monitoring



Please Be Aware of

- Longstanding issues of noncompliance and challenges
- Most common issues of noncompliance
- Challenges since the pandemic



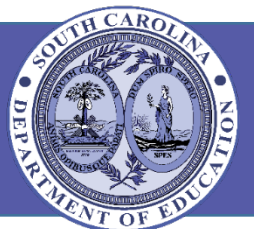
Challenges Related to the Lack of Resources

***Note: While we recognize the reality of these challenges



Placement and Service-Delivery Option Issues

- Least Restrictive Environment (LRE)
 - Ensure a Continuum of Placement Options is Available
 - Make Decisions Based on the Student's Needs
- Appropriately Certified Personnel -
 - SCDE Memorandum - Qualifications of Special Education Teachers (November 1, 2022)
- Appropriately Trained Personnel
- Appropriate Supervision in Some Cases



New IEP System

- The new IEP system will be implemented during the 2024-25 school year - EDPlan SC.
- The SCDE will provide opportunities for staff and local educational agencies (LEAs) to provide input while the program is being configured and feedback during the training and rollout phase.



Other Updates

- Legislative Update - Debbie Elmore
- Proposed Revisions - State Board of Education Regulation 43.243.1 - Criteria for entry into effective programs of special education for students with disabilities
- Proviso - Billing
 - 1.6 - Billing under the Foster Care and Group Home proviso will remain the same for the 2023 - 24 school year
 - 1.32 - Billing under the residential treatment facility proviso will remain the same for the 2023-24 school year



Options for Pursuing Disputes/Complaints

- U.S. Department of Justice (DOJ) Complaint
- U.S. Office for Civil Rights (OCR) Complaint
- Due Process Complaint- (Due Process Hearing Request)
- Mediation
- State-Level Complaint
- Federal Court
- State Court



Legal Update

Exhaustion of IDEA Claims not Required to Pursue a Claim under Section 504 in the Federal Court



Perez v. Sturgis Public Schools

143 S. Ct. 859 (March 21, 2023)

- In 2017 the family settled a due process complaint filed against the Sturgis Public Schools, alleging a denial of a free appropriate public education (FAPE) to the student as a result of the failure to provide appropriate educational services and supports, including sign language and an appropriately trained aide.
- In addition to the due process complaint, the family filed a lawsuit to obtain compensatory damages, which are not available under the IDEA.



- The lawsuit alleged emotional distress and economic harms caused by the failure to provide an adequate education to the student and violations of Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA) and state anti-discrimination laws.
- **The Court unanimously held a student with a disability does not have to exhaust the IDEA administrative due process procedures before filing a lawsuit seeking compensatory damages under the ADA or other federal anti-discrimination laws.**
- To recover damages under these laws, plaintiffs generally must prove that the school district's actions were “deliberately indifferent” to the rights of the plaintiff afforded under those laws.



Z.W. et al v. Horry County School District et al. No. 21-1596 (4th Cir. 2023)

- Similar to Perez, this case started with disputes under the IDEA, but the filing in federal court did not mention the IDEA or allege the denial of a FAPE. The case was brought under the Rehabilitation Act and Title II of the ADA.
- The lawsuit claims the deprivation of medically-necessary therapy at school is causing the student ongoing and irreparable harm. The parent demanded that the court end the District's refusal to allow the student's applied behavior analysis (ABA) trained therapist to work with the student in the school setting.
- Citing Fry v. Napoleon Community Schs., 580 U.S. 154 (2017), the 4th Circuit ruled the district court erred in concluding the need to exhaust administrative remedies under the IDEA before bringing this suit.



Seclusion and Restraint

Recent Investigations



United States Department of Justice (DOJ) Settlement Agreements – Students with Disabilities

- Spokane, Washington School District (April 17, 2023)
- Anchorage, Alaska School District (February 16, 2023)
- Okaloosa County, Florida School District (December 20, 2022)
- Cedar Rapids, Iowa School District (September 12, 2022)



United States Department of Education

Office for Civil Rights (OCR)

A South Carolina School District – May 23, 2022

- The OCR found there were no written procedures or guidance documents for the District for the use of mechanical restraint.
- Although the written procedures and guidance documents pertaining to the use of restraint or seclusion are applicable to both regular education and special education students, the OCR noted the documents are located within the District's Special Education Procedures for the Special Education Department.
- The OCR noted that neither guidance document provides information to school teams pertaining to when a student's IEP team should meet to discuss the use of restraint or seclusion.



- The District spoke with personnel about its practices, but the OCR stated the District had no written procedures or guidance directly addressing how District staff should implement a restraint or seclusion.
- The District’s guidance documents state school-based teams should review the use of restraint or seclusion on a quarterly basis in their school and, during the quarterly reviews, the school based team should review each incident, whether the behavioral intervention plan (BIP) was implemented, any disciplinary records, records related to positive classroom management, and any data that may reveal that the use of seclusion or restraint “is having collateral effects such as increases in aggressive or escape behaviors, health-related effects and/or emotional reactions.”
- However, there are no written procedures or guidance concerning how staff are to review or monitor the restraint or seclusion and debriefing logs for the Therapeutic Learning Center (TLC) and non-TLC schools discussed above.



- The OCR noted there were no written procedures or guidance concerning when the use of restraint or seclusion would trigger a student's reevaluation. Instead, OCR identified different practices across the District. Different schools, however, reported to OCR different practices for when reconvening a team is required.
- The Guidance Document for the Use of Physical Restraint notes that staff should be trained, and that staff should be annually certified in the use of nonviolent crisis intervention. There is no similar information related to training noted in the Guidance Document for the Use of Seclusion.
- The OCR's review of the students' special education files did not identify any information that shows staff documented or discussed the total duration of missed instruction due to the use of restraint or seclusion.
- Logs failed to document the total duration of missed instruction.



- The OCR determined documentation failed to note the elapsed time for the events preceding or after an incident of restraint or seclusion, in which a student would be subject to missed instructional time. Documentation focused only on the duration of time in which a student was actively restrained or secluded.
- The OCR found instances involving the repeated use of restraint or seclusion that, in the aggregate, suggested a significant loss of instructional time. Although staff told the OCR that students are able to make-up missed instructional time due to an incident of restraint or seclusion, the OCR did not find any corroborating documentary evidence with respect to how and when a student receives compensatory services for missed instruction.
- The OCR stated they observed students placed in seclusion, but the incidences were not appropriately recorded.
- Some parents said they were never notified about the use of seclusion or restraint.



- The OCR discovered multiple incidents that showed staff restraining or secluding students with disabilities as punishment to force compliance in response to certain behavior, such as refusing to stay in a designated area, walking out of class, not following instructions, and disrupting class.
- The OCR noted concerns that some District documentation includes staff suggesting that restraint or seclusion could have been avoided if students had been sent home earlier. This suggestion raises a concern that District staff may not know that this alternative approach could raise separate discrimination concerns (e.g. shortening a student's school day without determining that doing so is necessary to support the student's educational needs as part of an individualized assessment from the team of persons knowledgeable about the student would violate Section 504).



Training

- Seclusion is not a recommended practice, and it may increase the likelihood of escalation of behavior, resulting in increased possibility of physical restraint.
- If a school uses seclusion, staff must be trained as noted above in de-escalation and restraint skills.
- Staff must be knowledgeable in the practice known as time out and cognizant that instead of working as a deterrent, it may serve as reinforcement of the negative behavior. This practice assumes that the environment is desirable and positive for the student.
- All safety issues must be addressed including appropriate locations for seclusion and the continuous presence of a supervising adult.



Wake County School System to Pay \$450K, Change Procedures after Special Needs Student Placed in Closet

(Wake County News – August 18, 2023)

- A pair of Wake County parents said their third-grade daughter, who was in a behavioral program for her learning disabilities, was locked in a closet as a disciplinary measure at school 24 times.
- The settlement terms require a report to be made anytime a student is restrained or secluded.
 - Parents must be notified no later than the end of the school day when it happens.



- That notice needs to include why the action was taken and whether any other alternatives or de-escalation were attempted
- The school district must also send corrected data to the OCR. Because the district reported no instances of student restraint or seclusion, they have to send corrected data going back to 2016.
- New data will need to be presented to the district's board of education on a semi-annual basis.



Charter Schools

What if the School Closes?



When the School District Authorizes a Charter School

- Children with disabilities who attend public charter schools and their parents retain all rights under the IDEA. (b) Charter schools that are public schools of the LEA. (1) . . . the LEA must—(i) Serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools,
- If the charter school closes, its charter is not renewed, or the charter is revoked, the authorizer is still responsible for ensuring students with disabilities who attended the charter school received a FAPE.



Service Animals in Schools

Allowable Questions and Enforcement



Title II of the ADA

28 C.F.R. 35.136 (2010)

- Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.
- Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.
- The work or tasks performed by a service animal must be directly related to the individual's disability.



Examples of Work or Tasks Include

- Assisting individuals who are blind or have low vision with navigation and other tasks,
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds,
- Providing non-violent protection or rescue work,
- Pulling a wheelchair,
- Assisting an individual during a seizure,
- Alerting individuals to the presence of allergens,



- retrieving items such as medicine or the telephone,
- providing physical support and assistance with balance and stability to individuals with mobility disabilities, and
- helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.



Are There Limitations on the Breed of Dog?



- Schools and other public entities cannot exclude a breed of dog merely because of its perceived reputation. A service animal may be any dog breed, from a chihuahua to a pit bull.
- A service animal may not be excluded based on assumptions or stereotypes about the animal's breed or how the animal might behave. However, if a particular service animal behaves in a way that poses a direct threat to the health or safety of others, has a history of such behavior, or is not under the control of the handler, that animal may be excluded. If an animal is excluded for such reasons, staff must still offer their goods or services to the person without the animal present.



Just Dogs???



Although the definition of service animal is limited to dogs, the Title II regulations for service animals also require public entities to permit the use of a miniature horse by an individual with a disability, if the miniature horse is individually trained to do work or perform tasks for the individual's benefit. 28 C.F.R. 35.136(i)(1).



How Does South Carolina Define Service Animal?

South Carolina Code Ann. § 47-3-920(4)(a)

Service animal or service animal in-training means an animal that is trained or that is being trained to do work or perform tasks for an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. A service animal is not a pet and is limited to a dog or a miniature horse.



Does the ADA Require Service Animals to be Professionally Trained?

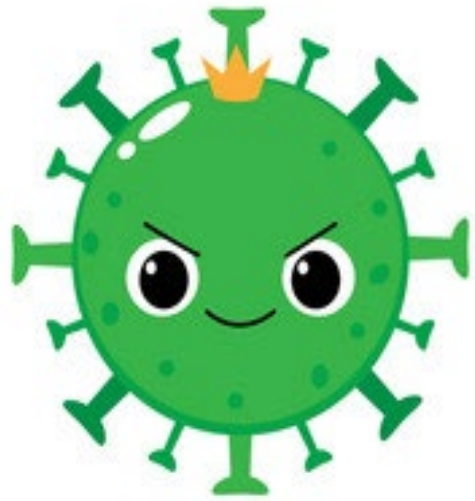
- People with disabilities have the right to obtain training from organizations of their choice or to train service animals themselves. However, professional service dog training programs are not required.
- On the other hand, the dog (or miniature horse) must already be trained before it is allowed into a school or other public places.
- School personnel may not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal, as a condition for entry.



- Allowable Questions
 - 1) Is the service animal required because of a disability?
 - 2) What work or task is the animal trained to perform?
- School personnel may ask parents to verify the animal has been vaccinated, spayed or neutered, and treated for fleas and ticks.
- Service animals are subject to local dog licensing and registration requirements.



Reminders



COVID-19

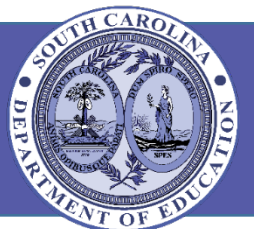
SCDE Memorandum Dated August 18, 2021

- 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.



Individual and Unique Needs

- When considering whether masking or other accommodations are 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.



Issues that Impact Student Outcomes

- Attendance
- Discipline
- School Safety
- Mental Health
- Medical Homebound
- Parental Involvement

