



SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

# SCHOOL LAW

CONFERENCE

AUG. 10 - 11, 2024

CHARLESTON MARRIOTT • CHARLESTON, SC

**Barbara A. Drayton**  
**Deputy General Counsel**  
**[bdrayton@ed.sc.gov](mailto:bdrayton@ed.sc.gov)**



**SOUTH CAROLINA**  
**DEPARTMENT OF EDUCATION**





# **The Individuals with Disabilities Education Act (IDEA) 2024: News, Updates, and Information You Need to Know!**





# Disability Scoop Headline

## Ed Department: More States Failing To Meet Special Education Requirements by Michelle Diamant | June 28, 2024

---

States are increasingly struggling to meet their obligations under the Individuals with Disabilities Education Act, with federal officials labeling a growing number of states as deficient multiple years in a row.

Under the IDEA, the United States Department of Education is required to annually assess how well each state provides special education services and assign it to one of four categories: meets requirements, needs assistance, needs intervention, and needs substantial intervention.

\*\*\*State Performance Plan (SPP) and Annual Performance Plan (APR)\*\*\*

The states that satisfied the “meets requirements” standard were Alabama, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Texas, Virginia, Washington, Wisconsin and Wyoming.

Among states found to need assistance, 25 and Washington, D.C. have received the designation for two or more consecutive years.

Under the IDEA, the United States Department of Education must take enforcement action, which can include requiring the state to access technical assistance or directing funds to the areas deemed inadequate, among other things.



# Federal Monitoring

- The SCDE was monitored by the United States Department of Education, (OSEP) in 2022 (June – November). Report was issued on April 24, 2024.
- Based on its review of available documents, information, and interviews, OSEP identified six findings of noncompliance with IDEA requirements.



# 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.



# Legal Update – Federal Guidance and Opinions

*Loper Bright Enterprises vs. Raimondo and Relentless Inc. v. Department of Commerce, et al.* 603 U.S. \_\_\_\_ (6/28/2024)

- Congress delegates regulatory functions through statute to administrative agencies to interpret its authority within the limits provided by Congress. On occasion, regulations are challenged via lawsuit as exceeding statutory authority.
- In 1984, the U.S. Supreme Court created a doctrine for interpretation of statutory authority in its opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). After the 1984 ruling, the “Chevron Doctrine” became the standing case law used by the courts.
- Under this doctrine, courts would defer to an executive agency when the statute was either silent or ambiguous in its interpretation, or there could be multiple reasonable interpretations.



# Legal Update – State Guidance, Opinions, and Settlement Agreements

*Pennsylvania School Boards Association v. Dr. K.N. Mumin, Sec'y. of Ed. of the PA Dept. of Ed., et al.*, 409 MD 2023 (Pa. Cmwlth. May 16, 2024)

- The Pennsylvania's Department of Education (PDE) signed a settlement agreement on August 30, 2023, without prior notice to school districts and after they established budgets for the 2023–24 school year, which immediately changed its mandated model policy for school districts and issued a directive that effective September 5, 2023, the right to a free appropriate public Education (FAPE) under the IDEA and the Pennsylvania regulations continued until the 22nd birthday.
- The state school boards association and a few individual school districts filed suit in appellate state court to challenge the enforceability of the PDE's new age-out policy.
- The federal district court concluded since Pennsylvania state law requires formal rule-making procedures and state legislature review, the PDE's policy statement is void and unenforceable. The PDE has appealed to the Pennsylvania Supreme Court.





# Legal Update – Recording IEP Meetings

## *Pita v. Medeiros*, No. 23-1513 (1st Cir. 2024)

- Scott Pitta filed an appeal with the United States Supreme Court after a federal appeals court determined that school officials could prohibit him from video recording a virtual individualized education program (IEP) meeting.
- During a 2022 IEP meeting with the Bridgewater-Raynham Regional School District in Massachusetts that was held via Google Meet. Concerned that school officials had left important information out of the minutes from previous meetings, Pitta indicated he was video recording the session. School officials terminated the meeting in line with their policy against video recording.
- At issue is whether parents have a First Amendment right to “record government officials in the performance of their duties.” Both the federal district court and the U.S. Court of Appeals for the First Circuit dismissed the claim because the government officials in question — school employees — were not operating in a “public space” or having discussions that would typically occur publicly. Even if there was a constitutional right to record the meetings, the panel said, the school could place reasonable restrictions if needed, for example, to promote candid conversations.





# Legal Update – Discipline

*Sampson County Board of Education v. Torres*, NO. 7:22-CV-100-FL (E.D. N.C. February 13, 2024)

- A North Carolina student was a 6th grader with an IEP for other health impairment based on diagnoses of selective mutism, attention deficit hyperactivity disorder (ADHD), and oppositional defiant disorder (ODD). He had a long history of inappropriate physical touching for attention and communication, resulting in disciplinary incidents and a behavioral intervention plan (BIP).
- During 5<sup>th</sup> grade in April 2021 the student was suspended for physically touching a female student. The conduct qualified as sexual assault. Early in 6<sup>th</sup> grade , he received a three-day suspension for fighting. In the following month, for the conduct at issue in this case, he entered another classroom during the transition to the school bus at the end of the school day, approached the same female student from the April 2021 incident, and when she told him to “get away,” he touched her buttocks and breast.
- The school promptly arranged for a manifestation determination review (MDR) attended by the student’s grandparents, the principal, the special education director, and two of the student’s teachers.



# Legal Update – Discipline (cont.)

- During the MDR, administrators mis-reported the student did not have a functional behavioral assessment (FBA) or BIP and cut short the grandparents' attempts to discuss the student's previous pattern of behavior, including the role of his diagnoses.
- The determination was that the conduct in question was not a manifestation of the student's disability. A disciplinary hearing in November 2021 found that the student's behavior constituted a sexual assault in violation of the district's code of conduct and recommended a long-term suspension for the rest of the school year. The grandparents unsuccessfully appealed the suspension and then filed an expedited due process complaint.
- The administrative law judge (ALJ) found both fatal procedural and substantive violations and ordered reinstatement of the student, invalidation of the long-term suspension, and a new FBA and BIP.
- The federal district court concluded that the team's failure to consider the student's FBA and BIP, compounded by its failure to consider the pattern of previous disciplinary incidents, amounted to a denial of FAPE.



# When is a MDR Required?

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of conduct, the school district or agency, the parent, and relevant members of **the student's IEP team must review all relevant information in the student's file, including the student's IEP, teacher observations, and any relevant information provided by the parents to determine if the conduct in question is a manifestation of the student's disability.**

34 C.F.R. § 300.530(e)



# What is Considered During a MDR?

- Pursuant to 34 C.F.R. §300.530(e)(1), conduct must be found to be a manifestation of the child's disability if:
  - The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
  - The conduct was the direct result of the district's failure to implement the IEP.
- As a part of the process, the team should review the special education, related services, supports, aids, accommodations, modifications, and other requirements in the student's IEP and determine if the student's IEP is meeting the student's needs?
- The team should consider teacher observations, evaluative data, relevant information provided by the parent, any other relevant information that is available about the student's disability, conduct, and the incident.





# United States Department of Education Proposed Amendments

---

- Regulations implementing Section 504 of the Rehabilitation Act of 1973 (Section 504) - Notice of Proposed Rulemaking were expected in August 2023 and then delayed until November 2023. At this time, no new release date has been offered.
- Regulations implementing the Family Educational Rights and Privacy Act (FERPA) - Notice of Proposed Rulemaking were expected in November 2023 and then delayed until May 2024. At this time, no new release date had been offered.

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



# Federal Regulatory Updates - Title II of the Americans with Disabilities Act (ADA)

- On April 24, 2024, the Federal Register published the Department of Justice's (DOJ) final rule updating its regulations for Title II of the ADA. The final rule has specific requirements about how to ensure that web content and mobile applications (apps) are accessible to people with disabilities.
- This rule sets a specific technical standard that state and local governments must follow to meet their existing obligations under Title II of the ADA for web and mobile app accessibility. This includes when a state or local government has an arrangement with someone else who provides or makes available web content for them.
- The federal rule requires K-12 and higher education institutions verify that their web content, including mobile apps and social media postings are accessible for those with vision, hearing, cognitive, and manual dexterity disabilities.



# What is the New Standard?

- The Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA is the technical standard for state and local governments' web content and mobile apps.
- Websites and mobile apps that are not accessible can make it difficult or impossible for people with disabilities to access government and public entity information and services, like enrolling children in school, applying for free lunch, and other information that is quickly and easily available to other members of the public online. WCAG sets the guidelines for what public entities, including universities, colleges, school districts, and school boards publish on their websites.
- The new standard increases the responsibility for equal and effective communication.
- The South Carolina Department of Education issued a memorandum on August 6, 2024: [School District Website Requirements 2024](#).



# Digital Accessibility – What is Covered?

The guidelines address requirements related to:

- Color contrast
- Providing descriptive labels
- Using alternative text for links and images
- Making information in tables accessible and easy to read
- Navigating websites without the use of a mouse
- Emphasizing content through means other than color
- Font sizes
- Headings and labels
- Captions for video and audio content





# Digital Accessibility – What is Exempt?

- 1) Archived Web Content
- 2) Preexisting Conventional Electronic Documents
- 3) Content posted by a third party where the third party is not posting due to contractual, licensing, or other arrangements with a public entity
- 4) Individualized documents that are password-protected
- 5) Preexisting social media posts



# Digital Accessibility – Compliance Dates

State and Local Government Size	Compliance Date
0 to 49,999 persons	April 26, 2027
50,000 or more persons	April 24, 2026
Special district governments	April 26, 2027

A school district is not a special district government. If it is a city school district, it would use the population of the city to know when to comply. If it is a county school district, it would use the population of the county. If it is an independent school district, it would use the population estimate in the most recent [Small Area Income and Poverty Estimates](#).



# State Statutory Updates - Requirements to be Included in the Written Notification of Expulsion – S.C. Code § 59-63-240

Senate Bill 1188 passed on May 21, 2024, amending § 59-63-240

If procedures for expulsion are initiated, the parents or legal guardian of the pupil shall be notified in writing of the time and the place of a hearing either before the board or a person or committee designated by the board. **The written notification to the parents or legal guardian of the pupil must include their right to have legal counsel present at the hearing, the right to question all witnesses, and contact information for a legal aid service provider which may determine eligibility for free legal representation. The notification must also include the right to access the investigative file in its entirety, to include all documents and videos, at least three days prior to the hearing, with appropriate exemptions and redactions as required by the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232g.**



# Transportation – School Buses

- Responsibilities
  - IDEA
  - Section 504 of the Rehabilitation Act of 1973 (Section 504)
  - Title II of the Americans with Disabilities Act (ADA)
- Sharing information with transportation personnel
- Impact of late arrivals and shortened school days
- Attendants on buses





# State Regulatory Updates - Transportation

State Board of Education Regulation Reg. 43-80(II) was amended during the most recent legislative session. The last sentence of 1<sup>st</sup> paragraph now reads:

*A student with a disability **shall** be transported on a bus staffed with an aide **if** the student's Individualized Education Program or accommodations plan under Section 504 of the Rehabilitation Act of 1973 (504 Plan) specifies.*



# Transportation - Reminders

- A student in a Child Safety Restraint System, excluding standard seatbelts, **must** be transported on a bus with an aide. If an aide is not available for a bus transporting a student in a Child Safety Restraint System, the bus shall not run unless it would put the school district in violation of Federal and State statutes or regulations.
- A student in a wheelchair **shall** be transported on a bus staffed with an aide or other qualified employee who shall operate the wheelchair lift.
- Unless a Student's IEP or Section 504 Accommodation Plan specifies a 1:1 aide, an aide for a student with an IEP or 504 Plan **may** count as an aide for the bus.



# State Regulatory Updates - Criteria for Entry into Programs of Special Education for Children with Disabilities – State Board Of Education Regulation 43-243.1

- The Standards for Evaluation and Eligibility Determination (SEED) document is designed to be a companion to South Carolina State Board of Education regulation 43-243.1 – Guidance Document.
- School districts may not use any single measure or assessment as the sole criteria for determining whether the child is a child with a disability and for determining an appropriate educational program for the child. Teams must use technically sound evaluative instruments.



# State Statutory Updates - Seizure Safe School Act - S.C. Code § 59-10-215

- House Bill 3309 passed on May 13, 2024, enacting § 59-10-215  
Each school district and charter school shall adopt a seizure training program to provide instruction in understanding the basics about epilepsy and its impact on student learning, recognizing signs and symptoms of seizures, the appropriate steps to be taken to respond to symptoms of a seizure, and the administration of seizure medications. This training must be consistent with guidelines established by a qualified nonprofit organization that supports the welfare of individuals with epilepsy and seizure disorders. The completion of this training must be documented by the school district and the training may be provided virtually, provided by school or district staff, or may be conducted by an individual trained to deliver such information.
- This Act also amends § 59-63-80 relating to Individual Health Care Plans for Students with Special Health Care Needs. It takes effect July 1, 2025.



# Rule Outs

A child must not be determined to be a child with a disability under the IDEA—

- If the determinant factor for that determination is—
  - Lack of appropriate instruction in reading, including the essential components of reading instruction (phonemic awareness, phonics, reading fluency, vocabulary, and comprehension);
  - Lack of appropriate instruction in math; or
  - Limited English proficiency; and
- If the child does not otherwise meet the eligibility criteria





# Proposed State Board of Education Regulation 43-243.2 - Educational Interpreters for Students who are Deaf

- Why is this regulation being proposed?

S.C. Code 59-33-120 requires the State Board of Education to establish regulations for the appropriate credentialing of sign language interpreters in the public and special schools of the State. No local educational agency (LEA) in the State shall employ a person as an educational interpreter for Deaf students in our South Carolina public and special schools unless they demonstrate the qualifications outlined in this Regulation.
- The Office of Special Education Services (OSSES) disseminated a survey to gather input from stakeholders who wish to participate in the Educational Interpreter Regulation process.



# General Appropriation Act (The Budget)

- Proviso 1.103 (SDE: Anti-Bullying/School Safety)
  - Prohibition on Access to Cell Phones and other Personal Electronic Devices by Students
  - Do not forget to plan for exceptions for medical reasons
- Proviso 1.118 (SDE: Interscholastic athletics)
  - Allows students who attended independent schools to try out for, and if selected, participate in an interscholastic athletic program offered by the district
    - a) the student must reside within the attendance zone of the public school,
    - b) the independent school which the student attends does not offer the particular sport for the student's gender, and
    - c) the student pays for all sports-specific fees.



# Seclusion and Restraint

Revisions are underway that take into account

- Updated guidance
- Office for Civil Rights (OCR) rulings
- Input from the
  - South Carolina Department of Education (SCDE), Office of School Facilities (OSF), Student Support, and other offices
  - State Fire Marshal
  - LEAs
  - Advocacy Organizations



# Medically-Prescribed Non-District (i.e.) Independent Therapies

- The IDEA
- Section 504 and the (ADA)
- Other Situations



# Applied Behavior Analysis (ABA) Services - October 9, 2017

- The provision of ABA services in the school setting is dependent upon each IEP team's decision as to the specific services and supports necessary to ensure an individual student's unique needs are met, and to ensure the student receives services and supports that allow the student access to and participation in appropriate educational services.
- The decision about the type, placement, frequency, and duration of services is determined by the student's IEP team to meet that child's individual needs.
- Furthermore, LEAs and state operated programs (SOPs) are reminded that all compulsory attendance laws apply equally to students with disabilities; and students must be given access to and make progress in the general education curriculum.
- As such, IEP teams should ensure that core educational programs and services are not supplanted by therapies which may preclude the student from participating in school.





# ABA Services - October 9, 2017

- Should a parent/guardian request that an outside agency be permitted to provide ABA services during the school day, the IEP team needs to convene to determine whether the student needs ABA services to receive FAPE based upon collected data from the student's IEP team. The team should consider how to provide those services within the district. If the team decides that the services are necessary but the LEA or SOP is unable to provide the services, it can then determine if an outside agency will be contracted.
- If the IEP team determines that services needed by the student, based upon current data, can appropriately be provided by the LEA or SOP, yet the parent insists on an outside agency coming into the school to provide the services, the parent should proceed through the LEA or SOP's policies and procedures for outside agencies entering a school district.



# Office for Civil Rights (OCR) Complaint - South Carolina School District – September 14, 2023

- Based on the information gathered thus far, the OCR determined that the District has a policy applicable to all students, regardless of disability status, restricting excused absences for school missed to attend independent therapy appointments. The OCR has concerns that in implementing this policy in its elementary schools, the District did not appropriately consider information suggesting that some students missing school to attend independent therapy appointments may have required special education related services in order to ensure the provision of a FAPE.
- Specifically, the OCR has concerns that the District may have failed to evaluate or re-evaluate students with repeated absences to attend independent therapy appointments, in accordance with its policy and training, which potentially resulted in a denial of a FAPE for these students.



# OCR Complaint - South Carolina School District – September 14, 2023

- The Complainant alleged by refusing to grant excused absences and imposing attendance consequences, including truancy actions, on elementary school students who miss school to attend independent physical, occupational and speech therapy sessions the District was in violation of Section 504 and Title II of the ADA.
- The OCR noted Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services when there is information suggesting that a student's educational program is not meeting the student's individual needs. A group of knowledgeable persons should consider whether further evaluation or revisions to the student's IEP, Section 504 plan, or placement are necessary.



# OCR Complaint - September 14, 2023

- Based on the information gathered thus far, the OCR determined that the District has a policy applicable to all students, regardless of disability status, restricting excused absences for school missed to attend independent therapy appointments. The OCR has concerns that in implementing this policy in its elementary schools, the District did not appropriately consider information suggesting that some students missing school to attend independent therapy appointments may have required special education related services to ensure the provision of a FAPE.
- Specifically, the OCR has concerns that the District may have failed to evaluate or re-evaluate students with repeated absences to attend independent therapy appointments, in accordance with its policy and training, which potentially resulted in a denial of a FAPE for these students.



# OCR Complaint – Resolution Agreement Requirements

The District will compile a list of all District elementary school students who received an unexcused absence as a result of any non-District provided (i.e., independent) therapy session during the 2022-2023 school year.

- a) For each student identified as eligible to receive special education and/or related services, the District will assess whether available information indicates that the student’s educational program is not meeting the student’s individual educational needs. If appropriate, the District will convene a group of persons knowledgeable about the student, making all reasonable efforts to include the parent/guardian, to determine if the student requires a change in placement or additional or different related services, including District-provided therapy services, to ensure the provision of a FAPE.
- b) For each student not previously or currently identified as eligible to receive special education and/or related services, the District will assess whether available information indicates that the student may need special education and/or related services, including District-provided therapy services, due to a disability. If appropriate, the District will convene a group of persons knowledgeable about the student, making all reasonable efforts to include the parent/guardian, to evaluate the Student to determine eligibility and, if relevant, appropriate placement and related services for the student.





# ABA Therapy Access in Schools – April 2, 2024

- Decisions regarding a requested accommodation must be made on an individual, case-by-case basis when a request is made under the ADA and/or Section 504 of the Rehabilitation Act to allow a student with autism spectrum disorder (ASD) to access medically necessary behavioral health treatment in school settings as prescribed by the student's qualified healthcare provider. A categorical denial of such a request for accommodation likely does not comply with the ADA and Section 504 mandates.
- Any denial of a request for an accommodation to allow for the delivery of ABA services in the school setting without a comprehensive, individualized review of the request may violate our obligations under federal law.
- Keep detailed records of the evaluation process for each request to ensure that decisions are made based on the student's individual needs and are well-documented.



# ABA Therapy Access in Schools

- a) For each student identified as eligible to receive special education and/or related services, the LEA will assess whether available information indicates that the student's educational program is not meeting the student's individual educational needs. If appropriate, the LEA will convene a group of persons knowledgeable about the student, making all reasonable efforts to include the parent/guardian, to determine if the student requires a change in placement or additional or different related services, including LEA-provided therapy services, to ensure the provision of a FAPE.
- b) For each student not previously or currently identified as eligible to receive special education and/or related services, the LEA will assess whether available information indicates that the student may need special education and/or related services, including LEA-provided therapy services, due to a disability. If appropriate, the LEA will convene a group of persons knowledgeable about the student, making all reasonable efforts to include the parent/guardian, to evaluate the Student to determine eligibility and, if relevant, appropriate placement and related services for the student.



# Special Education Dispute Resolution Did Not Take a Summer Break

- Ombudsman
- Facilitated Individualized Education Program (FIEP)
- State Complaint
- Mediation
- Due Process





**Barbara A. Drayton**  
**Deputy General Counsel**  
**Office of General Counsel**  
[bdrayton@ed.sc.gov](mailto:bdrayton@ed.sc.gov)

---

