

The disAbility Law Center of Virginia Presents:

Special Education in Virginia: A Guidebook for Parents

INTRODUCTION

Welcome to special education in Virginia. There are many state and federal laws, regulations, court decisions, and practices that say what services and supports must be provided to students with disabilities. These can be complicated and hard to understand for everyone involved – school division administrators, regular and special education teachers, and parents.

Let's start with the “big picture” of special education. Congress passed the laws that say what rights a student with a disability has in public education. This set minimum standards for defining who is eligible, developing an educational program for an eligible student, determining discipline standards for students with disabilities, and establishing procedures for resolving disputes if the parents and the school division disagree. This “big picture” law is called “The Individuals with Disabilities Education Improvement Act” and is commonly referred to as IDEA. The IDEA can be found in the United States Code at **20 USC §1400**.¹

As much as the IDEA covers, it is only one piece of the puzzle. After Congress passes a law such as IDEA, the law is sent to a federal agency. That agency develops regulations that create more specific requirements under the law - the who, what, when, and how questions that must be answered to make the law work. The Federal Special Education Regulations can be found in the Code of Federal Regulations at **34 CFR §300**.²

In addition to the federal special education law and regulations, every state has its own special education law and regulations. A state may choose to provide more rights or protections than given by federal law, but cannot take away rights granted by federal law or regulations. Virginia's special education regulations are found in the Virginia Regulations at **8VAC20-81**.³

Sometimes it is unclear what the law or regulation means or requires in the real world. In those cases, there are court decisions that explain the meaning of both federal and state special education laws. Special education cases are usually brought in federal court after an administrative Due Process hearing, and a few have gone to the United States Supreme Court.

This “big picture” makes a big difference on the “small picture” parents like you are most concerned about – special education for your own child. Some parents are blessed by having a supportive school division that helps them through the process of determining eligibility and services and then faithfully implements the individual program developed for their child. Other parents hit some bumps in obtaining appropriate services. Those parents need outside resources to help them determine what their child's rights are in a given situation.

The purpose of this manual is to provide some answers and some direction for parents who need help navigating a complicated system. We hope you find it helpful.

¹ tinyurl.com/p2nrdg7

² tinyurl.com/qjocp6y

³ tinyurl.com/6v57vus

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CHAPTER 1: THE BASICS OF SPECIAL EDUCATION

THE BASIC SPECIAL EDUCATION PROCESS



1 IDENTIFICATION

This very first step is called “Child Find.” School divisions in Virginia must identify, locate, and evaluate every child suspected of having disabilities to decide if the child needs special education services. Child Find begins with a referral or request for evaluation. Once a child begins school, a school professional may refer a child to be evaluated, but keep in mind that Child Find also applies to very young children who may not have started school yet. Parents may also contact their child's principal or the school division's special education administrator to ask for an evaluation. Parents may make a verbal or written request, but we suggest that parents communicate with their school division in writing.

2 EVALUATION

Parents must consent before the school evaluates a child. Evaluations must look at all areas related to a child's suspected disability. The evaluation results help the school division determine if a child is eligible for special education services. If a child is found eligible, the results will also guide what is included in the child's individualized education plan (IEP). In Virginia, evaluations must be completed no later than 65 business days after the parent gives consent. Parents are given a copy of all of their child's evaluation reports. If a parent disagrees with the evaluation results, they can ask the school to pay for Independent Educational Evaluations (IEEs).

3 ELIGIBILITY

A group of qualified professionals, including the parents, review the child's evaluation results. Together, the group decides if the child is a "child with a disability" as defined by IDEA. To be found eligible, a child must have a disability that falls within one of the IDEA disability categories AND the disability must have a negative impact on a child's ability to learn.

If the child is determined to be a "child with a disability," he or she is eligible for special education services. These services will be described in an Individualized Education Program, or IEP.

4 IEP DEVELOPMENT

The IEP team must meet and write an IEP within 30 calendar days after a child is found eligible. The school division must schedule and conduct the IEP meeting. School staff must:

- Contact the participants, including the parents
- Notify parents early enough to make sure they have an opportunity to attend
- Schedule the meeting at a time and place agreeable to parents and the school
- Tell the parents the purpose, time, and location of the meeting
- Tell the parents who will be attending, and
- Tell the parents that they may invite people to the meeting who have knowledge or special expertise about the child

The IEP team meets, talks about the child's needs, and writes the child's IEP. Parents and the child (when appropriate) are required team members.

5 IEP IMPLEMENTATION

Before the school division can provide special education and related services to the child, the parents must give consent. The child then receives those agreed-to special education and related services as soon as possible after the IEP is signed by the parent.

The school division must carry out a child's IEP as written. Parents are given a copy of the IEP. Everyone involved in the child's education should know what is in the IEP and what each must do to carry out the IEP, including the accommodations, modifications, and supports listed in the IEP.

REVIEW AND REEVALUATION

A child's IEP must be reviewed once every year to ensure the child is making appropriate progress toward the annual goals in the IEP and to update the IEP to reflect a child's current needs. A child's parents must be regularly informed of their child's progress at least as often as parents of non-disabled children receive progress reports and report cards.

A child should be reevaluated every three (3) years.

There are two other important processes in special education, discipline and dispute resolution. While not every student receiving special education services will be involved in these processes, it is still important to be aware of the steps and stages of each.

DISCIPLINE

Sometimes, a child's behavior gets in the way of their ability to learn, or in the way of other children's learning. In these cases, the law requires school divisions to provide positive behavioral supports before it becomes a discipline problem. School divisions may conduct an evaluation called a Functional Behavior Assessment (FBA). The IEP team uses the data collected to draft and carry out a Behavior Intervention Plan (BIP). Parents can ask the school division to conduct a FBA to develop a BIP to support the child's behavioral needs.

If the school division suspends a child with a disability for more than ten (10) days of school, the school division must hold a meeting to decide if the child's behavior was caused by the child's disability. If they find the behavior is caused by the child's disability, the school division **MUST** conduct a FBA and implement a BIP.

DISPUTE RESOLUTION

There are times when parents and school divisions don't agree about a child's special education service needs. The Virginia Department of Education (VDOE) runs a dispute resolution system to help resolve disagreements. At the federal level, The United States Department of Education's Office for Civil Rights (OCR) also resolves parent complaints.

CHAPTER 2: CHILD FIND

The first step in the special education process is called Child Find. Child Find requires school divisions to identify, locate, and evaluate children from birth through age 21, who live within the school division's borders and may be eligible for special education services. IDEA and Virginia's regulations make clear that:

- School divisions must ensure that all children eligible for special education services are identified and provided with those services
- Referrals for evaluation can be made by anyone and can be oral or written. This is important because the IDEA says the referral must be in writing; Virginia relaxes this requirement and allows for oral referrals, and
- Parents of an identified child must consent to the evaluation process

After a child has been identified and referred for evaluation, the child and parents will be covered by specific rights outlined in the IDEA. First, the school division must provide the parent with a copy of their procedural safeguards.⁴ Second, if the decision has been made to conduct evaluations, the school division must complete the evaluations **AND** convene an eligibility meeting to determine your child's eligibility for special education services **within 65 business days** of the decision to evaluate.

Child Find has 4 stages:

1. Referral
2. Initial Evaluation
3. Team Meeting
4. Denial or referral for full evaluation for eligibility

1. REFERRAL

The Child Find process begins with a referral, usually from the parent or school staff. The referral must inform the special education administrator why an evaluation is needed and the efforts taken to address the concerns that led to the referral. The referral may be made orally or in writing. Virginia's regulations are more flexible than IDEA and the federal regulations, which require a referral for initial evaluations to be in writing.

After the special education administrator receives the referral for initial evaluation, he or she must begin the evaluation procedures.

⁴ Appendix B on page 132

2. INITIAL EVALUATION

Referrals for initial evaluations can come from the school division, the parent or another source. This manual includes a form letter you can use to refer your child for initial evaluations.⁵

The initial evaluation will include a review of existing data and information about the child, including information provided by the parent, classroom based assessments and teacher observations.

3. TEAM MEETING

After the initial referral, the Child Find team must meet **within ten (10) business days** of the referral. The team is made up of the following:

- The referring source, as appropriate (unless including the referring source would breach the child's privacy)
- The parent
- The principal (or their designee)
- At least one teacher, and
- At least one specialist

The team will consider other strategies which may help the child before starting the evaluation process. Any strategies used must be documented and available for the parent to review upon request. If the strategies are unsuccessful, the child will be referred for evaluations. If the strategies are successful, the referral will be denied.

If the school division believes that the child needs any additional evaluations, the team shall refer the child to the special education administrator or designee **within three (3) business days**. If the school division denies the request for evaluations, the school division must provide Prior Written Notice (PWN) to the parent. PWN is required any time there is a change to a student's services.

PWN must include:

- What change was requested and denied
- Why the change was denied
- The alternative that will be in place instead
- What evidenced-based strategies were used to determine that the alternative is appropriate, and
- The parent's right to dispute the school division's alternative

⁵ Appendix C on page 171

4. DENIAL OR REFERRAL FOR ADDITIONAL EVALUATIONS

Evaluations can provide important information on a child’s academic and functional strengths and needs. Examples of the types of evaluations are:

- Social Cultural / Emotional
- General Intelligence / IQ
- Academic Performance / Educational
- Speech / Communication Status
- Occupational and Physical Therapy
- Observation (Teacher and Parent)
- Hearing, Vision and Medical

The eligibility team will rely heavily upon the information in the evaluations when determining eligibility, so every evaluation must be conducted by a *qualified evaluator*. The evaluations must also be *valid*. In order to be valid, an evaluation must:

- Assess the child’s educational strengths and areas of suspected need
- Be conducted according to the standards set by the manufacturer of the evaluation
- Be non-discriminatory, with no cultural bias, and
- Be valid for the purpose for which it is being utilized; that is, measure what it says it measures

After the evaluation process is completed, an eligibility meeting is held to determine whether the child is eligible for special education services.

PROTECTIONS – PROCEDURAL SAFEGUARDS

Procedural safeguards are important at all stages of the special education process.⁶ They become available to children and parents immediately upon the initial referral for evaluation, and the school division must give parents a copy of the procedural safeguards at the time the request or referral is made. If the school division refuses to evaluate a child, the parents have the right to dispute the decision and file for due process, file a complaint, or ask for mediation. We will discuss those dispute resolution processes in more detail in Chapter 6. If a parent disagrees with any of the school division’s evaluations, the parent has a right to request an independent educational evaluation paid for by the school division. Once a child is referred for evaluations, they are considered a “child with a disability” in any disciplinary action. As soon as the parent signs and provides consent to evaluate, the school has **sixty-five (65) business** to complete the evaluations and convene an eligibility meeting to determine if a child is eligible for special education and related services.

⁶ See Appendix B at page 132 for the language of the Procedural Safeguards.

CHAPTER 3: ELIGIBILITY

Once the Child Find and initial evaluations are complete, determining eligibility is the next step. For many parents and school divisions, this is an area of major concern. It is also an issue that often leads to significant disagreement. This chapter will give a brief overview of the categories of disability and legal standard to meet eligibility for special education. We will then focus on two important components of this complex area: understanding evaluations and obtaining independent educational evaluations.

CATEGORIES OF DISABILITY

The Virginia Regulations set out fourteen (14) different categories of disability.⁷ Each child found eligible for special education must fall under one of these categories. You may already have some idea of what categories will most likely apply to your child, based on a previous diagnosis or on your observations. Keep in mind that the legal definition of the disability category may be similar to a medical diagnosis, but a diagnosis by a medical professional is not required to meet the eligibility criteria.

The Virginia Department of Education has worksheets that help break down the requirements for each eligibility category.⁸

Eligibility Category	Description from the Regulations
Autism	A developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in this definition are satisfied.

⁷ 8VAC20-81-10

⁸ http://www.doe.virginia.gov/special_ed/disabilities/guidance_evaluation_eligibility_appendix_a.docx

Eligibility Category	Description from the Regulations
Deaf-Blindness	Simultaneous hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.
Deafness	A hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects the child’s educational performance.
Developmental Delay (age 2-6)	A child who is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development, or (ii) who has an established physical or mental condition that has a high probability of resulting in developmental delay; The delay(s) is not primarily a result of cultural factors, environmental or economic disadvantage, or limited English proficiency; and The presence of one or more documented characteristics of the delay has an adverse effect on educational performance and makes it necessary for the student to have specially designed instruction to access and make progress in the general educational activities for this age group.
Emotional Disability	A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: An inability to learn that cannot be explained by intellectual, sensory, or health factors; An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; Inappropriate types of behavior or feelings under normal circumstances; A general pervasive mood of unhappiness or depression; or A tendency to develop physical symptoms or fears associated with personal or school problems. Note: Emotional disability includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disability as defined in this section
Hearing Impairment	An impairment in hearing in one or both ears, with or without amplification, whether permanent or fluctuating, that adversely affects a child’s educational performance but that is not included under the definition of deafness in this section.

Eligibility Category	Description from the Regulations
Intellectual Disability	Significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child’s educational performance.
Multiple Disabilities	Simultaneous impairments (such as intellectual disability with blindness, intellectual disability with orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.
Orthopedic Impairment	A severe orthopedic impairment that adversely affects a child’s educational performance. The term includes impairments caused by congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).
Other Health Impairment	A child having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia and Tourette syndrome that adversely affects a child’s educational performance.

Eligibility Category	Description from the Regulations
Specific Learning Disability	<p>A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.</p> <p>Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of intellectual disabilities; of emotional disabilities; of environmental, cultural, or economic disadvantage.</p> <p>Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.</p>
Speech or Language Impairment	<p>A communication disorder, such as stuttering, impaired articulation, expressive or receptive language impairment, or voice impairment that adversely affects a child's educational performance.</p>
Traumatic Brain Injury	<p>An acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance.</p> <p>Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.</p>
Visual Impairment (including blindness)	<p>An impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness</p>

The important thing to remember is that the category or “label” should never be the focus of the eligibility determination. The category of disability can be helpful for identifying a child’s areas of need, but it should not dictate what services and supports a child can and cannot receive. After identifying the disability category, the focus should turn to the individual child and the *individualized* services that will provide the child with educational benefit.

It isn’t enough to have a disability that falls within one or more of these 14 categories. The child’s disability must have an *adverse effect* on the child’s educational performance – the disability must interfere with the child’s ability to learn.

The eligibility team is made up of:

- School division staff who specialize in the subjects of the assessments
- The Special Education Administrator
- The parents
- A special education teacher
- The child’s general education teacher, and
- At least one person qualified to conduct and explain individual tests (such as a school psychologist, speech-language pathologist, or remedial reading teacher)

This team determines whether the child’s disability falls under one or more of the 14 categories, and whether their disability interferes with their ability to learn.

UNDERSTANDING EVALUATIONS

Evaluation results are the most important things the eligibility and IEP team will consider. Most parents of a child with a disability know the numbers and data that go along with evaluations. But what do the numbers and data all mean? Understanding evaluations is a complex process that takes more than a single training to master. Whenever you receive the results of a child’s evaluation, you should make sure to go over them in detail with your evaluator and, if necessary, any other people who may be able to help you understand what your child’s evaluation results mean. Here is a brief overview to get you started.

Before you begin focusing on the results of a child’s evaluation or assessment, you should make sure that the evaluation tool used was reliable and valid.

- Reliability: The degree to which test scores for a group of examinees are consistent over repeated administrations
- Validity: The extent to which the test measures what it is intended to measure

There are a variety of factors that can influence the reliability and validity of an assessment. Here are some to consider

- Whether the person providing the test followed the test’s rules and procedures
- Whether the test is standardized
- Who is looking at the data to decide what it means, and

- Outside influences, such as:
 - Health factors (vision, hearing, etc.) – Is the child who is getting a speech language assessment just getting over strep throat or an ear infection?
 - Emotional state of the child being evaluated
 - Room environment – Is there a fire alarm going off in the middle of an assessment measuring a child’s ability to focus?

If you feel that the results of an evaluation are very different from what you were expecting, one of the first questions you should ask yourself is, was it a good evaluation? Look at the factors that may have influenced the reliability and validity of the test to see if there are any areas of concern.

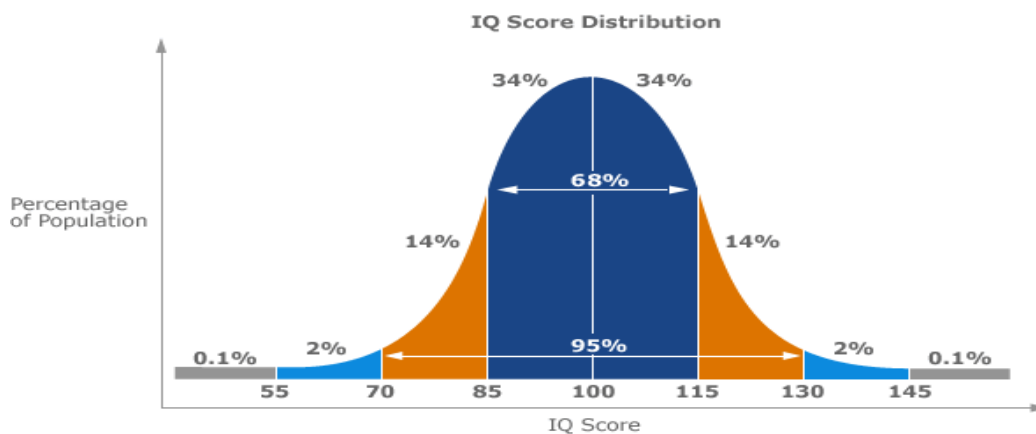
Once you have determined that good evaluations are being used, you still have to understand how to read them. Here are some common terms you will encounter when interpreting evaluation scores:

- Mean: The average score
- Mode: The score that occurs most frequently in a set of scores
- Median: The middle point in a sequence of ranked/ordered scores

Here are some other important points to be aware of when looking at the numbers:

- The average standardized score on most tests is 100. This means that about half the people taking this test are expected to score higher than 100, and the other half are expected to score below 100.
- The average standard deviation is 15 (think of this as a margin of error, accounting for some of the outside factors listed above)
- Within one standard deviation on either side (85-115) is average; in other words, anywhere in that range is an average score
- Two standard deviations away is significant (below 70 usually indicates an intellectual disability, above 130 is gifted)

This chart might help you visualize how standard deviations work.



The large scores within data (broad scores) are often made up of a collection of smaller scores of data called subsets. For instance, to determine a child's IQ, there are several small sets of evaluative data, such as processing speed, reading comprehension, word decoding, etc. These subset scores are then averaged to formulate the broad score, or the child's IQ score.

Be sure the eligibility team reviews ALL of the subset scores to see if there are any particular areas of concern that may be overlooked by only reviewing broad scores. For instance, in a broad score consisting of 6 subsets it is possible for a child to have an average score in five of the areas and a clinically significant low score in just one area. In this instance, the broad score may indicate the child has an average IQ. If the subset scores are not reviewed closely, an area of need could be overlooked because of the overemphasis placed on the broad score.

Parents can and should request copies of any evaluations several days before the meeting. Parents should also specifically request that the person who did the evaluation be present at any meetings discussing the scores. This way, parents can easily ask questions and clarify parts they may not understand.

INDEPENDENT EDUCATIONAL EVALUATION (IEE)

If a parent disagrees with the results of an evaluation performed by the school division, they could consider asking for an independent educational evaluation. For example, if you see the results of an evaluation, but you believe those results may have been affected by one of the factors listed above, you should consider requesting an IEE.

The IEE process begins with a parent's request. If the school division disagrees with this request, they can either initiate due process to deny the IEE or comply with the request and provide information about how to get the IEE. The school division pays for the IEE, but the IEE is done by an evaluator who does not work for the school division.

If the school division denies the IEE through Due Process and wins, the parent can still seek and pay for independent evaluations, and the IEP team must still consider the results of those evaluations. A school is allowed to ask why a parent is requesting an IEE, but parents are not required to give them an answer, and the school division cannot use the parent's answer as a reason to delay or deny the request.

A parent is only entitled to one IEE paid for by the school division for each of the school division's evaluations they disagree with. However, each time the school re-evaluates a child, the parent can ask for new IEEs if they disagree with the new evaluations.

IEE requests can be made orally, but we *strongly* recommend making them in writing. We have included a sample form letter to request an IEE.⁹

⁹ Appendix C on page 173

CHAPTER 4: THE INDIVIDUALIZED EDUCATION PROGRAM (IEP)

Once a child has been found eligible as a child with a disability under IDEA, they are entitled to services from the school division. The overall goal of IDEA is for every child to be educated, as much as possible, with their non-disabled peers. IDEA requires every child be educated in the *least restrictive environment* (LRE), while still receiving a *free appropriate public education* (FAPE).

This chapter focuses on the IEP, and will describe LRE and FAPE in more detail. The IEP is a contract between the parent and the school that outlines how a child with a disability will be given a FAPE in the LRE. An IEP is a broad document that, when written and followed properly, gives a clear picture of the needs of the child and how the school division will help the child to reach his or her annual goals.

The sections of this chapter will cover: the major differences between an IEP and a 504 Plan, timelines, the IEP team, and the parts of the IEP document.

IEP VS. SECTION 504 PLAN

An IEP is the required document under the IDEA; a Section 504 plan is created to comply with federal anti-discrimination laws, namely the Rehabilitation Act of 1973 (RA) and the Americans with Disabilities Act (ADA).

For children receiving special education services, an IEP is more common, but 504 plans may also be used to accommodate children with disabilities when a child does not meet the IDEA eligibility criteria. Although we will not cover all the specifics of a Section 504 plans in this manual, it is worth mentioning that a Section 504 plan may be an effective way to provide services for your child. In many cases, a child can receive the same services through a Section 504 plan that they would receive through an IEP.

The chart on the next page outlines some of the differences between the rights Section 504 and IDEA give to parents and students.

	504 Plan	IEP
Format	No written plan required	Plan must be in writing
Dispute Resolution	Mediation, due process, OCR complaint, lawsuit	All options under 504 plan plus state complaints
Independent Educational Evaluations (IEE)	Parents can obtain an outside evaluation, but they are responsible for the cost	Right to one IEE for each evaluation a parent disagrees with provided at school's expense
Meetings	Parents do not have to be invited	Parents must be invited
Review and Revision	"Periodic review" which is generally considered to be every three years.	At least annually
Consent	Parental consent required for initial evaluations.	Parental consent required for evaluations and to implement or change an IEP.
Notice	Parents must receive notice of all evaluation and placement decisions as well as notice of their rights. Notice does not have to be in writing.	All notice requirements under section 504 plus additional notice requirements, such as notice of IEP meetings. Notice must be in writing.
Parts of the Plan	The accommodations, services, or supports a student needs to receive an appropriate education.	Some parts of an IEP include present levels of performance, goals, services, accommodations, placement. For children of a certain age, transition planning is also part of an IEP.
Age Eligibility Terminates	No age based termination of eligibility	Upon the student's 22 nd birthday. (Can complete school year in which student turns 22, if birthday is after September 30 th)
Discipline	Students are entitled to Manifestation Determination Reviews	Students are entitled to Manifestation Determination Reviews

TIMELINES

When a child is found eligible under IDEA through initial eligibility or re-evaluation, the team must meet within 30 calendar days to develop an IEP.

The IEP team must meet at least once per year to review and determine whether the student is meeting their annual goals and make any needed changes to the IEP. Either the parent or the school can call an IEP meeting earlier if needed. As always, we recommend putting a request for an IEP meeting *in writing* and saving copies of all written communication between the parent and the school. We have included a sample form letter to request an IEP meeting in this manual.¹⁰

THE IEP TEAM

In Virginia, an IEP team must consist of:

- The parent(s) of the child
- At least one regular education teacher of the child (if the child is or may be participating in the regular educational environment)
- At least one special education teacher or provider of the child. For a child whose only disability is speech-language impairment, the speech-language pathologist must attend in this role
- A representative of the school division who is:
 - Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities
 - Knowledgeable about the general education curriculum, and
 - Knowledgeable about the availability of school division resources
- Someone who can interpret and explain the evaluation results. This role can be filled by a member of the team serving in another role, other than the parent of the child
- Anyone else the parent or school division feel has knowledge or special expertise regarding the child. The determination of knowledge or special expertise of any individual is made by the party who invited them to be a member of the team, and
- Whenever appropriate, the child

Although parents should tell the school division which teachers they would like to be present at an IEP meeting, the law gives the school division the right to decide who fills the school personnel roles.

The school division is also responsible for ensuring that one or both of the parents of the child with a disability are present at each IEP meeting or are afforded the opportunity to participate. These steps must include notifying the parent(s) of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. School divisions must set and reschedule IEP meetings as requested by the parents. If

¹⁰ Appendix C on page 174

the school division does not follow these steps, the school division cannot claim that a parent refused to participate in the IEP process.

PARTS OF AN IEP

PRESENT LEVEL OF PERFORMANCE (PLOP)/PRESENT LEVELS OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE (PLAAFP)

The first part of the IEP document is usually the Present Levels of Performance (PLOP), sometimes called the Present Levels of Academic Achievement and Functional Performance. The PLOP is a statement of the child's current levels of academic achievement and functional performance. It should describe how the child's disability affects the child's involvement and progress in the general curriculum. For preschool children, it should explain how the disability affects the child's participation in appropriate activities. Basically the PLOP should summarize a child's strengths, weaknesses, and how a child's disability presents in the school setting.

The Virginia Department of Education promotes the use of a "standards-based" IEP, which ties specific parts of the document to state Standards of Learning (SOL) tests. In a standards-based IEP, the PLOP and some or all of the annual goals are connected to specific grade-level SOLs. According to VDOE, "this creates a program that is aimed at getting the child to a proficient level on state standards in addition to addressing functional and/or behavioral needs of the child, as needed."¹¹

The PLOP is a key part of the IEP and should be thoroughly reviewed at meetings. The PLOP should accurately describes the child's *present* level of performance, and the parent and school division should make sure it isn't relying on old information. Most importantly, there needs to be a *direct* relationship between the PLOP and the rest of the IEP, especially the goals and benchmarks.

The PLOP is the roadmap to your child's IEP. You should be able to highlight every area of need identified in the PLOP with a different color marker. Then use that same color to highlight where the need is addressed in the services sections of the IEP. You'll be able to see if any needs aren't being addressed!

ANNUAL GOALS

The law requires each IEP to include a statement of measurable annual goals, including academic and functional goals.

Each of the goals should be designed to meet the child's needs described in the PLOP. They should be *specific* and *measurable*. Goals that are subjective, such as "Joey will get better at math," are not specific or measurable. Goals that say things like "Joey will score at least an 80%

¹¹ http://www.doe.virginia.gov/special_ed/iep_instruct_svcs/stds-based_iep/index.shtml

on single digit multiplication tests and quizzes by the end of the first quarter,” are specific and measurable.

This section must include a statement of how the child’s progress toward the annual goals will be measured. This can be through the use of quarterly or other periodic reports. The section must also include a statement about when periodic reports on the progress will be sent to parents. These reports must be sent to parents at least as often as progress reports are sent to all students, but can be sent more often.

In addition, the annual goals should be broken down into short-term goals or “benchmarks.” Benchmarks help the IEP team think through the steps needed to meet the goal and measure them along the way. They also help the IEP team track progress throughout the year, rather than waiting until the annual meeting to realize that a goal has not been met.

It is important to note that the IDEA does not guarantee that a child will achieve the projected goals and growth planned for in the IEP. The IEP must be reasonably calculated to enable a child to make appropriate progress in light of the child’s circumstances, which will be different for every child.

SERVICES AND AIDS

This section of the IEP should contain a list of the aids and services that the school will provide to the child. It should include all the program modifications or supports that school staff will use to make sure the child can:

- Make progress toward their annual goals
- Be involved and progress in the general education curriculum as well as in extracurricular and other nonacademic activities, and
- Be educated and participate with other children with and without disabilities in various educational activities

This section of the IEP specifies services like occupational therapy, or any assistive technology the school division will provide to the child. This section should also list the date services will begin, as well as how long and how often the school division will provide them.

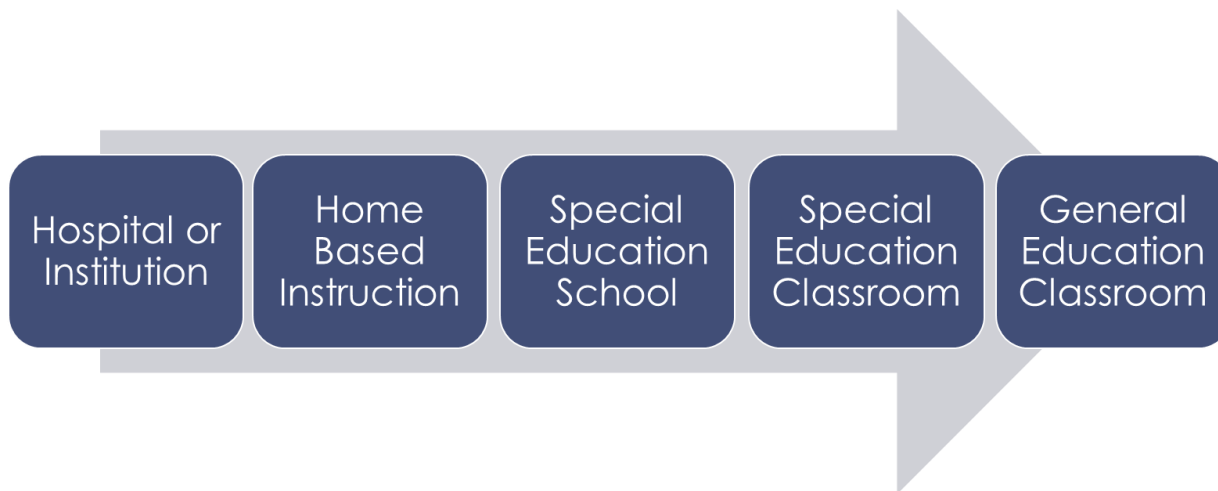
PLACEMENT

The placement section of an IEP must explain where a child will receive their educational and related services. This section must describe the extent to which the child will not participate with their non-disabled peers in general education classes and in school activities. In other words, the placement section of the IEP must describe the *least restrictive environment* (LRE). Again, it is important that this section is specific, as children with disabilities may split their school days between general education settings and self-contained settings. If placement is going to include multiple settings, it must be clearly outlined in the IEP document.

The LRE must be determined based on the provision of supports and services. For example, if student can progress through the curriculum in the general education setting with support from

an aide, the school must provide the aide and cannot simply place the child in a more restrictive setting.

Placement and LRE deal with the type of placement and services necessary for a student, not the physical address. This means that moving a student from one public school to another public school would not be a change in placement, but moving a student from a general education classroom to a special education classroom within the same school would be a change in placement. The graphic below will help illustrate the range of placement options, from most to least restrictive.



Parents should always read this section of the IEP closely before signing. Placement is often discussed at length in IEP meetings, so the language of the placement section might change significantly from the original draft. It is very important for what is written in the IEP document to match what the parties have orally agreed to; this will help prevent complications and misunderstandings in the future.

TESTING ACCOMMODATIONS

Each IEP must address, in detail, how the child will participate in state-wide standardized testing. This section of the IEP must include either:

- A statement of any individual accommodations or modifications that are necessary to measure the child's academic achievement and functional performance on state assessments, or
- If the IEP team determines that the child must take an alternate assessment instead of a particular state assessment of student achievement (or part of an assessment), a statement of:
 - Why the child cannot participate in the regular assessment
 - Why the particular assessment selected is appropriate for the child, including that the child meets the criteria for the alternate assessment, and
 - How the child's nonparticipation in the assessment will impact the child's promotion; graduation, or other matters

TRANSITION PLAN

This manual does not include a comprehensive overview of transition services.¹² Generally, parents should be aware of certain requirements regarding transition planning:

- In the first IEP that will be in effect when a child turns 14, the transition plan must include measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills
- In the first IEP that will be in effect when a child turns 16, the IEP must also include a statement of interagency responsibilities or any linkages, if applicable
- Students must be involved, their opinions considered – if the student can't attend the meeting, the school must consider their opinions another format
- If a representative from an outside agency will attend the IEP meeting, the school division must get a separate consent from parents for that representative's attendance

SIGNATURES AND CONSENT

Parents must provide consent before the school division can do the following:

- Conduct an initial evaluation or reevaluation, including a functional behavioral assessment if that assessment is not a review of existing data conducted at an IEP meeting
- Make an initial eligibility determination or any change in categorical identification
- Provide special education and related services to a child with a disability
- Make any revision to the child's IEP services
- Make any partial or complete termination of special education and related services, except for graduation with a standard or advance studies diploma
- Access a child's public benefits or insurance or private insurance proceeds
- Invite a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services to an IEP meeting

At the IEP meeting, there will be two places for a parent's signature. The first occurs at the beginning of the meeting, and confirms the parent's attendance and participation at the IEP meeting. The second signature provides consent to put the IEP developed at that meeting in place.

The services and supports in an IEP must be implemented as soon as possible after consent is provided. Sometimes, parents agree with some parts of the IEP, but not all of it. In those cases, the Virginia Department of Education has clarified that the regulations require the school

¹² For more comprehensive information on planning for life after high school, please see our website <https://www.dlcv.org/coa>

division to put the parts of the IEP that the parent and IEP team agree to in place, and document what steps they will take to work toward a full agreement.¹³

Services and supports in the IEP can't change without at least one parent's consent, but only one parent is needed to provide or take away consent. The Virginia Department of Education has made clear that, when parents disagree and one consents to **eligibility** for special education services and the other revokes consent, if they each have equal legal right to make educational decisions, the school must not provide services.¹⁴ However, if the parents disagree about consent to **implementing** an IEP, the school division must provide the services and supports outlined in the IEP.¹⁵

REMEDIES

The law provides three major remedies when school divisions and parents cannot reach a consensus on some area of a child's IEP. Those remedies are discussed in detail in Chapter 6: Dispute Resolution.

¹³ http://www.doe.virginia.gov/special_ed/regulations/state/faq_implementing_regulations/2011/016-11_partial_parental_consent_iep.shtml

¹⁴

http://www.doe.virginia.gov/special_ed/regulations/state/faq_implementing_regulations/2010/003_revocati_on_parent_consent.shtml

¹⁵

http://www.doe.virginia.gov/special_ed/regulations/state/faq_implementing_regulations/2010/009_consent_parents_disagree.shtml

CHAPTER 5: DISCIPLINE

Every school division has a code of conduct which outlines the discipline procedures, but they all fall into one of four broad disciplinary categories. The chart below provides an overview of the disciplinary categories, and the limitations and protections that go with each.

Type	Overview for All Students	All Students in Grades PreK-3	Students with Disabilities
In-school	In class demerits, detention, in-school suspension	No special protections, but a pattern of in-school discipline may show a need for preventative behavior services and supports.	
Short term removal	Suspension/removal from school for 10 days or fewer	Maximum of 3 days	No services required for the initial 10 days; if there are additional short term removals, the student's teacher and school staff decide if any services need to continue so the student can stay on track to meet annual IEP goals
Long term removal	Suspension/removal from school for between 11-45 calendar days (can be up to 364 days if involving firearms, certain drug offenses, serious bodily injury, physical harm, or "aggravating circumstances"). Also a pattern of short term removals for similar behavior adding to more than 10 days.	Only used in cases of physical harm, credible threat of physical harm, or "aggravating circumstances"	
Expulsion	Removal from school for one calendar year. Approved by the school board after a hearing, based on 8 factors. After the year removal, student may ask the school board to re-enroll in school.		

BEHAVIORS THAT INTERFERE WITH LEARNING

An IEP Team must try to address behaviors that interfere with learning *before* disciplinary actions occur.

- Behaviors can be addressed by:
 - Goals and services in the IEP that address behaviors or
 - A Functional Behavioral Assessment (FBA) to determine the need for a Behavior Intervention Plan (BIP)

Parents can ask the IEP team to conduct an FBA and develop a BIP. We have included a sample form letter to request an FBA from the school division.¹⁶

The Virginia Department of Education has a guidance document titled *GUIDELINES FOR CONDUCTING FUNCTIONAL BEHAVIORAL ASSESSMENT AND DEVELOPING POSITIVE BEHAVIOR INTERVENTION AND SUPPORTS/STRATEGIES* available online.¹⁷ This document goes into great detail about the processes the school division should follow when conducting the FBA and BIP. Like other evaluations, if a parent disagrees with the results of the FBA, they are entitled to an IEE.

MANIFESTATION DETERMINATION REVIEW

If the school division seeks a long term removal (more than 10 days) or decides a pattern of removals is a long term removal (totaling more than 10 days), the school division must conduct a Manifestation Determination Review (MDR) within 10 days after making the removal decision. The members of the MDR team should include the parent and relevant members of the child's IEP team. The MDR team should review all relevant information in the child's file and any other information provided by the parent to decide if the behavior is a manifestation of the child's disability.

The MDR team will use two standards to decide whether a behavior is a manifestation of a child's disability.

MDR Standard One: The conduct was caused by or had a *direct and substantial* relationship to the child's disability. To make this decision, the MDR team will consider the following:

- Environmental factors; the child's school program, home factors and the child's mental, physical and developmental challenges
- Discipline history; total number of suspensions, how often the suspensions happened and the length of each suspension

¹⁶ Appendix C on page 176

¹⁷ <http://tinyurl.com/qa7q3ds>

- The type of misconduct in relation to the child's discipline history (isolated instance vs. repeated; whether the child's behavior is substantially similar to behavior in previous and current incident)
- The factors contributing to the misconduct such as unique circumstances, information from observers of the incident, environmental factors, educational program, home factors and the child's mental, physical and developmental challenges
- Whether the student code of conduct was provided to the family
- Whether the behavior was dangerous, likely to result in injury, or inflicted "serious bodily injury" on another person
- How well current school-wide behavioral strategies are working to prevent similar misbehavior and reinforce desirable behavior
- The effectiveness of the child's Behavioral Intervention Plan (BIP) in relationship to the misconduct and whether the BIP is based on research-based practices
- In the absence of a BIP, whether a Functional Behavioral Assessment (FBA) was completed
- Whether more information is needed (such as a FBA or other types of evaluation)

If the MDR team determines standard one is met, the student will return to their placement, unless the parent and school division agree to a change in placement. The IEP team must also conduct an FBA and create or modify a BIP for the student.

MDR Standard Two: The conduct in question was the direct result of the school division's failure to implement the child's IEP. The team must first look at whether parts of the IEP weren't implemented by the school division. The MDR team will then consider:

- How the supports or services that weren't implemented relate to functional skills, social competency and behavior of the child and the misconduct observed
- How the supports or services that weren't implemented relate to service, goals, positive behavior supports or the BIP
- The impact of the failure to implement on the behavior that caused the removal

If the MDR team determines that standard two was met, the school division must immediately take steps to implement the IEP, in addition to the actions required when standard one was met.

If the MDR team determines neither standard is met, the behavior is determined *not* to be a manifestation of the child's disability, and the school division can discipline the child as it would a student without a disability. The school division must still continue to provide FAPE so the student can meet their IEP goals. The school division can provide these services in a placement not listed in the student's IEP, for example in the home.

ALTERNATIVE INTERIM PLACEMENTS

In limited circumstances, the school division can change a student's placement for up to 45 days, even if the behavior that led to the removal is a manifestation of the child's disability. The

regulations call this an *alternative interim placement*. In the following circumstances, the IEP team will meet to determine the interim placement:

- The child carries a weapon to or possesses a weapon at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education, or
- The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education, or
- The child inflicts serious bodily injury upon another person at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education

If the child is removed to an alternative interim placement, he or she will have the same rights as if it were a long-term removal, including the right to receive educational services and, where appropriate, an FBA and BIP.

NOTICE

Notice is a type of procedural safeguard that ensures a parent or guardian is informed of a disciplinary removal and can act to protect the child's rights and interests. When the school division recommends a child with a disability be disciplined with long term removal, the parents must receive three types of notice:

- Prior Written Notice of the intended removal action no later than 10 days from the date of the removal decision
- A copy of procedural safeguards, and
- Notice of the IEP team meeting to conduct an MDR

APPEALS

What if the parent and the school division disagree about discipline? If a parent disagrees with an MDR team decision, the decision can be challenged through an *expedited due process hearing*. Most school divisions have an internal review process available to parents to challenge the MDR before filing for due process, available through the school board policies. There are advantages to requesting an internal administrative review in lieu of filing for due process. First, the internal review process is less formal. Second, while the school division will be represented by an attorney at a due process hearing, there is usually no attorney involved in the administrative review process. Another advantage to internal review is that the process takes less time than due process. We encourage parents to resolve all disagreements with the school division in the least adversarial manner. To make this easier, we have provided a form letter to request an internal administrative review.¹⁸

¹⁸ Appendix C on page 177

The school division may also request an expedited due process hearing if it believes that the student remaining at the current placement is *substantially likely to result in injury to the child or others*.

In expedited due process, the VDOE will conduct a hearing within 20 school days of the request, and the Hearing Officer will make a decision within 10 school days of the hearing. Although parents may represent their child in the due process hearing, we recommend seeking legal representation. The school division will be represented at hearings by an attorney for the school district. A child with a disability and his parent should also be represented during the appeals process. We will discuss Due Process hearings and other dispute resolution options in more detail in Chapter 6.

DISCIPLINE STANDARDS

If the school division determines that the behavior that led to a removal is not a manifestation of the child's disability, it can proceed with the same discipline procedures used for students without disabilities. That may seem like the "end of the line" for your child, but consider that many school divisions provide procedural protections for all children. Even if the behavior is not a manifestation of a disability, parents may be able to appeal a disciplinary action to the principal, school division superintendent or school board. Parents should carefully read the student code of conduct and understand the school division's discipline procedures, paying close attention to appeal requirements and deadlines.

EXPULSION

A student and parent must be provided written notice of the expulsion, including the reasons for the expulsion.

If the school personnel recommend that your child be expelled, you and your child have a right to appeal the recommendation to the school board. Sometimes this hearing is held by a committee of the school board. If so, there must be at least three members on the committee. If the committee's decision is not unanimous, the parent has a right to appeal the decision to the full school board and the full school board must then make their decision within 30 days.

If the school board confirms the expulsion, the parents must receive notice stating the terms and conditions for the student to return to school and if they can attend an alternative program. If this is not the case, the student may apply for readmission at any time. That readmission would not occur until one year after the expulsion date. Applications for readmission are reviewed by the superintendent, school board, or a school board committee. A denial of readmission by the superintendent or committee can be appealed to the full school board.

If your child is recommended for expulsion, it is critical that you present your side of the story to the school board. The board has the authority to reverse the recommendation and propose an alternative to expulsion. Moreover, the regulations set out the factors that the board will consider when reviewing the recommendation. Note that for certain offences involving drugs and firearms there is a presumption of expulsion. Even for these offences, schools are allowed to consider the

below factors as special circumstances, and if deemed appropriate can issue alternative discipline actions.

Expulsion Factors:¹⁹

1. The nature and seriousness of the violation
2. The degree of danger to the school community
3. The student's disciplinary history, including the seriousness and number of previous infractions
4. The appropriateness and availability of an alternative education placement or program;
5. The student's age and grade level
6. The results of any mental health, substance abuse, or special education assessments;
7. The student's attendance and academic records, and
8. Such other matters as deemed appropriate

The factors, especially 4, 5 and 6, help paint a complete picture of the student and the effects of the disability on his or her behavior. Even if the behavior is not a manifestation of a child's disability, a school board will consider evidence of a disability when reviewing a recommendation for expulsion. This is similar to the section of the regulations that permit school personnel to consider removal on a case-by-case basis when a child with a disability violates the code of student conduct. While the criteria for the MDR are well defined, the school personnel and school board should consider a child's disability whenever a removal is consistent with the code of conduct and may exercise discretion.

SECLUSION AND RESTRAINT (PENDING ADOPTION)

In 2015, the Virginia legislature passed a law directing the Virginia Board of Education to adopt regulations governing the use of seclusion and restraint. Once finalized and adopted, these regulations will apply to all students and school personnel in Virginia's public elementary and secondary schools.

*School divisions are not required to use seclusion or restraint in their schools, but those that do will have to follow the finalized and adopted regulations. As of January 2020, these requirements are **not** in effect, and schools **do not** have to follow them.*

What are the Expectations for School Division Staff?

- *If action does not meet the standard for "seclusion" or "physical restraint," school division staff may respond to undesirable student behavior with "reasonable discretion."*
- *When an intervention meets the standard for "seclusion" or "physical restraint," school division staff may only employ it in certain circumstances.*

¹⁹ VA Code § 22.1-277.06

- Acts detrimental to the “health, safety or dignity of the student” may never be used by school division staff.

What is Physical Restraint?

Physical restraint is defined as any personal restriction that keeps a student from moving or reduces their ability to move freely. This does not include briefly holding a student to calm or comfort them, holding a student’s hand while escorting them from one area to another, or other incidental, minor, reasonable physical contact.

What is Seclusion?

Seclusion is defined as any involuntary confinement of a student alone in a room or other area where the student is physically prevented from leaving. This does not include a time-out when the student is not confined, in-school suspensions, detention, student-requested breaks or short removals to allow the student to regain self-control, removal by a teacher for disruptive classroom behavior, or confinement during an investigation regarding a student’s role in violation of the student code of conduct.

When is Seclusion or Restraint Allowed?

Restraint and Seclusion may only be used in an emergency situation when other interventions would be ineffective, and only to:

- Prevent a student seriously harming or injuring themselves or others
- Quell a disturbance or remove a student from a disturbance
- Defend self or others from serious physical harm or injury, or
- Obtain possession of weapons/dangerous objects/controlled substances/paraphernalia

Physical restraint must be discontinued as soon as the imminent risk of serious harm has dissipated. Damage to property alone, without imminent risk of serious harm or injury to people, is not a justification for restraint or seclusion.

Seclusion rooms or areas must be free of any objects that might injure the student and have sufficient dimensions, lighting, heating/cooling and ventilation to ensure the dignity and safety of the student.

School staff must engage in continuous visual monitoring of students in seclusion.

Prohibited Actions

School division staff may never use:

- Mechanical Restraint – use of any material, device, or equipment to restrict a student’s movement (except where medically or developmentally necessary and appropriate)

- *Pharmacological Restraint – use of a drug or medication to control a student’s behavior or restrict their movement (except those administered as prescribed by a qualified health professional in the standard course of treatment for the student)*
- *Application of Aversive Stimuli – any intervention intended to induce pain or discomfort, used to punish the student or reduce/eliminate an unwanted behavior*
- *Use of prone restraint or any restraint that harms a student or reduces their breathing*
- *Use of any seclusion that harms a student or reduces their breathing*
- *Any seclusion or restraint documented as medically or psychologically contraindicated*
- *Corporal punishment, or*
- *Otherwise allowable seclusion or restraint if used*
 - *To punish or discipline*
 - *In coercion or retaliation*
 - *As a convenience*
 - *To prevent property damage*
 - *For any other reason besides those explicitly allowed*

What Happens After the Seclusion or Restraint?

The Day of the Seclusion or Restraint:

- *School staff must inform the principal of the seclusion or restraint and any related first aid as soon as possible, no later than the end of the day, and*
- *The principal must make a reasonable effort to make direct contact with the parent to inform them of the incident and any related first aid by phone, email, or in person*

Within 2 School Days Following the Seclusion or Restraint:

- *Or as soon as practicable, the staff involved must submit an incident report to the principal. This report must be given to the parent within 7 days of the event.*
- *The principal must meet with school staff involved to determine whether the seclusion or restraint was implemented using the methods required in regulation and school division policy, and to discuss how to prevent future need for seclusion or restraint.*
- *Or within 2 school days of the student’s return to school, the principal must meet with the student to discuss the details of the incident to identify patterns of behaviors, triggers, or antecedents, and identify alternative behaviors or coping skills the student can use to prevent or reduce behaviors that led to the seclusion or restraint.*

School Division Policy Development

School divisions must create policies in line with these regulations. This must include a statement of intent to use positive behavioral supports to reduce the use of seclusion and restraint, provisions for the appropriate use of seclusion and restraint, and details on how the school division will comply with these regulations. These policies and procedures must be made available to the public and posted on the school division’s website.

Seclusion and Restraint Prevention Planning

School principals must regularly review the use of seclusion and restraint to ensure compliance with the regulations and school division policy and take steps to reduce how often it's used.

At the initial development or annual review of a student's IEP or 504 Plan, the IEP/504 team must consider whether the student is likely to be secluded or restrained. If the team agrees that seclusion or restraint is likely, or after the second time a student is restrained or secluded in a school year, they must meet and consider a Functional Behavioral Assessment (FBA), a Behavior Intervention Plan (BIP), new or revised behavioral goals, and additional evaluations.

If a student does not already have an IEP or 504 plan, after the second seclusion or restraint event in a school year, the school must hold a meeting with a team consisting of the parents, the principal, a teacher, the staff member involved in the seclusion or restraint, and other appropriate staff members to discuss and consider a FBA, development or revision of a BIP, and a referral for evaluation for special education eligibility.

School Division Staff Training

All school division staff must be given evidence-based basic training in strategies and procedures to make seclusion and restraint less likely to occur. Every school must provide advanced training in the use of physical restraint and seclusion to at least one administrator and any staff members who work with students whose IEP or Section 504 teams think the student is likely to be secluded or restrained.

More information about the regulations and their development can be found online.²⁰

²⁰ <https://www.townhall.virginia.gov/ViewStage.cfm?stageid=8705>

CHAPTER 6: DISPUTE RESOLUTION

So far in this book, we have talked about the steps in the special education process - from initial referral through the creation of an individualized education program (IEP), and even how the discipline process works for students with disabilities. In a perfect world, families and school divisions work through those stages together as a team. Of course, there are times when parents and school divisions don't agree about what a student needs. We will now discuss the rights and options families have to settle special education related disagreements.

Federal laws like the IDEA and Section 504, give parents, students, and school divisions options for resolving disagreements about special education. The IDEA also requires states to set up systems to protect the rights of students with disabilities, including dispute resolution procedures. As a general rule, during the resolution process, your child will "stay put" in their current placement. The chart below shows the resolution options we will discuss in this chapter.

VIRGINIA	
Dispute Resolution Type	Most Commonly Used For
Ombudsman	Questions about special education process and procedures
Mediation	Questions about what the school division is willing to provide when IEP negotiations have stalled
Complaint	Disputes about whether the school division is following an IEP or special education procedures and rules
Due Process	Disputes about what services and accommodations a student needs in order to receive a Free Appropriate Public Education
FEDERAL	
Dispute Resolution Type	Most Commonly Used For
US Dept. of Education Office of Civil Rights Complaint	Disputes about whether a school is following a 504 plan or discriminating against a student because of their disability
Americans with Disabilities Act/Section 504 Lawsuit	Disputes about physical accessibility and accommodations, like ramps or allowing service animals in school; only when the dispute does NOT involve discussions of FAPE

RESOLUTION OPTIONS

At the State level, the Virginia Department of Education (VDOE) offers procedural safeguards and dispute resolution options to make sure parents and children can enforce their rights when school divisions and parents disagree about a student's needs. Each dispute resolution

alternative provided by VDOE has advantages and may be better suited to some issues than others.

Parents can pursue these dispute resolution options on their own. However, an advocate or an attorney can at least provide advice on the best process for your child's issue. Each process has its own procedures and timelines; a delay might mean that a particular dispute resolution option is no longer available.

VIRGINIA DEPARTMENT OF EDUCATION (VDOE)

OMBUDSMAN

The VDOE offers an Ombudsman for parents looking for help with non-legal special education issues. The Ombudsman advocates for a fair process, and is a source of information and referral. The Ombudsman answers questions and assists in the resolution of educational concerns and issues. As an advocate for fairness, the Ombudsman considers the needs of all parties when they become involved in issues between parents and local education agencies. The four key features of the Ombudsman's position are

1. Confidentiality (will not share personal information)
2. Neutrality (does not represent the position of either party)
3. Informality (no formal process), and
4. Independence (not a representative of the school division)

The Ombudsman's skills include communication, judgment/decision making, problem-solving/conflict resolution, agency organization, and professionalism. VDOE has more information about the Ombudsman, including how to contact the current Ombudsman, available online.²¹

MEDIATION

Mediation is a voluntary process to resolve disputes about the special education and services schools are willing and able to provide to a child with a disability. Mediation can be requested by parents or school divisions any time they cannot agree on an issue related to a child's special education needs and can be used before or even after a VDOE Complaint or Due Process are filed. Mediation is a confidential process. This means that no matter what goes on during mediation, neither party can use anything they learn in these confidential session(s) in any other proceeding, or tell anyone else about the mediation – including posting about the mediation on social media.

Mediation is a good option for parents and school divisions when negotiations about what a student needs have come to a standstill. Mediation gives both parties a chance to share their

²¹ <http://tinyurl.com/ndp7s2f>

side and opinion about the student's needs. A mediator is always neutral and independent – not on the school or the parents' side – which is helpful for parents who may feel outnumbered in meetings. VDOE encourages parents and schools to try to resolve disputes through the IEP process, but when they can't, mediation is recommended as a less hostile way to attempt to resolve issues.

In mediation, a qualified and impartial third party (the Mediator) is assigned by VDOE to help resolve matters between the school division and the parent. The Mediator conducts the mediation session(s) with the goals of:

- Defusing tensions
- Refocusing negotiations back to the needs of the child
- Allowing both parties to be heard
- Assisting the parties to understand the position of the other side, and
- Reaching an acceptable resolution while taking the considerations of both parties and the unique needs of the child into account

Mediation may not be used by a school division as a tactic to deny or delay a parent's right to a hearing on a parent's due process complaint or any other rights afforded under special education regulations. A parent may request mediation by submitting a written request to the school division stating the grounds for pursuing mediation. Once both parties agree to mediate, a formal mediation request will be sent to the VDOE by the school division, and a Mediator will be assigned. The Mediator will then contact the parties to schedule the conference.

The final result of a mediation is the Mediation Agreement. The Mediation Agreement is a legally binding, confidential document that should include the following:

- An outline of each resolved issue and associated remedy
- Agreed upon deadlines for each resolution
- Who is responsible for what with regard to each issue, and
- What each party is bound to do and not to do

When mediation is successful and all issues are resolved, the school or parent can request that any VDOE Complaints or requests for Due Process on the same issues be retracted. This provides closure and clears the air for future productive interactions between the parent and the school division. Once an issue has been resolved through Mediation, neither the school division nor the parent can raise the same issue again through any dispute resolution options.

You will find a copy of the VDOE mediation information in this guidebook.²² More information is available online.²³ We have also provided a sample form letter to request mediation through the school division.²⁴

VDOE COMPLAINT

VDOE has developed a system that

- Receives Complaints
- Investigates the allegations
- Makes a decision about whether there is a violation, and
- Makes a determination on what action must be taken to remedy the violation, if one occurred

VDOE complaints are most appropriate when there is a clear violation of a student or parent's rights as written in the Virginia special education regulations. VDOE Complaints can only address actions that occurred less than **1 year** from the date the complaint is filed. However, if a violation is ongoing, the 1 year period begins after the most recent violation. Although the regulations state that either the parent or the school division may file a Complaint, parents use this dispute resolution alternative most often.

The VDOE Complaint is an option best used when a school division fails to follow the procedures in the Virginia regulations. When the school division's failure to follow the regulations keeps a parent from participating in the decision-making process about their child's education or otherwise deprives the child of an education, the VDOE Complaint is the most appropriate option.

The process begins with the Complaint form. The information you as the parent must provide on the Complaint form includes:

- Your child's name and address
- The name of the school that your child is attending
- A description of the issues, with supporting facts that your Complaint is based upon
- The law that that you allege the school has violated that applies to your facts
- All documents related to the situation that back up your allegations
- Your proposal for how the problem should be resolved

Your completed Complaint must be submitted to the VDOE Office for Dispute Resolution and Administrative Services (ODRAS). You must forward a copy of your Complaint to the school division as well.

²² Appendix A on page 42

²³ <http://tinyurl.com/3vraw9j>

²⁴ Appendix C on page 175

Once VDOE receives your Complaint it will first make sure that all required information is included. The 60 day timeline for completion of the Complaint process begins once VDOE determines the Complaint includes all the required information. Within 7 days, VDOE will notify all parties to the Complaint, and tell them about the 10 day resolution period. Early resolution may include use of VDOE Mediation, and gives the parent and the school division time to reach an agreement. If the dispute is resolved, the school division must submit a resolution statement to VDOE. VDOE will then close the investigation associated with that Complaint. If the dispute is not resolved within the resolution period, VDOE proceeds with the investigation and issues a finding.

The VDOE investigation begins with the school division's response to the Complaint. It must be provided to both VDOE and the parent. The investigation includes a review of all relevant documentation and may also include an independent on-site investigation, if VDOE thinks one is needed. The parent and the school division are both given the opportunity to provide additional relevant information within the 60 day timeline.

When VDOE is done with the investigation, they decide whether the school division met the requirements of special education law and regulations. This decision is based on the facts and applicable law, regulations, or standards. VDOE will notify all parties in writing of the findings and the basis for the findings. This notification is called the Letter of Findings.

If the school division is found to not meet the requirements, the Letter of Findings will outline the steps the school division must take to fix their errors. This is called the Action Plan. The school division must draft and submit an Action Plan to VDOE.

A copy of the VDOE Complaint form is reproduced in this manual.²⁵ More information on the Complaint process can be found online.²⁶

DUE PROCESS

Due Process is the most formal and confrontational of all the dispute resolution processes. Due Process can be used by either parents or school divisions when there is a dispute about any aspect the special education process, but is most often used when there is a question about what services and supports a student needs to make sure they're getting FAPE. School divisions will always be represented by an attorney during a due process hearing, so we highly recommend that parents seek representation when filing or defending their child in a due process hearing.

Due Process is an administrative proceeding, but in many ways is very similar to a court proceeding. A neutral Hearing Officer appointed by the Supreme Court of Virginia listens to the testimony presented by both sides and reviews evidence. The Hearing Officer makes a finding

²⁵ Appendix A on page 46

²⁶ <http://tinyurl.com/o88z73d>

based on a “preponderance of the evidence,” which means whichever side they find has at least 51% of the evidence and testimony supporting their position.

Due Process hearings are most likely to be used when the parent and school division disagree about what services and supports the school must provide to make sure the student is getting a Free Appropriate Public Education (FAPE). Due Process can only address actions that occurred less than **2 years** from the date the complaint is filed. However, there are a few exceptions to the two year rule. If a violation is ongoing, the 2 year period begins after the most recent violation. The 2 year period may also be extended if a school division misrepresented that it had resolved the issue in questions, or if the school division withheld information it was required to provide under IDEA AND that withholding caused the delay in filing.

The request for Due Process must include:

- The name of the child, address of the residence of the child, name of the school the child is attending;
- A description of the issues and what happened that caused the problem; and
- A proposed resolution to the extent known and available to the parent at the time of the notice.

As with the VDOE Complaint, a copy of the Due Process Hearing request must be provided to the VDOE and to the other side. As previously stated, Due Process is a complex administrative process which is similar to a court proceeding. It is not a process we advise parents to attempt without representation. Therefore, this manual will not go further into explaining the process. However, we have included a copy of the VDOE Due Process request form in this manual, and more information is available on the VDOE website.²⁷

At the Federal level, two important dispute resolution options are a United States Department of Education’s Office for Civil Rights (USDOE OCR) Complaint and lawsuits in federal court under the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act (Section 504).

A federal lawsuit under the ADA or Section 504 is only available when the case does **not** involve questions about what a student needs to make sure they are getting a Free Appropriate Public Education (FAPE). If the dispute is about physical accessibility of the building, or another issue that an adult with a disability could have at the school, a federal lawsuit to protect the student’s rights may be a good option. In almost all special education cases, before you file a lawsuit, the court won’t hear the case unless you’ve done something called “exhaust administrative remedies” first. In Virginia, this means that you must first go through Due Process. A federal lawsuit is not a process we advise parents to attempt without legal

²⁷ Appendix A on page 49, <http://tinyurl.com/d7a2uj9>

representation. Therefore, this manual will not go further into explaining the process, but even with the limitations discussed above, it is an option you should be aware exists.

UNITED STATES DEPARTMENT OF EDUCATION (USDOE)

OFFICE FOR CIVIL RIGHTS (OCR) COMPLAINT

OCR has a Complaint system to people with disabilities from discrimination based on their disability. This Complaint system enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (ADA) in public schools, most public and private colleges and universities, and any other programs that get federal money from the Department of Education.

A Complaint must be filed within 180 days of the last act of discrimination. Sometimes, OCR will waive this 180 day time limit if good cause is shown for the delay in filing.

You can submit your Complaint to OCR directly online²⁸. If you choose to mail or fax your Complaint to OCR, you can use the OCR Complaint form or write your own letter. That letter must include:

- Your name, address and, if possible, a telephone number where you may be reached during business hours
- Information about the people harmed by the discrimination listed in the Complaint
- The name, city and state of the school or other program that committed the discrimination listed in the Complaint, and
- A description of the discrimination in enough detail so OCR knows what happened, when it happened, and why you think what happened discriminated against the person or people harmed

After a Complaint is filed, OCR decides whether there is enough information to allow them to investigate the Complaint. OCR might contact you to request more information or documents if it feels it needs more information to decide whether it can investigate.

OCR's investigation can include reviewing the documents both you and the school send in, holding interviews with you, school staff and other witnesses, and going to the school or program for an in-person visit. Once their investigation is done²⁹, OCR will decide whether or not the school or program followed the law. OCR investigations, like Due Process decisions, are based on a "preponderance of the evidence," which means OCR will find in favor of whichever side they find has at least 51% of the evidence and testimony supporting their position. OCR will send both parties a Letter of Findings explaining their decisions.

²⁸ <https://ocrcas.ed.gov/>

²⁹ There are no formal deadlines for the completion of these investigations, and they can sometimes take years to complete.

If OCR finds that a school or program did not follow Section 504 or the ADA, OCR will ask the school or program to create a resolution agreement with them. The resolution agreement between OCR and the school or program will include the specific actions the school or program must do to fix the violation of the law. OCR will monitor the agreement to make sure the school or program is following it. If the school or program does not agree to reach a resolution agreement with OCR, then OCR has the option to limit the federal funding the school or program receives, or can refer the case to the Department of Justice.

You and the school can come to an agreement before OCR makes their decision. This can speed up the Complaint process, and give you some more control over the outcome of your Complaint. OCR offers a Facilitated Resolution Between the Parties (FRBP) program, which works a lot like VDOE's mediation process. The FRBP is voluntary, and if both sides agree to try it, OCR will act as a mediator to the settlement discussions. You and the school can also reach a settlement outside of the FRBP process, but OCR has to approve the settlement. If the school or program doesn't follow the agreement, you can file a new complaint with OCR within 180 days of the date of the original discrimination or 60 days from when you learn of the failure to follow the agreement, whichever is later.

Finally, no matter what OCR decides, you may have the right to file a lawsuit Federal court to enforce Section 504 or the ADA. We strongly recommend you discuss any such lawsuit with an attorney.

More information about the OCR Complaint process can be found on their website.³⁰

APPEALS

Virginia Department of Education (VDOE) Complaint - If you disagree with the VDOE decision because you have newly found information that the department did not have when you filed your complaint OR you think the VDOE based its decision on a fact or law they got wrong, you can file an appeal with the VDOE. The appeal must be in writing and include supporting documents and the errors that you believe were made. The appeal must be received within 30 days of the date that the VDOE issued its letter of findings, and a copy of the appeal must be sent to the school division as well. The response to your appeal is the final decision and ends the VDOE Complaint process.

Due Process – If you disagree with the Hearing Officer's findings in a Due Process hearing because you think the Hearing Officer based their decision on a fact or law they got wrong, you have the right to appeal the final decision. You can file the appeal in either state circuit court within 180 days or federal district court within 90 days of the Hearing Officer's final decision. Every case is different, so we encourage you to discuss the pros and cons of filing an appeal in state or federal court with an attorney.

³⁰ <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>

United States Department of Education Office for Civil Rights (OCR) Complaint- Much like the appeal of a VDOE Complaint, you can file an appeal of the OCR Complaint outcome with OCR. You must explain why you believe the factual information in the decision was incomplete or incorrect, why the legal analysis or legal standard was incorrect, and how correction of these errors would change the outcome of the case. You have 60 days from OCR’s final decision to file the appeal.

Lawsuit – Appeals from a lawsuit filed under Section 504 or the ADA will depend on the court the case was filed in and the circumstances of the case. As every case is different, we again encourage you to discuss the appeal options with an attorney.

STAY PUT

Finally, you may find yourself asking yourself, “What happens to my child while we’re going through any of these options?” Your child will “stay put” while you and the school division resolve the dispute. This means that the last signed IEP, including placement and services, will stay in place and must still be followed until Due Process or a judicial appeal is completed. In an appeal of a Due Process decision, the Hearing Officer’s decision acts as the “stay put” option if it holds for the parent regarding a change in placement. If the Hearing Officer finds in favor of the school division, the decision is held during the appeal.

Stay put has an important exception you should be aware of – it does not apply to changes in placement that happen because of a disciplinary action.

TOP TEN TIPS FOR EFFECTIVE IEP ADVOCACY FOR YOUR CHILD

- 1 Focus on the possible.** IEP meetings are meant to be a collaborative, problem-solving process. Keep the team focused on what they are able to do (within reason), instead of the minimum they're required to do.
- 2 Keep your cool.** Emotions can run high in meetings between parents and school divisions, but it's important to keep calm to make sure the focus stays on the services and supports for the student.
- 3 Get it in writing.** Virginia's regulations relax a federal requirement that requests for referrals and IEEs be in writing. However, a written request is also a record that you can keep and that will go into your child's school file. If you have conversations with school division staff, following up with an email to confirm can help keep everyone's memory sharp about what was discussed when.
- 4 Record meetings.** The regulations allow parents to audio record every meeting convened to determine their child's eligibility, to develop their child's IEP, or to review discipline matters. We strongly recommend that parents record eligibility and IEP meetings. We have included a sample letter you may wish to use to tell the school division that you will record every meeting.³¹
- 5 Don't sign the IEP right away.** Take it home, review it and make sure everything you talked about is in there. Use the highlighter technique to make sure that everything in the PLOP is addressed in the goals and services, and make any notes to follow up with additional questions.
- 6 Prepare!** Make a checklist and refer to it throughout the meeting so you remember to bring up important issues.
- 7 Bring a buddy.** You can invite anyone to your child's IEP meetings, so bring someone who will support you and help you by listening, explaining things, or taking notes.
- 8 Split it up!** IEP meetings can take hours, and still not cover everything. It's okay to hold multiple meetings to get things done.
- 9 Bring your WHY** Come to the meeting knowing why you think a particular service or support is necessary in an IEP, but keep an open mind about how to get there.
- 10 Know when to call in the pros.** Sometimes, the collaborative process breaks down and you need some extra help. Advocates and attorneys can help get the collaborative process back on track.

³¹ Appendix C on page 172

REFERENCES

We have now covered the basics of special education law. Below you will find a list of references and resources used in compiling the information in this manual.

Individuals with Disabilities Education Act 20 USC §1400, accessed online at:

<http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=a95ac2aa366cd1370c9c40e15bbf75af&ty=HTML&h=L&r=APPENDIX&n=32y1.1.1.4.41.0.58.7.42>

Federal Regulations governing Special Education Law 34 CFR §300, accessed online at:

http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title34/34cfr300_main_02.tpl

Virginia Code Regulations Governing Special Education Law in Virginia 8VAC20-81, accessed online at:

http://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf

VDOE Discipline of Children with Disabilities Technical Assistance Resource Document accessed online at:

http://www.doe.virginia.gov/support/student_conduct/discipline_children_disabilities.pdf

VDOE Functional Behavioral Assessment, Behavioral Intervention Plans, and Positive Intervention and Supports: An Essential Part of Effective School wide Discipline in Virginia accessed online at:

http://www.doe.virginia.gov/support/student_conduct/functional_behavioral_assessment.pdf.

APPENDIX A

I. MEDIATION REQUEST

VIRGINIA SPECIAL EDUCATION MEDIATION SERVICES

REQUEST FORM

<p>I. STUDENT INFORMATION</p> <ul style="list-style-type: none">• Student's Name: _____ Student's Grade/Program*: _____• Student's Age: _____ Student's School Division: _____
<p>II. BACKGROUND INFORMATION</p> <p>Please provide requested information. Enter NA (not applicable) where appropriate.</p> <ul style="list-style-type: none">• Date(s) of previous mediations: _____• Date of complaints filing: _____
<p><u>COMPLETE ONLY IF A DUE PROCESS HEARING HAS BEEN REQUESTED:</u></p> <ul style="list-style-type: none">• Date of due process hearing request: _____• Date of expedited hearing request: _____

- Hearing Officer's name: _____

Regulations permit both the parent and school division to agree that mediation will be used instead of a Resolution Session. Please initial here if you both agree.

Parent's Initials

School division representative initials

III. Mediation requests need to be jointly requested by the school division and the parent(s) as evidenced by the signatures below.

Submit this form only when you are prepared to schedule a date for mediation.

PARTIES' NAMES AND SIGNATURES

SCHOOL PERSONNEL		PARENT/GUARDIAN	
Signature	Print Name	Signature	Print Name
Signature	Print Name	Signature	Print Name

IV. CONTACT INFORMATION

SCHOOL REPRESENTATIVE	PARENT/GUARDIAN
Name: _____	Name: _____
Mailing Address: _____ _____	Mailing Address: _____ _____
Phone Number: _____	Phone Number: _____

_____	_____
Fax Number: _____	Fax Number: _____
E-mail: _____	E-mail: _____

V. SUPPORT NEEDS

Translation Needs (Please specify)

Interpreter Needs (Please specify)

Accessibility Needs (Please specify)

VI. ADDITIONAL INFORMATION

You may use this space to briefly list the issues you would like to work on at mediation. The mediation conference need not be limited to the issues you have noted here.

Parent:

School:

- * **If the student is currently enrolled in a special education program, attach the most recent present level of performance.**

SEND FORM TO:

Mr. Art Stewart

Office of Dispute Resolution and Administrative Services

Division of Special Education and Student Services

Virginia Department of Education

P. O. Box 2120

Richmond, VA 23218-2120

arthur.stewart@doe.virginia.gov

Telephone: 804-786-0711

FAX: 804-786-8520

Revised 1/19/2011

II. COMPLAINT FORM

Virginia Department of Education, Division of Special Education and Student Services

Office of Dispute Resolution and Administrative Services

P. O. Box 2120, Richmond, Virginia 23218-2120

(804) 225-2013

SPECIAL EDUCATION COMPLAINT FORM

***PLEASE TYPE OR WRITE LEGIBLY A RESPONSE TO EACH QUESTION BELOW.
THEN SIGN AND DATE THE FORM.***

1. Name of Person Filing Complaint³²: _____

Address: _____

E-mail address (optional): _____

Telephone Numbers: Home () _____ Office () _____

Relationship to student: Parent Citizen Attorney Advocate

2. Full Name of Student: _____

School: _____ School Division: _____

Student's Address: _____

In case of a homeless child or youth, please include any available contact information for the child.

³² If the person filing the complaint is not the child's parent, or if the child has reached the age of majority (18 in Virginia), this complaint should include a consent for the release of information, signed by the child's parent or the child if age 18 or older, to the complainant, before any information will be shared with that individual. If authorization for release of information is not provided, then no information will be shared with the complainant subsequent to the issuance of this office's Notice of Complaint in this matter.

3. Subject(s) the Complaint Involves: (Please include the disability area involved, and give a brief summary of what you allege to be the violation(s) of the special education regulations):

4. List persons you have already talked with to resolve this complaint, along with their response to your request.

5. Provide a description of the nature of the problem, including facts relating to the problem here. Use additional sheets, if needed. Please number specific areas of concern, if you can. Please include dates, where available. (NOTE: COMPLAINTS MUST ADDRESS AN ACTION THAT OCCURRED NOT MORE THAN ONE YEAR PRIOR TO THE DATE THE COMPLAINT IS RECEIVED BY THE VIRGINIA DEPARTMENT OF EDUCATION (VDOE)).

NOTE: YOU MAY INCLUDE ANY DOCUMENTATION THAT SUPPORTS YOUR ALLEGATION(S) AS AN ATTACHMENT TO THIS FORM. SHOULD AUDIO RECORDINGS (CD OR CASSETTE TAPE) OR VIDEO RECORDINGS (DVD OR VIDEOTAPE) BE SUBMITTED TO SUPPORT AN ALLEGATION(S), THERE MUST BE A REFERENCE MADE, EITHER IN THE COMPLAINT DOCUMENT OR ON THE RECORDING LABEL, AS TO WHERE ON THE RECORDING THE SUPPORTING INFORMATION IS LOCATED.

6. Provide a proposed resolution of the problem to the extent known and available.³³

³³ Proposed resolutions are intended in part to assist the parent and school division in reaching early resolution of the complaint. Any corrective action that may be required in connection with the complaint is within the discretion of the VDOE. Certain actions that may be suggested, such as discipline or termination of school division personnel, are not within the VDOE's authority.

A COPY OF THIS COMPLAINT, WHICH INCLUDES THE SUPPORTING DOCUMENTATION, MUST BE SIMULTANEOUSLY FORWARDED TO THE SCHOOL DIVISION.

7. To satisfy the sufficiency standards established by federal and state regulations for processing of a state complaint, a copy of this complaint, along with the supporting documentation, must be simultaneously submitted to the school division. Please indicate below if this requirement has been met:

_____ YES _____ NO

Signature (Required)

Date

MEDIATION

Mediation is offered at no cost to parents and school personnel. Mediation is encouraged and may be beneficial in your case. Please be advised, however, that mediation is a voluntary system for resolving disputes. Both parties must agree to mediate their issues prior to the initiation of the mediation process. Additional information regarding mediation is available on our office's Web site at:

<http://www.doe.virginia.gov/VDOE/dueproc>. Please indicate your interest below concerning mediation as an option in resolving your complaint issues.

_____ I am interested in mediation as an option in resolving my complaint issues.

_____ I decline mediation.

III. DUE PROCESS FORM

REQUEST FOR DUE PROCESS HEARING

(Virginia Department of Education Form¹)

If due process is requested by or on behalf of a student, please submit this form to the Superintendent, Special Education Director or other representative of the Local Educational Agency, who shall then forward such request form to the Virginia Department of Education. If due process is requested by the Local Educational Agency, please submit this form to the parent(s), representative, or student and the Virginia Department of Education.

(Please type or write legibly, sign and date)

1. Child's Name:

Age: _____ Date of Birth: _____

2. Child's Home Address²:

(City)

(Zip)

3. City/County School Division:

4. School Child Attends:

5. Name of Parent(s)³ Initiating Hearing:

Address:

(City)

(Zip)

Telephone Numbers: Home () _____ Office () _____

Parent's (Parents') Representative, if any (i.e., Attorney, Advocate, etc.)

Name:

Address:

(City)

(Zip)

Telephone Number: _____

¹ The use of this form is not mandatory; however, much of the information requested by this form is necessary in order to initiate a due process hearing. Please note that the failure to use this form may not be used to delay or deny a parent's right to a due process hearing.

² If a homeless child or youth, then provide available contact information.

³ Parent includes student at age 18, if parental rights have been transferred to the student, and any other individual who meets the definition of parent in the special education regulations.

6. Description of the nature of the problem (what are the issues; what's wrong?)

7. Facts relating to the problem (what happened that caused the problem?)

8. A proposed resolution of the problem to the extent known and available to the parents.

(Please attach additional pages to provide additional information as necessary.)

NOTE: New issues may not be raised at the due process hearing that are not raised in this Notice, unless the other party agrees.

MEDIATION

Federal law requires that when a parent requests a hearing, the school division must inform the parent of the availability of mediation. Mediation is offered at no cost to the parties. Mediation is encouraged and may be beneficial in your case. Please be advised, however, that mediation is a voluntary system for resolving disputes. Both parties must agree to mediate their issues prior to the initiation of the mediation process. Any request for mediation cannot delay the appointment of a due process hearing officer or the scheduling of a due process hearing. Please indicate your decision below concerning your acceptance or rejection of the offer of mediation.

_____ I request mediation.

_____ I decline mediation.

Signature of Parent(s)

Date

Virginia Department of Education –Revised June 2005. Based on the Individuals with Disabilities Education Improvement Act of 2004, mandates effective July 1, 2005.

APPENDIX B

I. 8VAC20-81-10. DEFINITIONS.

“Act” means the Individuals with Disabilities Education Improvement Act, P.L. 108-446, December 3, 2004, §1400 et seq. (34 CFR 300.4)

“Age of eligibility” means all eligible children with disabilities who have not graduated with a standard or advanced studies high school diploma who, because of such disabilities, are in need of special education and related services, and whose second birthday falls on or before September 30, and who have not reached their 22nd birthday on or before September 30 (two to 21, inclusive) in accordance with the Code of Virginia. A child with a disability whose

22nd birthday is after September 30 remains eligible for the remainder of the school year. (§22.1-213 of the Code of Virginia; 34 CFR 300.101(a) and 34 CFR 300.102(a)(3)(ii))

"Age of majority" means the age when the procedural safeguards and other rights afforded to the parent(s) of a student with a disability transfer to the student. In Virginia, the age of majority is 18. (§1-204 of the Code of Virginia; 34 CFR 300.520)

“Agree or Agreement” - see the definition for “consent”.

"Alternate assessment" means the state assessment program, and any school division-wide assessment to the extent that the school division has one, for measuring student performance against alternate achievement standards for children with significant intellectual disabilities who are unable to participate in statewide Standards of Learning testing, even with accommodations. (34 CFR 300.320(a)(2)(ii) and 34 CFR 300.704(b)(4)(x))

“Alternative assessment” means the state assessment program for measuring student performance on grade level standards for children with disabilities who are unable to participate in statewide Standards of Learning testing, even with accommodations.

"Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of that device. (34 CFR 300.5)

"Assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes: (34 CFR 300.6)

1. The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
2. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
4. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
5. Training or technical assistance for a child with disability or, if appropriate, that child's family; and
6. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to employ or are otherwise substantially involved in the major life functions of that child.

"At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to students without disabilities or their parent(s) as part of the regular education program. (34 CFR 300.39(b)(1))

"Audiology" means services provided by a qualified audiologist licensed by the Board of Audiology and Speech Language Pathology and includes: (Regulations Governing the Practice of Audiology and Speech-Language Pathology, 18 VAC 30-20; 34CFR 300.34(c)(1))

1. Identification of children with hearing loss;
2. Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;
3. Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lipreading), hearing evaluation, and speech conservation;
4. Creation and administration of programs for prevention of hearing loss;
5. Counseling and guidance of children, parents, and teachers regarding hearing loss; and

6. Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

"Autism" means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in this definition are satisfied. (34 CFR 300.8(c)(1))

"Behavioral intervention plan" means a plan that utilizes positive behavioral interventions and supports to address behaviors that interfere with the learning of students with disabilities or with the learning of others or behaviors that require disciplinary action.

"Business days" means Monday through Friday, 12 months of the year, exclusive of federal and state holidays (unless holidays are specifically included in the designation of business days, as in 8 VAC 20-81-150 B 4 a (2)). (34CFR 300.11)

"Calendar days" means consecutive days, inclusive of Saturdays, Sundays. Whenever any period of time fixed by this chapter shall expire on a Saturday, Sunday, or federal or state holiday, the period of time for taking such action under this chapter shall be extended to the next day, not a Saturday, Sunday, or federal or state holiday. (34CFR 300.11)

"Career and technical education" means organized educational activities that offer a sequence of courses that: (20USC § 2301 et seq.)

1. Provides individuals with the rigorous and challenging academic and technical knowledge and skills the individuals need to prepare for further education and for careers (other than careers requiring a master's or doctoral degree) in current or emerging employment sectors;
2. May include the provision of skills or courses necessary to enroll in a sequence of courses that meet the requirement of this subdivision; or
3. Provides, at the postsecondary level, for a one-year certificate, an associate degree, or industry-recognized credential and includes competency-based applied learning that contributes

to the academic knowledge, higher–order reasoning and problem-solving skills, work attitudes, general employability skills, technical skills, and occupational-specific skills.

"Caseload" means the number of students served by special education personnel.

"Change in identification" means a change in the categorical determination of the child's disability by the group that determines eligibility.

"Change in placement" or **"change of placement"** means when the local educational agency places the child in a setting that is distinguishable from the educational environment to which the child was previously assigned and includes: (34 CFR 300.102(a)(3)(iii), 34 CFR 300.532(b)(2)(ii) and 34 CFR 300.536)

1. The child's initial placement from general education to special education and related services;
2. The expulsion or long-term removal of a student with a disability;
3. The placement change that results from a change in the identification of a disability;
4. The change from a public school to a private day, residential, or state-operated program; from a private day, residential, or state-operated program to a public school; or to a placement in a separate facility for educational purposes;
5. Termination of all special education and related services; or
6. Graduation with a standard or advanced studies high school diploma. A "change in placement" also means any change in the educational setting for a child with a disability that does not replicate the elements of the educational program of the child's previous setting.

"Change in placement" or **"change of placement"** for the purposes of discipline, means: (34 CFR 300.536)

1. A removal of a student from the student's current educational placement is for more than 10 consecutive school days; or
2. The student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as:
 - a. The length of each removal;
 - b. The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals;

- c. The total amount of time the student is removed; or
- d. The proximity of the removals to one another.

“Chapter” means these regulations.

"Charter schools" means any school meeting the requirements for charter as set forth in the Code of Virginia. (§§22.1-212.5 through 22.1-212.16 of the Code of Virginia; 34 CFR 300.7)

"Child" means any person who shall not have reached his 22nd birthday by September 30 of the current year.

"Child with a disability" means a child evaluated in accordance with the provisions of this chapter as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disability (referred to in this part as “emotional disability”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf/blindness, or multiple disabilities who, by reason thereof, needs special education and related services. This also includes developmental delay if LCPS recognizes this category as a disability in accordance with 8 VAC 20-81-80 M 3. If it determined through an appropriate evaluation that a child has one of the disabilities identified but only needs a related service and not special education, the child is not a child with a disability under this part. If the related service required by the child is considered special education rather than a related service under Virginia standards, the child would be determined to be a child with a disability. (§22.1-213 of the Code of Virginia; 34 CFR 300.8 (a)(1) and 34 CFR 300.8(a)(2)(i) and (ii))

“Collaboration” means interaction among professionals as they work toward a common goal. Teachers do not necessarily have to engage in co-teaching in order to collaborate.

"Complaint" means a request that the Virginia Department of Education investigate an alleged violation by LCPS of a right of a parent(s) of a child who is eligible or suspected to be eligible for special education and related services based on federal and state law and regulations governing special education or a right of such child. A complaint is a statement of some disagreement with procedures or process regarding any matter relative to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education. (34 CFR 300.151)

"Comprehensive Services Act" (CSA) means the Comprehensive Services Act for At-Risk Youth and Families that establishes the collaborative administration and funding system for services for certain at-risk youths and their families. (Chapter 52 (§2.2-5200 et seq. of Title 2.2 of the Code of Virginia)

"Consent" means: (34 CFR 300.9)

1. The parent(s) or eligible student has been fully informed of all information relevant to the activity for which consent is sought in the parent's(s'), or eligible student's native language, or other mode of communication;
2. The parent(s) or eligible student understands and agrees, in writing, to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
3. The parent(s) or eligible student understands that the granting of consent is voluntary on the part of the parent(s) or eligible student and may be revoked any time.

If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked. Revocation ceases to be relevant after the activity for which consent was obtained was completed.)

The meaning of the term "consent" is not the same as the meaning of the term "agree" or

"Agreement." **"Agree"** or **"Agreement"** refers to an understanding between the parent(s) and LCPS about a particular matter and as required in this chapter. There is no requirement that an agreement be in writing, unless stated in this chapter. LCPS and parent(s) should document their agreement.

"Controlled substance" means a drug or other substance identified under schedules I, II III, IV or V in §202(c) of the Controlled Substances Act, 21 USC §812(c). (34 CFR 300.530(i)(1))

"Core academic subjects" means English, reading or language arts, mathematics, science, foreign languages, civics, and government, economics, arts, history, and geography. (34 CFR 300.10)

"Correctional facility" means any state facility of the Virginia Department of Corrections or the Virginia Department of Juvenile Justice, any regional or local detention home, or any regional or local jail. (§§ 16.1-228 and 53.1-1 of the Code of Virginia)

"Coteaching" means a service delivery option with two or more professionals sharing responsibility for a group of students for some or all of the school day in order to combine their expertise to meet student needs.

"Counseling services" means services provided by qualified visiting teachers, social workers, psychologists, guidance counselors, or other qualified personnel. (34 CFR 300.34(c)(2); Licensure Regulations for School Personnel (8 VAC 20-22))

"Dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or bodily injury, except that such term does not include a pocket knife with a blade of less than three inches in length. (18 USC §930(g)(2); §18.2-308.1 of the Code of Virginia)

"Day" means calendar day unless otherwise indicated as business day or school day. (34 CFR 300.11)

"Deaf-blindness" means simultaneous hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness. (34 CFR 300.8(c)(2))

"Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects the child's educational performance. (34 CFR 300.8(c)(3))

"Destruction of information" means physical destruction or removal of personal identifiers from information so that information is no longer personally identifiable. (34 CFR 300.611(a))

"Developmental delay" means a disability affecting a child ages two by September 30 through six, inclusive: (34 CFR 300.8 (b); 34 CFR 300.306(b))

1. (i) Who is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedure, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development, or (ii) who has an established physical or mental condition that has a high probability of resulting in developmental delay;
2. The delay(s) is not primarily a result of cultural factors, environmental or economic disadvantage, or limited English proficiency; and
3. The presence of one or more documented characteristics of the delay has an adverse affect on educational performance and makes it necessary for the student to have specially designed instruction to access and make progress in the general education activities for this age group.

"Direct services" means services provided to a child with a disability directly by the Virginia Department of Education, by contract, or through other arrangements. (34 CFR 300.175)

"Due process hearing" means an administrative procedure conducted by an impartial special education hearing officer to resolve disagreements regarding the identification, evaluation, educational placement and services, and the provision of a free appropriate public education that arise between a parent(s) and LCPS. A due process hearing involves the appointment of an impartial special education hearing officer who conducts the hearing, reviews evidence, and determines what is educationally appropriate for the child with a disability. (34 CFR 300.507)

"Early identification and assessment of disabilities in children" means the implementation of a formal plan for identifying a disability as early as possible in a child's life. (34 CFR 300.34 (c)(3))

"Education record" means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as

"Scholastic record." In addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child's educational program (e.g. scheduling of meetings or notices). This term also includes the type of records covered under the definition of "education record" in the regulations implementing the

Family Education Rights and Privacy Act. (20 USC § 1232g (a)(3); § 22.1-289 of the Code of Virginia; 34 CFR 300.611(b))

“Educational placement” means the overall instructional setting in which the student receives his education including the special education and related services provided. LCPS shall ensure that the parents of a child with a disability are members of the group that makes decisions on the educational placement of their child. (34 CFR 300.327)

“Educational service agencies and other public institutions or agencies” include: (34 CFR 300.12)

1. Regional public multiservice agencies authorized by state law to develop, manage, and provide services or programs to local education agencies;
2. Recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the state;
3. Any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and
4. Entities that meet the definition of intermediate educational unit in §1402(23) of the Act as in effect prior to June 4, 1997.

“Eligible student” means a child with a disability who reaches the age of majority and to whom the procedural safeguards and other rights afforded to the parent(s) are transferred.

“Emotional disability” means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (34 CFR 300.8(c)(4))

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or

5. A tendency to develop physical symptoms or fears associated with personal or school problems. Emotional disability includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disability as defined in this section.

“Equipment” means machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house machinery, utilities, or equipment and all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published and audio-visual instructional materials, telecommunications, sensory and other technological aids and devices and books, periodicals, documents, and other related materials. (34 CFR 300.14)

"Evaluation" means procedures used in accordance with this chapter to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. (34 CFR 300.15)

“Excess costs” means those costs that are in excess of the average annual per-student expenditure in LCPS during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that shall be computed after deducting (34 CFR 300.16)

1. Amounts received:

a. Under Part B of the Act

b. Under Part A of Title I of the ESEA; and

c. Under Parts A and B of Title III of the ESEA; and

2. Any state or local funds expended for programs that would qualify for assistance under any of the parts described in subdivision 1 a of this definition, but excluding any amounts for capital outlay or debt service.

"Extended school year services" for the purposes of this chapter means special education and related services that: (34 CFR 300.106 (b))

1. Are provided to a child with a disability:

a. Beyond the normal school year of the local educational agency;

b. In accordance with the child's individualized education program;

- c. At no cost to the parent(s) of the child; and
2. Meet the standards established by the Virginia Department of Education.

“Federal core academic subjects” means English, reading or language arts, mathematics, science, foreign language (languages other than English), civics and government, economics, art, history, and geography. (20 USC

§7801(11))

"Federal financial assistance" means any grant, loan, contract or any other arrangement by which the U.S. Department of Education provides or otherwise makes available assistance in the form of funds, services of federal personnel, or real and personal property. (34 CFR 104.3(h))

"Free appropriate public education" or “FAPE” means special education and related services that: (34 CFR 300.17)

1. Are provided at public expense, under public supervision and direction, and without charge;
2. Meet the standards of the Virginia Board of Education;
3. Include an appropriate preschool, elementary school, middle school or secondary school education in Virginia; and
4. Are provided in conformity with an individualized education program that meets the requirements of this chapter.

“Functional behavioral assessment” means a process to determine the underlying cause or functions of a child’s behavior that impede the learning of the child with a disability or the learning of the child’s peers. A functional behavioral assessment may include a review of existing data or new testing data or evaluation as determined by the IEP team.

"General curriculum" means the same curriculum used with children without disabilities adopted by a local educational agency, schools within the local educational agency or, where applicable, the Virginia Department of Education for all children from preschool through secondary school. The term relates to content of the curriculum and not to the setting in which it is taught.

"Hearing impairment" means impairment in hearing in one or both ears, with or without amplification, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section. (34 CFR 300.8(c)(5))

"Highly qualified special education teacher" means a teacher has met the requirements as specified in 34 CFR 300.18 for special education teachers in general, for special education teachers teaching core academic subjects, for special education teachers teaching to alternate achievement standards, or for special education teachers teaching multiple subjects as it applies to their teaching assignment. (34 CFR 300.18)

"Home-based instruction" means services that are delivered in the home setting (or other agreed upon setting) in accordance with the child's individualized education program.

"Homebound instruction" means academic instruction provided to students who are confined at home or in a health care facility for periods that would prevent normal school attendance based upon certification of need by a licensed physician or licensed clinical psychologist. For a child with a disability, the IEP team shall determine the delivery of services, including the number of hours of services. (Regulations Establishing Standards for Accrediting Public Schools in Virginia, 8 VAC 20-131-180)

"Home instruction" means instruction of a child or children by a parent(s), guardian or other person having control or charge of such child or children as an alternative to attendance in a public or private school in accordance with the provisions of the Code of Virginia. This instruction may also be termed home schooling. (§ 22.1-254.1 of the Code of

Virginia)

"Homeless children" has the meaning given the term "homeless children and youth" in §725 (42 USC §11434 a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 USC §11431 et seq. and listed below: (34 CFR 300.19)

The term **"homeless children and youth"** means individuals who lack a fixed, regular, and adequate nighttime residence within the meaning of §103(a)(1) of the McKinney-Vento Homeless Assistance Act and includes the following:

1. Children and youth who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to a lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
2. Children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings within the meaning of §103(a)(2)(C);
3. Children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
4. Migratory children (as such term is defined in §1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless because the children are living in circumstances described in subdivisions 1 through 3 of this definition.

The term **“unaccompanied youth”** includes a youth not in physical custody of a parent or guardian.

"Home tutoring" means instruction by a tutor or teacher with qualifications prescribed by the Virginia Board of Education, as an alternative to attendance in a public or private school and approved by the division superintendent in accordance with the provisions of the Code of Virginia. This tutoring is not home instruction as defined in the Code of Virginia. (§22.1-254 of the Code of Virginia)

“Illegal drug” means a controlled substance, but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under the Controlled Substances Act, 21 USC §812(c), or under any other provision of federal law. (34 CFR 300.530(i)(2))

"Impartial special education hearing officer" means a person selected from a list maintained by the Office of the Executive Secretary of the Supreme Court of Virginia to conduct a due process hearing.

"Implementation plan" means the plan developed by LCPS designed to operationalize the decision of the hearing officer in cases that are fully adjudicated.

"Independent educational evaluation" means an evaluation conducted by a qualified examiner or examiners who are not employed by the local educational agency responsible for the education of the child in question. (34 CFR 300.502(a)(3)(i))

"Individualized education program" or "IEP" means a written statement for a child with a disability that is developed, reviewed, and revised in a team meeting in accordance with this chapter. The IEP specifies the individual educational needs of the child and what special education and related services are necessary to meet the child's educational needs. (34 CFR 300.22)

"Individualized education program team" means a group of individuals described in 8 VAC 20-81-110 that is responsible for developing, reviewing, or revising an IEP for a child with a disability. (34 CFR 300.23)

"Individualized family service plan (IFSP) under Part C of the Act" means a written plan for providing early intervention services to an infant or toddler with a disability eligible under Part C and to the child's family. (34 CFR 303.24; 20 USC § 636)

"Infant and toddler with a disability" means a child, ages birth to two, inclusive, whose birthday falls on or before September 30, or who is eligible to receive services in the Part C early intervention system up to age three, and who: (§2.2-5300 of the Code of Virginia; 34 CFR 300.25)

1. Has delayed functioning;
2. Manifests atypical development or behavior;
3. Has behavioral disorders that interfere with acquisition of developmental skills; or
4. Has a diagnosed physical or mental condition that has a high probability of resulting in delay, even though no current delay exists.

"Informed parental consent" see "Consent."

"Initial placement" means the first placement for the child to receive special education and related services in either LCPS, other educational service agency, or other public agency or institution for the purpose of providing special education or related services.

“Intellectual disability” means the definition formerly known as “mental retardation” and means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child’s educational performance. (34 CFR 300.8(c)(6))

"Interpreting services" as used with respect to children who are deaf or hard of hearing, means services provided by personnel who meet the qualifications set forth under 8 VAC 20-81-40 and includes oral transliteration services, cued speech/language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print and TypeWell and interpreting services for children who are deaf-blind. A child who is not deaf or hard of hearing, but who has language deficits, may receive interpreting services as directed by the child’s Individualized Education Program. (Regulations Governing Interpreter Services for the Deaf and Hard of Hearing 22 VAC 20-30; 34 CFR 300.34(c)(4)(i))

"Least restrictive environment" (LRE) means that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 CFR 300.114 through 34 CFR 300.120)

"Level I services" means the provision of special education to children with disabilities for less than 50% of the instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program, rather than the location of services.

"Level II services" means the provision of special education and related services to children with disabilities for 50% or more of the instructional school day (excluding intermission for meals). The time that a child receives special education services is calculated on the basis of special education services described in the individualized education program, rather than the location of services.

“Limited English proficient” when used with respect to an individual means an individual: (20 USC §7801(25); 34 CFR 300.27)

1. Who is aged 2 through 21;
2. Who is enrolled or is preparing to enroll in an elementary or secondary school; or
3. Who:
 - a. Was not born in the United States or whose native language is a language other than English;
 - b. Is a Native American or Alaska Native, or a native resident of the outlying areas, and comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or
 - c. Is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and
4. Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual:
 - a. The ability to meet Virginia's proficient level of achievement on Virginia assessments;
 - b. The ability to successfully achieve in classrooms where the language of instruction is English; or
 - c. The opportunity to participate fully in society.

"Local educational agency" means a local school division governed by a local school board, a state-operated program that is funded and administered by the Commonwealth of Virginia or the Virginia School for the Deaf and the Blind at Staunton. Neither state-operated programs nor the Virginia School for the Deaf and Blind at Staunton are considered a school division as that term is used in these regulations. (§22.1-346 C of the Code of Virginia; 34 CFR 300.28)

"Long-term placement" if used in reference to state-operated programs as outlined in 8 VAC 20-81-30 H means those hospital placements which are not expected to change in status or condition because of the child's medical needs.

"Manifestation determination review" means a process to review all relevant information and the relationship between the child's disability and the behavior subject to the disciplinary action.

"Medical services" means services provided by a licensed physician or nurse practitioner to determine a child's medically related disability that results in the child's need for special education and related services. (§22.1-270 of the Code of Virginia; 34 CFR 300.34(c)(5))

"Mental retardation" - see "Intellectual Disability."

"Multiple disabilities" means simultaneous impairments (such as intellectual disability with blindness, intellectual disability with orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. This term does not include deaf-blindness. (34 CFR 300.8(c)(7))

"National Instructional Materials Access Center" or "NIMAC" means the national center established to do the following: (34 CFR 300.172)

1. Receive and maintain a catalog of print instructional materials prepared in the NIMAS, as established by the U.S. Secretary of Education, made available to such center by the textbook publishing industry, state educational agencies, and local education agencies;
2. Provide access to print instructional materials, including textbooks, in accessible media, free of charge, to blind or other persons with print disabilities in elementary schools and secondary schools, in accordance with terms and procedures as the NIMAC may prescribe; and
3. Develop, adopt and publish procedures to protect against copyright infringement, with respect to print instructional materials provided in accordance with the Act.

"National Instructional Materials Accessibility Standard" or "NIMAS" means the standard established by the

United States Secretary of Education to be used in the preparation of electronic files suitable and used solely for efficient conversion of print instructional materials into specialized formats. (34 CFR 300.172)

"Native language" if used with reference to an individual of limited English proficiency, means the language normally used by that individual, or, in the case of a child, the language normally used by the parent(s) of the child, except in all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment. For an

individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication). (34 CFR 300.29)

"Nonacademic services and extracurricular services" may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by LCPS, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by LCPS and assistance in making outside employment available. (34 CFR 300.107(b))

"Notice" means written statements in English or in the primary language of the home of the parent(s), or, if the language or other mode of communication of the parent(s) is not a written language, oral communication in the primary language of the home of the parent(s). If an individual is deaf or blind, or has no written language, the mode of communication would be that normally used by the individual (such as sign language, Braille, or oral communication). (34 CFR 300.503)(c))

"Occupational therapy" means services provided by a qualified occupational therapist or services provided under the direction or supervision of a qualified occupational therapist and includes:

(Regulations Governing the Licensure of Occupational Therapists (18 VAC 85-80-10 et seq.); 34 CFR 300.34(c)(6))

1. Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;
2. Improving ability to perform tasks for independent functioning if functions are impaired or lost; and
3. Preventing, through early intervention, initial or further impairment or loss of function.

"Orientation and mobility services" means services provided to blind or visually impaired children by qualified personnel to enable those children to attain systematic orientation to and safe movement within their environments in school, home, and community; and includes travel training instruction, and teaching children the following, as appropriate: (34 CFR 300.34(c)(7))

1. Spatial and environmental concepts and use of information received by the senses (e.g., sound, temperature, and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

2. To use the long cane or service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;
3. To understand and use remaining vision and distance low vision aids; and
4. Other concepts, techniques, and tools.

"Orthopedic impairment" means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). (34 CFR 300.8(c)(8))

"Other health impairment" means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia and Tourette syndrome that adversely affects a child's educational performance. (34 CFR 300.8(c)(9))

"Paraprofessional," also known as **paraeducator**, means an appropriately trained employee who assists and is supervised by qualified professional staff in meeting the requirements of this chapter. (34 CFR 300.156(b)(2)(iii))

"Parent" means: (§20-124.6 of the Code of Virginia; 34 CFR 99.4 and 34 CFR 300.30)

1. Persons who meet the definition of "parent":

a. A biological or adoptive parent of a child;

b. A foster parent:

(1) If the biological parent(s)' authority to make educational decisions on the child's behalf has been extinguished under §16.1-283, 16.1-277.01 or 16.1-277.02 of the Code of Virginia or a comparable law in another state;

(2) The child is in permanent foster care pursuant to Chapter 9 (§63.2-900 et seq.) of Title 63.2 of the Code of Virginia or comparable law in another state; and

(3) The foster parent has an on-going, long term parental relationship with the child, is willing to make the educational decisions required of the parent under this chapter, and has no interest that would conflict with the interests of the child;

c. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not a guardian ad litem, or the state if the child is a ward of the state);

d. An individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

e. A surrogate parent who has been appointed in accordance with requirements detailed under 8 VAC 20- 81-220; or

f. A minor who is emancipated under §16.1-333 of the Code of Virginia.

2. If a judicial decree or order identifies a specific person(s) under subdivisions 1a through 1e of this subsection to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person(s) shall be determined to be the "parent" for purposes of this definition.

3. "Parent" does not include local or state agencies or their agents, including local departments of social services, even if the child is in the custody of such an agency.

4. The biological or adoptive parent, when attempting to act as the parent under this chapter and when more than one party is qualified under this section to act as the parent, shall be presumed to be the parent for purposes of this section unless the natural or adoptive parent does not have legal authority to make educational decisions for the child.

5. Noncustodial parents whose parental rights have not been terminated are entitled to all parent rights and responsibilities available under this chapter, including access to their child's records.

6. Custodial stepparents have the right to access the child's record. Noncustodial stepparents do not have the right to access the child's record.

7. A validly married minor who has not pursued emancipation under § 16.1-333 of the Code of Virginia may assert implied emancipation based on the minor's marriage record, and, thus, assumes responsibilities of "parent" under this chapter.

"Parent counseling and training" means assisting parents in understanding the special needs of their child, providing parents with information about child development, and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. (34 CFR 300.34(c)(8))

"Participating agency" means a state or local agency (including a Comprehensive Services Act team), other than the local educational agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student. The term also means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained under Part B of the Act. (34 CFR 300.611(c), 34 CFR 300.324(c) and 34 CFR 300.321(b)(3))

"Personally identifiable" means information that contains the following: (34 CFR 300.32)

1. The name of the child, the child's parent(s), or other family member;
2. The address of the child;
3. A personal identifier, such as the child's social security number or student number; or
4. A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

"Physical education" means the development of: (34 CFR 300.39 (b)(2))

1. Physical and motor fitness;
2. Fundamental motor skills and patterns; and
3. Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports). The term includes special physical education, adapted physical education, movement education, and motor development.

"Physical therapy" means services provided by a qualified physical therapist or under the direction or supervision of a qualified physical therapist upon medical referral and direction. (Regulations Governing the Practice of Physical Therapy, 18 VAC 112-20; 34 CFR 300.34(c)(9))

"Private school children with disabilities" means children with disabilities enrolled by their parent(s) in private, including religious, schools or facilities that meet the definition of elementary school or secondary school as defined in this section other than children with disabilities who are placed in a private school by LCPS or a Comprehensive Services Act team in accordance with 8 VAC 20-81-150. (34 CFR 300.130)

"Program" means the special education and related services, including accommodations, modifications, supplementary aids and services, as determined by a child's individualized education program.

"Psychological services" means those services provided by a qualified psychologist or under the direction or supervision of a qualified psychologist, including: (34 CFR 300.34(c)(10))

1. Administering psychological and educational tests, and other assessment procedures;
2. Interpreting assessment results;
3. Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
4. Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;
5. Planning and managing a program of psychological services, including psychological counseling for children and parents; and
6. Assisting in developing positive behavioral intervention strategies.

"Public expense" means that LCPS either pays for the full cost of the service or evaluation or ensures that the service or evaluation is otherwise provided at no cost to the parent(s). (34 CFR 300.502(a)(3)(ii))

"Public notice" means the process by which certain information is made available to the general public. Public notice procedures may include, but not be limited to, newspaper advertisements, radio announcements, television features and announcements, handbills, brochures, electronic means, and other methods that are likely to succeed in providing information to the public.

"Qualified person who has a disability" means a "qualified handicapped person" as defined in the federal regulations implementing the Rehabilitation Act of 1973, as amended. (29 USC § 701 et seq.)

"Recreation" includes: (34 CFR 30.34(c)(11))

1. Assessment of leisure function;
2. Therapeutic recreation services;

3. Recreation program in schools and community agencies; and
4. Leisure education.

"Reevaluation" means completion of a new evaluation in accordance with this chapter. (34 CFR 300.303)

"Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the

Rehabilitation Act of 1973 (29 USC § 701 et seq.), as amended. (34 CFR 300.34(c)(12))

"Related services" means transportation, and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation; including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluation purposes. Related services also includes school health services and school nurse services; social work services in schools; and parent counseling and training. Related services do not include a medical device that is surgically implanted including cochlear implants, the optimization of device functioning (e.g. mapping), maintenance of the device, or replacement of that device. The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a child with a disability to benefit from special education. (§22 .1-213 of the Code of Virginia; 34 CFR 300.34(a) and (b))

Nothing in this section:

1. Limits the right of a child with a surgically implanted device (e.g. cochlear implant) to receive related services that are determined by the IEP team to be necessary for the child to receive FAPE;
2. Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

3. Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly.

"School day" means any day, including a partial day that children are in attendance at school for instructional purposes. The term has the same meaning for all children in school, including children with and without disabilities.

(34 CFR 300.11)

"School health services and school nurse services" means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. (Chapter 30 (§ 54.1-3000 et. seq.) of Title 54.1 of the Code of Virginia; 34 CFR 300.34(c)(13))

"Scientifically based research" means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs and includes research that: (20 USC §9501(18); 34 CFR 300.35)

1. Employs systematic, empirical methods that draw on observation or experiment;
2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;
3. Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;
4. Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;
5. Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and
6. Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

"Screening" means those processes that are used routinely with all children to identify previously unrecognized needs and that may result in a referral for special education and related services or other referral or intervention.

"Section 504" means that section of the Rehabilitation Act of 1973, as amended, which is designed to eliminate discrimination on the basis of disability in any program or activity receiving federal financial assistance. (29 USC §

701 et seq.)

"Serious bodily injury" means bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. (18 USC §1365(h)(3); 34 CFR 300.530(i)(3))

"Services plan" means a written statement that describes the special education and related services LCPS will provide to a parentally placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, and is developed and implemented in accordance with 8 VAC 20-81-150. (34 CFR 300.37)

"Social work services in schools" means those services provided by a school social worker or qualified visiting teacher, including: (Licensure Regulations for School Personnel, 8 VAC 20-22-660); 34 CFR 300.34(c)(14))

1. Preparing a social or developmental history on a child with a disability;
2. Group and individual counseling with the child and family;
3. Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;
4. Mobilizing school and community resources to enable the child to learn as effectively as possible in the child's educational program; and
5. Assisting in developing positive behavioral intervention strategies for the child.

LCPS, in its discretion, may expand the role of the school social worker or visiting teacher beyond those services identified in this definition, as long as the expansion is consistent with other state laws and regulations, including licensure.

"Special education" means specially designed instruction, at no cost to the parent(s), to meet the unique needs of a child with a disability, including instruction conducted in a classroom, in the home, in hospitals, in institutions, and in other settings and instruction in physical education. The term includes each of the following if it meets the requirements of the definition of special education: (§ 22.1-213 of the Code of Virginia; 34 CFR 300.39)

1. Speech-language pathology services or any other related service, if the service is considered special education rather than a related service under state standards;
2. Vocational education; and
3. Travel training.

"Special education hearing officer" has the same meaning as the term "impartial hearing officer" as that term is used in the Act and its federal implementing regulations.

"Specially designed instruction" means adapting, as appropriate to the needs of an eligible child under this chapter, the content, methodology, or delivery of instruction: (34 CFR 300.39(b)(3))

1. To address the unique needs of the child that result from the child's disability; and
2. To ensure access of the child to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction of the local educational agency.

"Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations, including conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of intellectual disabilities; of emotional disabilities; of environmental, cultural, or economic disadvantage. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.8(c)(10)) Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading

comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.

"Speech or language impairment" means a communication disorder, such as stuttering, impaired articulation, expressive or receptive language impairment, or voice impairment that adversely affects a child's educational performance. (34 CFR 300.8(c)(11))

"Speech-language pathology services" means the following: (34 CFR 300.34(c)(15))

1. Identification of children with speech or language impairments;
2. Diagnosis and appraisal of specific speech or language impairments;
3. Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;
4. Provision of speech and language services for the habilitation or prevention of communicative impairments; and
5. Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

"State assessment program" means the state assessment program in Virginia under the Act that is the component of the state assessment system used for accountability.

"State educational agency" means the Virginia Department of Education. (34 CFR 300.41)

"State-operated programs" means programs that provide educational services to children and youth who reside in facilities according to the admissions policies and procedures of those facilities that are the responsibility of state boards, agencies, or institutions. (§§ 22.1-7, 22.1-340 and 22.1-345 of the Code of Virginia)

"Supplementary aids and services" means aids, services, and other supports that are provided in general education classes or other education-related settings to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate in accordance with this chapter. (34 CFR 300.42)

"Surrogate parent" means a person appointed in accordance with procedures set forth in this chapter to ensure that children are afforded the protection of procedural safeguards and the provision of a free appropriate public education.

(34 CFR 300.519)

"Timely manner" if used with reference to the requirement for National Instructional Materials Accessibility Standard means that LCPS shall take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials. (34 CFR 300.172(b)(4))

"Transition from Part C (Early Intervention Program for Infants and Toddlers with Disabilities) services" means the steps identified in the Individualized Family Services Plan (IFSP) to be taken to support the transition of the child to: (34 CFR 300.124)

1. Early childhood special education to the extent that those services are appropriate; or
2. Other services that may be available, if appropriate.

"Transition services" if used with reference to secondary transition means a coordinated set of activities for a student with a disability that is designed within a results-oriented process that: (34 CFR 300.43)

1. Is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.
2. Is based on the individual child's need, taking into account the child's strengths, preferences, and interests and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, if appropriate, acquisition of daily living skills and functional vocational evaluation.

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if they are required to assist a student with a disability to benefit from special education.

"Transportation" includes: (34 CFR 300.34(c)(16))

1. Travel to and from school and between schools;

2. Travel in and around school buildings; and
3. Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

"Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 CFR 300.8(c)(12))

"Travel training" means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to: (34 CFR 300.39(b)(4))

1. Develop an awareness of the environment in which they live; and
2. Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

"Universal Design" has the meaning given the term in §3 of the Assistive Technology Act of 1998, as amended, 29 USC §3002. The term "universal design" means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies. (34 CFR 300.44)

"Virginia School for the Deaf and the Blind at Staunton" means the Virginia school under the operational control of the Virginia Board of Education. The Superintendent of Public Instruction shall approve the education programs of this school. (§22.1-346 of the Code of Virginia)

"Visual impairment including blindness" means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. (34 CFR 300.8(c)(13))

"Vocational education," for the purposes of special education, means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment or for additional preparation for a career not requiring a baccalaureate or advanced degree, and includes career and technical education. (34 CFR 300.39(b)(5))

"Ward of the State" means a child who, as determined by the state where the child resides, is: (34 CFR 300.45)

1. A foster child;
2. A ward of the state; or
3. In the custody of a public child welfare agency.

"Ward of the state" does not include a foster child who has a foster parent who meets the definition of a "parent".

"Weapon" means dangerous weapon under 18 USC §930(g)(2). 34 CFR 530(i)(4))

II. 8VAC20-81-50 CHILD FIND

- A. Each local educational agency shall establish procedures to ensure that the decision regarding eligibility for special education and related services and educational needs is made in accordance with the provisions of this section.
- B. The determination that a child is eligible for special education and related services shall be made on an individual basis by a group as designated in subdivision C 2 of this section.
- C. Upon completion of the administration of assessments and other evaluation materials or after determining that additional data are not needed, a group of qualified professionals and the parent(s) of the child shall determine whether the child is, or continues to be, a child with a disability and the educational needs of the child. If a determination is made that a child has a disability and requires special education and related services, an IEP shall be developed in accordance with the requirements of 8VAC20-81-110. (34 CFR 300.306, 34 CFR 300.308)
 1. The determination of whether a child is a child with a disability is made by the child's parent(s) and a group that is collectively qualified to:
 - a. Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development and social-emotional development;
 - b. Interpret assessment and intervention data, and apply critical analysis to those data; and
 - c. Develop appropriate educational and transitional recommendations based on the assessment data.
 2. The eligibility group composition.
 - a. The group may be an IEP team, as defined in 8VAC20-81-110, as long as the above requirements and notice requirements of 8VAC20-81-170 are met.
 - b. The group shall include, but not be limited to:
 - (1) Local educational agency personnel representing the disciplines providing assessments;
 - (2) The special education administrator or designee;
 - (3) The parent(s);
 - (4) A special education teacher;
 - (5) The child's general education teacher or if the child does not have a general education teacher, a general education teacher qualified to teach a child of the

child's age; or for a child of less than school age, an individual qualified to teach a child of the child's age; and

- (6) At least one person qualified to conduct individual diagnostic examinations of children, such as school psychologist, speech-language pathologist, or remedial reading teacher.

D. Procedures for determining eligibility and educational need. (34 CFR 300.306 through 34 CFR 300.311)

1. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and determining the educational needs of the child, the local educational agency shall:
 - a. Draw upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
 - b. Ensure that information from all these sources is documented and carefully considered.
2. The group shall provide procedural safeguards in determining eligibility and in ensuring the confidentiality of records.
3. Observation.
 - a. The local educational agency shall ensure that the child is observed in the child's learning environment (including the general education classroom setting) to document the child's academic performance and behavior in the areas of difficulty.
 - b. The eligibility group, in determining whether a child is a child with a disability shall:
 - (1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
 - (2) Have at least one member of the eligibility group conduct an observation of the child's academic performance in the general education classroom after the child has been referred for an evaluation and parental consent has been obtained consistent with the requirements of 8VAC20-81-170.
 - c. In the case of a child of less than school age or out of school, a group member shall observe the child in an environment appropriate for a child of that age.
4. A child shall not be determined to be eligible under this chapter if the child does not otherwise meet the eligibility criteria, or the determinant factor is:

- a. Lack of appropriate instruction in reading, including the essential components of reading instruction:
 - (1) Phonemic awareness,
 - (2) Phonics,
 - (3) Vocabulary development,
 - (4) Reading fluency, including oral reading skills, and
 - (5) Reading comprehension strategies;
 - b. Lack of appropriate instruction in math; or
 - c. Limited English proficiency.
5. The local educational agency shall provide the parent with a copy of the documentation of the determination of eligibility at no cost. This documentation shall include a statement of:
- a. Whether the child has a specific disability.
 - b. The basis for making the determination including an assurance that the determination has been made in accordance with the provisions of this section regarding determining eligibility and educational need.
 - c. The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning.
 - d. The educationally relevant medical findings, if any.
 - e. The instructional strategies used and the student-centered data collected if the child has participated in a response to scientific, research-based intervention process. This document shall also include:
 - (1) The local educational agency's notification to the parent of the Virginia Department of Education's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
 - (2) The strategies that were used to increase the child's rate of learning; and
 - (3) The parent's right to request an evaluation.
 - f. For identification of a child with a specific learning disability, whether consistent with the requirements of subdivisions T 2 a and T 2 b of this section, the child does not achieve adequately for the child's age or to meet Virginia-approved grade-level standards; and

- (1) The child does not make sufficient progress to meet age or Virginia-approved grade-level standards; or
 - (2) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards or intellectual development.
 - g. For identification of a child with a specific learning disability, the group's determination is consistent with the requirements of subdivision T 2 c of this section.
 6. The eligibility group shall consider, as part of the evaluation, data that demonstrates that prior to, or as part of the referral process, the child was provided appropriate high-quality, researched-based instruction in general education settings, consistent with § 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel. There shall be data-based documentation that repeated assessments of achievement at reasonable intervals, reflecting that formal assessment of student progress during instruction was provided to the child's parents.
 7. The eligibility group shall work toward consensus. If the group does not reach consensus and the decision does not reflect a particular member's conclusion, then the group member shall submit a written statement presenting that member's conclusions.
 8. The local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in categorical identification in the child's disability.
 9. The eligibility group shall have a written summary that consists of the basis for making its determination as to the eligibility of the child for special education and related services. The written summary shall include any written statement from a member whose conclusion differs from the other members' determination. The summary statement may include other recommendations. The written summary shall be maintained in the child's scholastic record.
 10. The written summary shall be forwarded to the IEP team, including the parent, upon determination of eligibility. The summary statement may include other recommendations.
 11. With reevaluations, if the eligibility group determines that there is not a change to the child's eligibility for special education and related services, and educational needs, the IEP team is not required to convene, unless the parent requests that the IEP team meets.
- E. Nothing in this chapter requires that children be identified by their disability on IEPs, local educational agency communications to parents regarding eligibility determinations, or other similar communications to parents. For such communications, local educational agencies shall identify that each child has a disability under this chapter and by reason of that disability needs special education and related services, and is regarded as a child with a disability.

- F. Eligibility for related services. A child with a disability shall be found eligible for special education in order to receive related services. Once a child is found eligible for special education, decisions about the need for related services shall be made by the IEP team. An evaluation may be conducted as determined by the IEP team. (34 CFR 300.34 and 34 CFR 300.306(c)(2))
- G. Two-year-old children previously served by Part C. A child, aged two, previously participating in early intervention services assisted under Part C of the Act, shall meet the requirements of this chapter to be determined eligible under Part B of the Act. For a child served by Part C after age two, and whose third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP will begin for the child. (34 CFR 300.124)
- H. For all children suspected of having a disability, local educational agencies shall:
 - 1. Use the criteria adopted by the Virginia Department of Education, as outlined in this section, for determining whether the child has a disability; and
 - 2. Have documented evidence that, by reason of the disability, the child needs special education and related services. (34 CFR 300.307(b))
- I. The Virginia Department of Education permits each local educational agency to use a process for determining whether a child has a disability based on the child's response to scientific, research-based intervention and permits each local educational agency to use other alternative research-based intervention and procedures. (34 CFR 300.307)
- J. Eligibility as a child with autism. The group may determine that a child has autism if:
 - 1. There is an adverse effect on the child's educational performance due to documented characteristics of autism, as outlined in this section; and
 - 2. The child has any of the Pervasive Developmental Disorders, also referenced as autism spectrum disorder, such as Autistic Disorder, Asperger's Disorder, Rhetts Disorder, Childhood Disintegrative Disorder, Pervasive Developmental Disorder – Not Otherwise Specified including Atypical Autism as indicated in diagnostic references.
 - a. Children with Asperger's Disorder demonstrate the following characteristics:
 - (1) Impairments in social interaction, such as marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction; failure to develop peer relationships appropriate to developmental level; a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (i.e., by a lack of showing, bringing, or pointing out objects of interest); or lack of social or emotional reciprocity are noted; and

- (2) Restricted repetitive and stereotyped patterns of behavior, interests, and activities such as encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus, apparently inflexible adherence to specific, nonfunctional routines or rituals, stereotyped and repetitive motor mannerisms, persistent preoccupation with parts of objects.
 - b. Children with autistic disorder, in addition to the characteristics listed in subdivisions 2 a (1) and 2 a (2) of this subsection, also demonstrate impairments in communication, such as delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime). In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others, stereotyped and repetitive use of language or idiosyncratic language, or lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level is noted.
 - c. Children with Pervasive Developmental Disorder - Not Otherwise Specified or Atypical Autism may display any of the characteristics listed in subdivisions 2 a (1), 2 a (2) and 2 b of this subsection without displaying all of the characteristics associated with either Asperger's Disorder or Autistic Disorder.
- K. Eligibility as a child with deaf-blindness. The group may determine that a child has deaf-blindness if the definition of "deaf-blindness" as outlined in [8VAC20-81-10](#) is met.
- L. Eligibility as a child with deafness. The group may determine that a child has deafness if:
- 1. The definition of "deafness" is met in accordance with [8VAC20-81-10](#);
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a deafness, as outlined in subdivision 3 of this subsection; and
 - 3. The child has a bilateral hearing loss (sensorineural, or mixed conductive and sensorineural), a fluctuating or a permanent hearing loss, documented auditory dyssynchrony (auditory neuropathy), and/or cortical deafness.
- M. Eligibility as a child with developmental delay. (34 CFR 300.111(b))
- 1. The group may determine that a child has a developmental delay if the local educational agency permits the use of developmental delay as a disability category when determining whether a preschool child, aged two by September 30 to six, inclusive, is eligible under this chapter, and:
 - a. The definition of "developmental delay" is met in accordance with [8VAC20-81-10](#); or

- b. The child has a physical or mental condition that has a high probability of resulting in a developmental delay.
 - 2. Eligibility as a child with a disability for children ages two through six shall not be limited to developmental delay if eligibility can be determined under another disability category.
 - 3. A local educational agency is not required to adopt and use developmental delay as a disability category for any children within its jurisdiction. If the local educational agency permits the use of developmental delay as a disability category, it shall comply with the eligibility criteria outlined in this section.
- N. Eligibility as a child with an emotional disability. The group may determine that a child has an emotional disability if:
 - 1. The definition of "emotional disability" is met in accordance with [8VAC20-81-10](#); and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an emotional disability.
- O. Eligibility as a child with a hearing impairment.
 - 1. The group may determine that a child has a hearing impairment if:
 - a. The definition of "hearing impairment" is met in accordance with [8VAC20-81-10](#); and
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a hearing impairment, as outlined in subdivision 2 of this subsection.
 - 2. Characteristics of children with a hearing impairment include unilateral hearing loss (conductive, sensorineural, or mixed), bilateral hearing loss (conductive, sensorineural, or mixed), a fluctuating or permanent hearing loss, and/or auditory dyssynchrony (auditory neuropathy). The hearing loss results in qualitative impairments in communication/educational performance.
 - 3. The term "hard of hearing" may be used in this capacity.
- P. Eligibility as a child with an intellectual disability. The group may determine that a child has an intellectual disability if:
 - 1. The definition of "intellectual disability" is met in accordance with [8VAC20-81-10](#);
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an intellectual disability, as outlined in subdivision 3 of this subsection; and
 - 3. The child has:

- a. Significantly impaired intellectual functioning, which is two or more standard deviations below the mean, with consideration given to the standard error of measurement for the assessment, on an individually administered, standardized measure of intellectual functioning;
 - b. Concurrently, significantly impaired adaptive behavior as determined by a composite score on an individual standardized instrument of adaptive behavior that measures two standard deviations or more below the mean; and
 - c. Developmental history that indicates significant impairment in intellectual functioning and a current demonstration of significant impairment is present.
- Q. Eligibility as a child with multiple disabilities. The group may determine that a child has multiple disabilities if the definition of "multiple disabilities" is met in accordance with [8VAC20-81-10](#).
- R. Eligibility as a child with an orthopedic impairment. The group may determine that a child has an orthopedic impairment if:
- 1. The definition of "orthopedic impairment" is met in accordance with [8VAC20-81-10](#); and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an orthopedic impairment.
- S. Eligibility as a child with other health impairment. The group may determine that a child has an other health impairment if:
- 1. The definition of "other health impairment" is met in accordance with [8VAC20-81-10](#); and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of the other health impairment.
- T. Eligibility of a child with a specific learning disability. (34 CFR 300.307 and 34 CFR 300.309)
- 1. The group may determine that a child has a specific learning disability if:
 - a. The definition of "specific learning disability" is met in accordance with [8VAC20-81-10](#); and
 - b. The criteria for determining the existence of a specific learning disability are met.
 - 2. The criteria for determining the existence of a specific learning disability are met if:
 - a. The child does not achieve adequately for the child's age or to meet Virginia-approved grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or Virginia-approved grade-level standards:
 - (1) Oral expression;

- (2) Listening comprehension;
 - (3) Written expression;
 - (4) Basic reading skills;
 - (5) Reading fluency skills;
 - (6) Reading comprehension;
 - (7) Mathematical calculations; or
 - (8) Mathematical problem solving.
- b. The child does not make sufficient progress to meet age or Virginia-approved grade-level standards in one or more of the areas identified in subdivision 2(a) of this subsection when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with [8VAC20-81-70](#).
 - c. The group determines that its findings under subdivisions 2 a and b of this subsection are not primarily the result of:
 - (1) A visual, hearing, or motor impairment;
 - (2) Intellectual disability;
 - (3) Emotional disability;
 - (4) Environmental, cultural, or economic disadvantage; or
 - (5) Limited English proficiency.
3. The Virginia Department of Education does not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. (34 CFR 300.307(a))

U. Eligibility as a child with speech or language impairment.

1. The group may determine that a child has a speech or language impairment if:
 - a. The definition of "speech or language impairment" is met in accordance with [8VAC20-81-10](#);
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of speech or language impairment;

- c. The child has a significant discrepancy from typical communication skills in one or more of the following areas: fluency, impaired articulation, expressive or receptive language impairment, or voice impairment; and
 - d. Information from instruments that are culturally and linguistically appropriate, including standardized and criterion-referenced measures, shall be used in conjunction with information from classroom observations to determine the severity of the communication impairment.
 - 2. Children shall not be identified as children having a speech or language impairment if the area of concern is primarily the result of sociocultural dialect, delays/differences associated with acquisition of English as a second language, or within the purview of established norms for articulation and language development.
 - 3. Speech language pathology services may be special education or a related service.
- V. Eligibility as a child with a traumatic brain injury. The group may determine that a child has a traumatic brain injury if:
- 1. The definition of "traumatic brain injury" is met in accordance with 8VAC20-81-10; and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of traumatic brain injury.
- W. Eligibility as a child with a visual impairment.
- 1. The group may determine that a child has a visual impairment if:
 - a. The definition of "visual impairment" is met in accordance with 8VAC20-81-10;
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of visual impairment; and
 - c. The child:
 - (1) Demonstrates the characteristics of blindness or visual impairment, as outlined in subdivisions 2 and 3 of this subsection; or
 - (2) Has any of the conditions including, but not limited to oculomotor apraxia, cortical visual impairment, and/or a progressive loss of vision, which may in the future, have an adverse effect on educational performance, or a functional vision loss where field and acuity deficits alone may not meet the aforementioned criteria.
 - 2. A child with blindness demonstrates the following:
 - a. Visual acuity in the better eye with best possible correction of 20/200 or less at distance or near; or
 - b. Visual field restriction in the better eye of remaining visual field of 20 degrees or less.

3. A child with a visual impairment demonstrates the following:
 - a. Visual acuity better than 20/200 but worse than 20/70 at distance and/or near; or
 - b. Visual field restriction in the better eye of remaining visual field of 70 degrees or less but better than 20 degrees.

X. Children found not eligible for special education.

1. Information relevant to instruction for a child found not eligible for special education shall be provided to the child's teachers or any appropriate committee. Parental consent to release information shall be secured for children who are placed by their parents in private schools that are not located in the local educational agency of the parent's residence. (34 CFR 300.622)
2. If the school division decides that a child is not eligible for special education and related services, prior written notice, in accordance with [8VAC20-81-170](#) shall be given to the parent(s) including the parent(s) right to appeal the decision through the due process hearing procedures. (34 CFR 300.503; 34 CFR 300.507)

Statutory Authority

§§ [22.1-16](#) and [22.1-214](#) of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 25, Issue 21, eff. July 7, 2009; Errata, 26:4 VA.R. 447-448 October 26, 2009; amended, Virginia Register Volume 26, Issue 8, eff. January 25, 2010.

III. 8VAC20-81-60. REFERRAL FOR INITIAL EVALUATION.

- A. All children, aged two to 21, inclusive, whether enrolled in public school or not, who are suspected of having a disability, shall be referred to the special education administrator or designee, who shall initiate the process of determining eligibility for special education and related services.
 1. Referrals may be made by any source including school staff, a parent(s), the Virginia Department of Education, any other state agency, other individuals, or a school-based team in accordance with 8VAC20-81-50 D 5 b. (34 CFR 300.301(b))
 2. The referring party shall inform the special education administrator or designee of why an evaluation is requested and efforts that have been made to address the concerns. The referral may be made in oral or written form.
 3. Upon receipt of the referral for initial evaluation for the provision of special education and related services to a child suspected of having a disability, from a source other than the school-based team, the special education administrator or designee shall:
 - a. Initiate the initial evaluation procedures under subsection B of this section;
 - b. Refer the child to the school-based team to review and respond to the request under 8VAC20-81-50 D 3 b (2); or
 - c. Deny the request, and provide prior written notice in accordance with 8VAC20-81-170.
- B. Procedures for referral for initial evaluation.
 1. The special education administrator, or designee, shall:
 - a. Record the date the referral was received, reason for referral, and names of the person or agency making the referral;
 - b. Implement procedures for maintaining the confidentiality of all data;
 - c. Provide written notice and procedural safeguards to inform the parent(s) in the parents' native language or primary mode of communication, unless it is clearly not feasible to do so, about:
 - (1) The referral for evaluation;
 - (2) The purpose of the evaluation; and
 - (3) Parental rights with respect to evaluation and other procedural safeguards;
 - d. Inform the parent(s) of the procedures for the determination of needed evaluation data and request any evaluation information the parent(s) may have on the child;
 - e. Secure informed consent from the parent(s) for the evaluation;
 - f. Ensure that all evaluations consist of procedures that:
 - (1) Gather relevant functional, developmental and academic information about the child to determine if the child is a child with a disability; and

- (2) Are sufficiently comprehensive to identify all of the child's special education and related services needs, and educational needs; and
 - g. Ensure that all evaluations are completed and that decisions about eligibility are made within 65 business days of the receipt of the referral by the special education administrator or designee, including if the special education administrator or designee routes the referral to the school-based committee for review and action. The time frame shall not apply to the local school division if: (34 CFR 300.301(d) and (e))
 - (1) The parent(s) of the child repeatedly fails or refuses to produce the child for the evaluation; or
 - (2) If the child enrolls in a school served by the local school division after the required 65 business days has begun and prior to a determination by the child's previous local school division as to whether the child is a child with a disability. This exception only applies if the local school division is making sufficient progress to ensure a prompt completion of the evaluation and the parent(s) and the local school division where the child is enrolled in school agree to a specific time when the evaluation will be completed.
 - h. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days. (34 CFR 300.300(a), 34 CFR 300.309(c))
 - i. If the decision is to not evaluate, prior written notice, in accordance with 8VAC20-81-170, shall be given to the parent(s), including the parent's right to appeal the decision through due process hearing procedures. (34 CFR 300.507)
2. Parental consent requirements. (34 CFR 300.300)
- a. Parental consent is not required before reviewing existing data as part of an evaluation or administering a test or other evaluation that is administered to all children, unless parental consent is required before administration to all children.
 - b. Parental consent for initial evaluation shall not be construed as consent for initial provision of special education and related services.
 - c. The local school division shall make reasonable efforts to obtain parental consent for an initial evaluation to determine whether the child is a child with a disability.
 - d. For initial evaluations only, if the child is a ward of the state and is not residing with the child's parent, the local school division is not required to obtain parental consent to determine whether the child is a child with a disability if:
 - (1) Despite reasonable efforts to do so, the local school division cannot discover the whereabouts of the parent of the child;
 - (2) The rights of the parents of the child have been terminated in accordance with Virginia law; or

- (3) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with Virginia law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

The local school division shall then proceed with evaluating the child without finalizing the appointment of a surrogate parent.

- e. If the parent does not provide consent for the initial evaluation, or fails to respond to a request to provide consent, the local school division may, but is not required to, use the dispute resolution options of mediation or due process to pursue the initial evaluation of the child. The local school division does not violate its obligation under Child Find or other free appropriate public education provisions if it declines to pursue the evaluation.
- f. If a parent of a child who is home-instructed or home-tutored, or who is placed in a private school by the parent(s) at the parent's own expense, does not provide consent for initial evaluation, or the parent fails to respond to a request to provide consent, the local school division may not use mediation or due process to pursue the initial evaluation.

Statutory Authority

§§ 22.1-16 and 22.1-214 of the Code of Virginia; 20 USC § 1400 et seq.; 34 CFR Part 300.

IV. 8VAC20-81-70. EVALUATION AND REEVALUATION.

- A. Each local educational agency shall establish procedures for the evaluation and reevaluation of referrals of children in accordance with the provisions of this section. (34 CFR 300.122)
- B. Determination of needed evaluation data for initial evaluation or reevaluation. (34 CFR 300.305 and 34 CFR 300.507)
 1. Review of existing evaluation data. A group that is comprised of the same individuals as an IEP team and other qualified professionals, as appropriate, shall:
 - a. Review existing evaluation data on the child, including:
 - (1) Evaluations and information provided by the parent(s) of the child;
 - (2) Current classroom-based, local, or state assessments and classroom-based observations; and
 - (3) Observations by teachers and related services providers; and
 - b. On the basis of that review and input from the child's parent(s), identify what additional data, if any, are needed to determine:
 - (1) Whether the child is, or continues to be, a child with a disability;
 - (2) The present educational needs of the child;
 - (3) The child's present level of academic achievement and related developmental needs;
 - (4) Whether the child needs or continues to need special education and related services; and
 - (5) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.
 2. Conduct of review. The group completing the review may conduct its review without a meeting. The local educational agency shall provide notice to ensure that the parent(s) has the opportunity to participate in the review. If there is a meeting, the local educational agency shall provide notice of the meeting early enough to ensure that the parent(s) will have an opportunity to participate. The notice shall meet the requirements of [8VAC20-81-110 E 2 a](#).
 3. Need for additional data. The local educational agency shall administer tests and other evaluation materials as may be needed to produce the data identified in this subsection.
 4. Requirements if additional data are not needed:
 - a. If the team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational

- agency shall provide the child's parent(s) with prior written notice, including information regarding:
- (1) The determination and the reasons for it; and
 - (2) The right of the parent(s) to request an evaluation to determine whether the child continues to be a child with a disability and to determine the child's educational needs.
- b. The local educational agency is not required to conduct the evaluation to gather additional information to determine whether the child continues to have a disability and to determine the child's educational needs, unless the child's parent(s) requests the evaluation for these specific purposes.
 - c. The child's parent(s) has the right to resolve a dispute through mediation or due process as described in this chapter.
 - d. This process shall be considered the evaluation if no additional data are needed.
5. If the team determines not to evaluate a child suspected of a disability, prior written notice, in accordance with [8VAC20-81-170](#), shall be given to the parent(s), including the parent's rights to appeal the decision through due process proceedings.
- C. The local educational agency shall establish policies and procedures to ensure that the following requirements are met. (§ [22.1-214](#) of the Code of Virginia; 34 CFR 300.304 and 34 CFR 300.310)
1. Assessments and other evaluation materials used to assess a child under this chapter are:
 - a. Selected and administered so as not to be discriminatory on a racial or cultural basis;
 - b. Provided and administered in the child's native language and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;
 - c. Used for the purposes for which the assessments or measures are valid and reliable; and
 - d. Administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the assessments.
 2. Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.
 3. A variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent(s), and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining whether the child is a child with a disability and the content of the child's IEP.

4. The assessment tools and strategies used provide relevant information that directly assists persons in determining the educational needs of the child.
5. If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test or the method of test administration) shall be included in the evaluation report.
6. Any non-standardized assessment administered by qualified personnel may be used to assist in determining whether the child is a child with a disability and the contents of the child's IEP.
7. Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
8. Assessments are selected and administered so as to best ensure that if an assessment is administered to a child with impaired sensory, motor, or communication skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure rather than reflecting the child's impaired sensory, motor, or communication skills (except where those skills are the factors that the test purports to measure).
9. The evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
10. Technically sound instruments are used that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
11. No single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for a child.
12. If the evaluation requires assessments in more than one area relating to the suspected disability, a group of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability, shall complete the assessments.
13. For a child suspected of having a specific learning disability, the evaluation shall include an observation of academic performance in the regular classroom by at least one team member other than the child's regular teacher. In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.
14. Each child is assessed by a qualified professional in all areas relating to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities, and adaptive behavior. This may include educational, medical, sociocultural, psychological, or developmental assessments.

- a. The hearing of each child suspected of having a disability shall be screened during the eligibility process prior to initial determination of eligibility for special education and related services.
 - b. A complete audiological assessment, including tests that will assess inner and middle ear functioning, shall be performed on each child who is hearing impaired or deaf or who fails two hearing screening tests.
- D. The evaluation report(s) shall be available to the parent(s) no later than two business days before the meeting to determine eligibility. (34 CFR 300.306(a)(2))
 - 1. A written copy of the evaluation report(s) shall be provided to the parent(s) prior to or at the meeting where the eligibility group reviews the evaluation report(s) or immediately following the meeting, but no later than 10 days after the meeting.
 - 2. The evaluation report(s) shall be provided to the parent(s) at no cost.
- E. Assessments of children with disabilities or suspected of having a disability who transfer from one local educational agency to another local educational agency in the same school year shall be coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with 8VAC20-81-60 B 1 g, to ensure prompt completion of full evaluations. (34 CFR 300.304(c)(5))
- F. Reevaluation.
 - 1. A reevaluation shall be conducted: (34 CFR 300.303(a) and (b)(2))
 - a. If the local educational agency determines that the child's educational or related services needs, including improved academic achievement and functional performance, warrants a reevaluation;
 - b. If the child's parent(s) or teacher requests a reevaluation; or
 - c. At least once every three years, unless the parent and local educational agency agree that a reevaluation is unnecessary.
 - 2. The local educational agency shall not conduct a reevaluation more than once a year unless the parent(s) and the local educational agency agree otherwise. If the local educational agency does not agree with the parent's request for a reevaluation, the local educational agency shall provide the parent(s) with prior written notice in accordance with 8VAC20-81-170. (34 CFR 300.303(b)(1))
 - 3. The local educational agency shall conduct a reevaluation in accordance with the requirements of subsection B of this section. (34 CFR 300.305)
- G. Parental consent for reevaluation. (34 CFR 300.300(c) and (d))
 - 1. Informed parental consent is required before conducting any reevaluation of a child with a disability.
 - a. If the local educational agency can demonstrate that it has taken reasonable measures to obtain consent and the child's parent(s) has failed to respond, the local educational agency shall proceed as if consent has been given by the parent(s).

Reasonable measures include providing notice to the parent(s) in writing (or by telephone or in person with proper documentation).

- b. If the parent(s) refuses consent, the local educational agency may continue to pursue those evaluations by using due process or mediation procedures. The local educational agency does not violate its obligation under this chapter if it declines to pursue the reevaluation.
2. Parental consent is not required before:
 - a. Review of existing data as part of an evaluation or reevaluation;
 - b. A teacher's or related service provider's observations or ongoing classroom evaluations; or
 - c. Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.
 3. If a parent of a child who is home-instructed or home-tutored, or who is placed in a private school by the parents at their own expense, does not provide consent for reevaluation, or the parent(s) fails to respond to a request to provide consent, the local educational agency may not use mediation or due process to pursue the reevaluation. In this instance, the local school division is not required to consider the child as eligible for equitable services under the provisions of [8VAC20-81-150](#) for parentally placed students.

H. Timelines for reevaluations.

1. The reevaluation process, including eligibility determination, shall be initiated in sufficient time to complete the process prior to the third anniversary of the date eligibility was last determined.
 2. If a reevaluation is conducted for purposes other than the child's triennial, the reevaluation process, including eligibility determination, shall be completed in 65 business days of the receipt of the referral by the special education administrator or designee for the evaluation.
 3. The parent and eligibility group may agree in writing to extend the 65-day timeline to obtain additional data that cannot be obtained within the 65 business days.
- I. The local educational agency is not required to evaluate a child with a disability who graduates with a standard diploma or advanced studies diploma. Since graduation is a change in placement, the local educational agency is required to provide the parent with prior written notice in accordance with [8VAC20-81-170](#). (34 CFR 300.305(e)(2))

Statutory Authority

§§ [22.1-16](#) and [22.1-214](#) of the Code of Virginia.

V. 8VAC20-81-80. ELIGIBILITY.

- A. Each local educational agency shall establish procedures to ensure that the decision regarding eligibility for special education and related services and educational needs is made in accordance with the provisions of this section.
- B. The determination that a child is eligible for special education and related services shall be made on an individual basis by a group as designated in subdivision C 2 of this section.
- C. Upon completion of the administration of assessments and other evaluation materials or after determining that additional data are not needed, a group of qualified professionals and the parent(s) of the child shall determine whether the child is, or continues to be, a child with a disability and the educational needs of the child. If a determination is made that a child has a disability and requires special education and related services, an IEP shall be developed in accordance with the requirements of 8VAC20-81-110. (34 CFR 300.306, 34 CFR 300.308)
 1. The determination of whether a child is a child with a disability is made by the child's parent(s) and a group that is collectively qualified to:
 - a. Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development and social-emotional development;
 - b. Interpret assessment and intervention data, and apply critical analysis to those data; and
 - c. Develop appropriate educational and transitional recommendations based on the assessment data.
 2. The eligibility group composition.
 - a. The group may be an IEP team, as defined in 8VAC20-81-110, as long as the above requirements and notice requirements of 8VAC20-81-170 are met.
 - b. The group shall include, but not be limited to:
 - (1) Local educational agency personnel representing the disciplines providing assessments;
 - (2) The special education administrator or designee;
 - (3) The parent(s);
 - (4) A special education teacher;
 - (5) The child's general education teacher or if the child does not have a general education teacher, a general education teacher qualified to teach a child of the

child's age; or for a child of less than school age, an individual qualified to teach a child of the child's age; and

- (6) At least one person qualified to conduct individual diagnostic examinations of children, such as school psychologist, speech-language pathologist, or remedial reading teacher.

D. Procedures for determining eligibility and educational need. (34 CFR 300.306 through 34 CFR 300.311)

1. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and determining the educational needs of the child, the local educational agency shall:
 - a. Draw upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
 - b. Ensure that information from all these sources is documented and carefully considered.
2. The group shall provide procedural safeguards in determining eligibility and in ensuring the confidentiality of records.
3. Observation.
 - a. The local educational agency shall ensure that the child is observed in the child's learning environment (including the general education classroom setting) to document the child's academic performance and behavior in the areas of difficulty.
 - b. The eligibility group, in determining whether a child is a child with a disability shall:
 - (1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
 - (2) Have at least one member of the eligibility group conduct an observation of the child's academic performance in the general education classroom after the child has been referred for an evaluation and parental consent has been obtained consistent with the requirements of 8VAC20-81-170.
 - c. In the case of a child of less than school age or out of school, a group member shall observe the child in an environment appropriate for a child of that age.
4. A child shall not be determined to be eligible under this chapter if the child does not otherwise meet the eligibility criteria, or the determinant factor is:

- a. Lack of appropriate instruction in reading, including the essential components of reading instruction:
 - (1) Phonemic awareness,
 - (2) Phonics,
 - (3) Vocabulary development,
 - (4) Reading fluency, including oral reading skills, and
 - (5) Reading comprehension strategies;
 - b. Lack of appropriate instruction in math; or
 - c. Limited English proficiency.
5. The local educational agency shall provide the parent with a copy of the documentation of the determination of eligibility at no cost. This documentation shall include a statement of:
- a. Whether the child has a specific disability.
 - b. The basis for making the determination including an assurance that the determination has been made in accordance with the provisions of this section regarding determining eligibility and educational need.
 - c. The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning.
 - d. The educationally relevant medical findings, if any.
 - e. The instructional strategies used and the student-centered data collected if the child has participated in a response to scientific, research-based intervention process. This document shall also include:
 - (1) The local educational agency's notification to the parent of the Virginia Department of Education's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
 - (2) The strategies that were used to increase the child's rate of learning; and
 - (3) The parent's right to request an evaluation.
 - f. For identification of a child with a specific learning disability, whether consistent with the requirements of subdivisions T 2 a and T 2 b of this section, the child does not

achieve adequately for the child's age or to meet Virginia-approved grade-level standards; and

(1) The child does not make sufficient progress to meet age or Virginia-approved grade-level standards; or

(2) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards or intellectual development.

g. For identification of a child with a specific learning disability, the group's determination is consistent with the requirements of subdivision T 2 c of this section.

6. The eligibility group shall consider, as part of the evaluation, data that demonstrates that prior to, or as part of the referral process, the child was provided appropriate high-quality, researched-based instruction in general education settings, consistent with § 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel. There shall be data-based documentation that repeated assessments of achievement at reasonable intervals, reflecting that formal assessment of student progress during instruction was provided to the child's parents.

7. The eligibility group shall work toward consensus. If the group does not reach consensus and the decision does not reflect a particular member's conclusion, then the group member shall submit a written statement presenting that member's conclusions.

8. The local educational agency shall obtain written parental consent for the initial eligibility determination. Thereafter, written parental consent shall be secured for any change in categorical identification in the child's disability.

9. The eligibility group shall have a written summary that consists of the basis for making its determination as to the eligibility of the child for special education and related services. The written summary shall include any written statement from a member whose conclusion differs from the other members' determination. The summary statement may include other recommendations. The written summary shall be maintained in the child's scholastic record.

10. The written summary shall be forwarded to the IEP team, including the parent, upon determination of eligibility. The summary statement may include other recommendations.

11. With reevaluations, if the eligibility group determines that there is not a change to the child's eligibility for special education and related services, and educational needs, the IEP team is not required to convene, unless the parent requests that the IEP team meets.

E. Nothing in this chapter requires that children be identified by their disability on IEPs, local educational agency communications to parents regarding eligibility determinations, or other similar communications to parents. For such communications, local educational agencies

shall identify that each child has a disability under this chapter and by reason of that disability needs special education and related services, and is regarded as a child with a disability.

- F. Eligibility for related services. A child with a disability shall be found eligible for special education in order to receive related services. Once a child is found eligible for special education, decisions about the need for related services shall be made by the IEP team. An evaluation may be conducted as determined by the IEP team. (34 CFR 300.34 and 34 CFR 300.306(c)(2))
- G. Two-year-old children previously served by Part C. A child, aged two, previously participating in early intervention services assisted under Part C of the Act, shall meet the requirements of this chapter to be determined eligible under Part B of the Act. For a child served by Part C after age two, and whose third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP will begin for the child. (34 CFR 300.124)
- H. For all children suspected of having a disability, local educational agencies shall:
 - 1. Use the criteria adopted by the Virginia Department of Education, as outlined in this section, for determining whether the child has a disability; and
 - 2. Have documented evidence that, by reason of the disability, the child needs special education and related services. (34 CFR 300.307(b))
- I. The Virginia Department of Education permits each local educational agency to use a process for determining whether a child has a disability based on the child's response to scientific, research-based intervention and permits each local educational agency to use other alternative research-based intervention and procedures. (34 CFR 300.307)
- J. Eligibility as a child with autism. The group may determine that a child has autism if:
 - 1. There is an adverse effect on the child's educational performance due to documented characteristics of autism, as outlined in this section; and
 - 2. The child has any of the Pervasive Developmental Disorders, also referenced as autism spectrum disorder, such as Autistic Disorder, Asperger's Disorder, Rhett's Disorder, Childhood Disintegrative Disorder, Pervasive Developmental Disorder – Not Otherwise Specified including Atypical Autism as indicated in diagnostic references.
 - a. Children with Asperger's Disorder demonstrate the following characteristics:
 - (1) Impairments in social interaction, such as marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction; failure to develop peer relationships appropriate to developmental level; a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (i.e., by a lack

of showing, bringing, or pointing out objects of interest); or lack of social or emotional reciprocity are noted; and

- (2) Restricted repetitive and stereotyped patterns of behavior, interests, and activities such as encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus, apparently inflexible adherence to specific, nonfunctional routines or rituals, stereotyped and repetitive motor mannerisms, persistent preoccupation with parts of objects.
- b. Children with autistic disorder, in addition to the characteristics listed in subdivisions 2 a (1) and 2 a (2) of this subsection, also demonstrate impairments in communication, such as delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime). In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others, stereotyped and repetitive use of language or idiosyncratic language, or lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level is noted.
 - c. Children with Pervasive Developmental Disorder - Not Otherwise Specified or Atypical Autism may display any of the characteristics listed in subdivisions 2 a (1), 2 a (2) and 2 b of this subsection without displaying all of the characteristics associated with either Asperger's Disorder or Autistic Disorder.
- K. Eligibility as a child with deaf-blindness. The group may determine that a child has deaf-blindness if the definition of "deaf-blindness" as outlined in [8VAC20-81-10](#) is met.
- L. Eligibility as a child with deafness. The group may determine that a child has deafness if:
1. The definition of "deafness" is met in accordance with [8VAC20-81-10](#);
 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a deafness, as outlined in subdivision 3 of this subsection; and
 3. The child has a bilateral hearing loss (sensorineural, or mixed conductive and sensorineural), a fluctuating or a permanent hearing loss, documented auditory dyssynchrony (auditory neuropathy), and/or cortical deafness.
- M. Eligibility as a child with developmental delay. (34 CFR 300.111(b))
1. The group may determine that a child has a developmental delay if the local educational agency permits the use of developmental delay as a disability category when determining whether a preschool child, aged two by September 30 to six, inclusive, is eligible under this chapter, and:

- a. The definition of "developmental delay" is met in accordance with 8VAC20-81-10; or
 - b. The child has a physical or mental condition that has a high probability of resulting in a developmental delay.
 - 2. Eligibility as a child with a disability for children ages two through six shall not be limited to developmental delay if eligibility can be determined under another disability category.
 - 3. A local educational agency is not required to adopt and use developmental delay as a disability category for any children within its jurisdiction. If the local educational agency permits the use of developmental delay as a disability category, it shall comply with the eligibility criteria outlined in this section.
- N. Eligibility as a child with an emotional disability. The group may determine that a child has an emotional disability if:
- 1. The definition of "emotional disability" is met in accordance with 8VAC20-81-10; and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an emotional disability.
- O. Eligibility as a child with a hearing impairment.
- 1. The group may determine that a child has a hearing impairment if:
 - a. The definition of "hearing impairment" is met in accordance with 8VAC20-81-10; and
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of a hearing impairment, as outlined in subdivision 2 of this subsection.
 - 2. Characteristics of children with a hearing impairment include unilateral hearing loss (conductive, sensorineural, or mixed), bilateral hearing loss (conductive, sensorineural, or mixed), a fluctuating or permanent hearing loss, and/or auditory dyssynchrony (auditory neuropathy). The hearing loss results in qualitative impairments in communication/educational performance.
 - 3. The term "hard of hearing" may be used in this capacity.
- P. Eligibility as a child with an intellectual disability. The group may determine that a child has an intellectual disability if:
- 1. The definition of "intellectual disability" is met in accordance with 8VAC20-81-10;
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an intellectual disability, as outlined in subdivision 3 of this subsection; and
 - 3. The child has:

- a. Significantly impaired intellectual functioning, which is two or more standard deviations below the mean, with consideration given to the standard error of measurement for the assessment, on an individually administered, standardized measure of intellectual functioning;
 - b. Concurrently, significantly impaired adaptive behavior as determined by a composite score on an individual standardized instrument of adaptive behavior that measures two standard deviations or more below the mean; and
 - c. Developmental history that indicates significant impairment in intellectual functioning and a current demonstration of significant impairment is present.
- Q. Eligibility as a child with multiple disabilities. The group may determine that a child has multiple disabilities if the definition of "multiple disabilities" is met in accordance with [8VAC20-81-10](#).
- R. Eligibility as a child with an orthopedic impairment. The group may determine that a child has an orthopedic impairment if:
- 1. The definition of "orthopedic impairment" is met in accordance with [8VAC20-81-10](#); and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of an orthopedic impairment.
- S. Eligibility as a child with other health impairment. The group may determine that a child has an other health impairment if:
- 1. The definition of "other health impairment" is met in accordance with [8VAC20-81-10](#); and
 - 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of the other health impairment.
- T. Eligibility of a child with a specific learning disability. (34 CFR 300.307 and 34 CFR 300.309)
- 1. The group may determine that a child has a specific learning disability if:
 - a. The definition of "specific learning disability" is met in accordance with [8VAC20-81-10](#); and
 - b. The criteria for determining the existence of a specific learning disability are met.
 - 2. The criteria for determining the existence of a specific learning disability are met if:
 - a. The child does not achieve adequately for the child's age or to meet Virginia-approved grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child's age or Virginia-approved grade-level standards:
 - (1) Oral expression;

- (2) Listening comprehension;
 - (3) Written expression;
 - (4) Basic reading skills;
 - (5) Reading fluency skills;
 - (6) Reading comprehension;
 - (7) Mathematical calculations; or
 - (8) Mathematical problem solving.
- b. The child does not make sufficient progress to meet age or Virginia-approved grade-level standards in one or more of the areas identified in subdivision 2(a) of this subsection when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Virginia-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with [8VAC20-81-70](#).
- c. The group determines that its findings under subdivisions 2 a and b of this subsection are not primarily the result of:
- (1) A visual, hearing, or motor impairment;
 - (2) Intellectual disability;
 - (3) Emotional disability;
 - (4) Environmental, cultural, or economic disadvantage; or
 - (5) Limited English proficiency.
3. The Virginia Department of Education does not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. (34 CFR 300.307(a))
- U. Eligibility as a child with speech or language impairment.
1. The group may determine that a child has a speech or language impairment if:
- a. The definition of "speech or language impairment" is met in accordance with [8VAC20-81-10](#);
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of speech or language impairment;

- c. The child has a significant discrepancy from typical communication skills in one or more of the following areas: fluency, impaired articulation, expressive or receptive language impairment, or voice impairment; and
 - d. Information from instruments that are culturally and linguistically appropriate, including standardized and criterion-referenced measures, shall be used in conjunction with information from classroom observations to determine the severity of the communication impairment.
2. Children shall not be identified as children having a speech or language impairment if the area of concern is primarily the result of sociocultural dialect, delays/differences associated with acquisition of English as a second language, or within the purview of established norms for articulation and language development.
 3. Speech language pathology services may be special education or a related service.
- V. Eligibility as a child with a traumatic brain injury. The group may determine that a child has a traumatic brain injury if:
1. The definition of "traumatic brain injury" is met in accordance with 8VAC20-81-10; and
 2. There is an adverse effect on the child's educational performance due to one or more documented characteristics of traumatic brain injury.
- W. Eligibility as a child with a visual impairment.
1. The group may determine that a child has a visual impairment if:
 - a. The definition of "visual impairment" is met in accordance with 8VAC20-81-10;
 - b. There is an adverse effect on the child's educational performance due to one or more documented characteristics of visual impairment; and
 - c. The child:
 - (1) Demonstrates the characteristics of blindness or visual impairment, as outlined in subdivisions 2 and 3 of this subsection; or
 - (2) Has any of the conditions including, but not limited to oculomotor apraxia, cortical visual impairment, and/or a progressive loss of vision, which may in the future, have an adverse effect on educational performance, or a functional vision loss where field and acuity deficits alone may not meet the aforementioned criteria.
 2. A child with blindness demonstrates the following:
 - a. Visual acuity in the better eye with best possible correction of 20/200 or less at distance or near; or
 - b. Visual field restriction in the better eye of remaining visual field of 20 degrees or less.

3. A child with a visual impairment demonstrates the following:
 - a. Visual acuity better than 20/200 but worse than 20/70 at distance and/or near; or
 - b. Visual field restriction in the better eye of remaining visual field of 70 degrees or less but better than 20 degrees.

X. Children found not eligible for special education.

1. Information relevant to instruction for a child found not eligible for special education shall be provided to the child's teachers or any appropriate committee. Parental consent to release information shall be secured for children who are placed by their parents in private schools that are not located in the local educational agency of the parent's residence. (34 CFR 300.622)
2. If the school division decides that a child is not eligible for special education and related services, prior written notice, in accordance with [8VAC20-81-170](#) shall be given to the parent(s) including the parent(s) right to appeal the decision through the due process hearing procedures. (34 CFR 300.503; 34 CFR 300.507)

Y. Statutory Authority

Z. §§ [22.1-16](#) and [22.1-214](#) of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 25, Issue 21, eff. July 7, 2009; Errata, 26:4 VA.R. 447-448 October 26, 2009; amended, Virginia Register Volume 26, Issue 8, eff. January 25, 2010.

VI. 8VAC20-81-110. INDIVIDUALIZED EDUCATION PROGRAM.

- A. Responsibility. The local educational agency shall ensure that an IEP is developed and implemented for each child with a disability served by that local educational agency, including a child placed in a private special education school by: (34 CFR 300.112)
1. A local school division; or
 2. A non-educational placement by a Comprehensive Services Act team that includes the school division. The local school division's responsibility is limited to special education and related services.
- B. Accountability.
1. At the beginning of each school year, each local educational agency shall have an IEP in effect for each child with a disability within its jurisdiction, with the exception of children placed in a private school by parents when a free appropriate public education is not at issue. (34 CFR 300.323(a))
 2. Each local educational agency shall ensure that an IEP: (34 CFR 300.323(c))
 - a. Is in effect before special education and related services are provided to an eligible child;
 - b. Is developed within 30 calendar days of the date of the initial determination that the child needs special education and related services;
 - c. Is developed within 30 calendar days of the date the eligibility group determines that the child remains eligible for special education and related services following reevaluation, if the IEP team determines that changes are needed to the child's IEP, or if the parent requests it; and
 - d. Is implemented as soon as possible following parental consent to the IEP.
 3. Each local educational agency shall ensure that: (34 CFR 300.323(d))
 - a. The child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and
 - b. Teachers and providers are informed of:
 - (1) Their specific responsibilities related to implementing the child's IEP; and
 - (2) The specific accommodations, modifications, and supports that shall be provided for the child in accordance with the IEP.
 4. Each local educational agency is responsible for initiating and conducting meetings to develop, review, and revise the IEP of a child with a disability.

5. Each local educational agency shall ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals are being achieved and to revise its provisions, as appropriate, to address: (34 CFR 300.324(b))
 - a. Any lack of expected progress toward the annual goals and in the general curriculum, if appropriate;
 - b. The results of any reevaluation conducted under this chapter;
 - c. Information about the child provided to or by the parent(s);
 - d. The child's anticipated needs; or
 - e. Other matters.
6. Each local educational agency shall provide special education and related services to a child with a disability in accordance with the child's IEP. (34 CFR 300.323(c)(2))
7. Nothing in this section limits a parent's right to ask for revisions of the child's IEP if the parent feels that the efforts required by this chapter are not being met.
8. To the extent possible, the local educational agency shall encourage the consolidation of reevaluation and IEP team meetings for the child. (34 CFR 300.324(a)(5))
9. In making changes to a child's IEP after the annual IEP team meeting for the school year, the parent(s) and the local educational agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. (34 CFR 300.324(a)(4) and (6))
 - a. If changes are made to the child's IEP, the local educational agency shall ensure that the child's IEP team is informed of those changes.
 - b. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.
 - c. This meeting is not a substitute for the required annual IEP meeting.

C. IEP team.

1. General. The local educational agency shall ensure that the IEP team for each child with a disability includes: (34 CFR 300.321(a), (c) and (d))
 - a. The parent(s) of the child;
 - b. Not less than one regular education teacher of the child (if the child is or may be participating in the regular educational environment);

- c. Not less than one special education teacher of the child or, if appropriate, not less than one special education provider of the child. For a child whose only disability is speech-language impairment, the special education provider shall be the speech-language pathologist;
 - d. A representative of the local educational agency who is:
 - (1) Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities;
 - (2) Knowledgeable about the general education curriculum; and
 - (3) Knowledgeable about the availability of resources of the local education agency. A local educational agency may designate another member of the IEP team to serve simultaneously as the agency representative if the individual meets the above criteria;
 - e. An individual who can interpret the instructional implications of evaluation results. This individual may be a member of the team serving in another capacity, other than the parent of the child;
 - f. At the discretion of the parent(s) or local educational agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate. The determination of knowledge or special expertise of any individual shall be made by the party (parent(s) or local educational agency) who invited the individual to be a member of the team; and
 - g. Whenever appropriate, the child.
2. The local educational agency determines the school personnel to fill the roles of the required IEP team members in subdivisions 1 b through 1 e of this subsection.
 3. Secondary transition service participants. (34 CFR 300.321(b))
 - a. The local educational agency shall invite a student with a disability of any age to attend the student's IEP meeting if a purpose of the meeting will be the consideration of:
 - (1) The student's postsecondary goals;
 - (2) The needed transition services for the student; or
 - (3) Both.
 - b. If the student does not attend the IEP meeting, the local educational agency shall take other steps to ensure that the student's preferences and interests are considered.

- c. To the extent appropriate and with the consent of the parent(s) or a child who has reached the age of majority, the local educational agency shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. If an agency invited to send a representative to a meeting does not do so, the local educational agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.
 4. Part C transition participants. In the case of a child who was previously served under Part C of the Act, the local educational agency shall, at the parent's(s') request, invite the Part C service coordinator or other representatives of the Part C system to the initial IEP meeting to assist with the smooth transition of services. (34 CFR 300.321(f))
- D. IEP team attendance. (34 CFR 300.321(e))
1. A required member of the IEP team described in subdivisions C 1 b through C 1 e of this section is not required to attend an IEP team meeting, in whole or in part, if the parent and the local educational agency agree, in writing, that the attendance of this member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.
 2. A required member of the IEP team may be excused from attending the IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of curriculum or related services, if:
 - a. The parent and the local educational agency consent in writing to the excusal; and
 - b. The member submits, in writing, to the parent and the IEP team input into the development of the IEP prior to the meeting.

E. Parent participation.

1. Each local educational agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each IEP meeting or are afforded the opportunity to participate including: (34 CFR 300.322(a))
 - a. Notifying the parent(s) of the meeting early enough to ensure that they will have an opportunity to attend; and
 - b. Scheduling the meeting at a mutually agreed on time and place.
2. Notice. (34 CFR 300.322(b))
 - a. General notice. The notice given to the parent(s):
 - (1) May be in writing, or given by telephone or in person with proper documentation;
 - (2) Shall indicate the purpose, date, time, and location of the meeting, and who will be in attendance; and
 - (3) Shall inform the parent(s) of the provisions relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child under subdivision C 1 f of this section.
 - b. Additional notice requirements are provided if transition services are under consideration.
 - (1) For Part C transition, the notice shall inform the parents of the provisions relating to the participation of the Part C service coordinator or other representative(s) of the Part C system under subdivision C 4 of this section.
 - (2) For secondary transition, the notice shall also:
 - (a) Indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child;
 - (b) Indicate that the local educational agency will invite the student; and
 - (c) Identify any other agency that will be invited to send a representative.
3. If neither parent can attend, the local educational agency shall use other methods to ensure parent participation, including individual or conference telephone calls and audio conferences. If the local educational agency uses an alternative means of meeting participation that results in additional costs, the local educational agency is responsible for those costs. (34 CFR 300.322(c))
4. A meeting may be conducted without a parent(s) in attendance if the local educational agency is unable to convince the parent(s) that they should attend. In this case, the local

educational agency shall have a record of the attempts to arrange a mutually agreed on time and place, such as: (34 CFR 300.322(d))

- a. Detailed records of telephone calls made or attempted and the results of those calls;
 - b. Copies of correspondence (written, electronic, or facsimile) sent to the parent(s) and any responses received; or
 - c. Detailed records of visits made to the parent's(s') home or place of employment and the results of those visits.
5. The local educational agency shall take whatever action is necessary to ensure that the parent(s) understand the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. (34 CFR 300.322(e))
 6. At the IEP meeting, the IEP team shall provide the parent(s) of a child with a disability with a written description of the factors in subdivisions F 1 and F 2 of this section that will be considered during the IEP meeting. The description shall be written in language understandable by the general public and provided in the native language of the parent(s) or other mode of communication used by the parent(s), unless it is clearly not feasible to do so.
 7. The local educational agency shall give the parent(s) a copy of the child's IEP at no cost to the parent(s) at the IEP meeting, or within a reasonable period of time after the IEP meeting, not to exceed 10 calendar days. (34 CFR 300.322(f))
- F. Development, review, and revision of the IEP. (34 CFR 300.324(a))
1. In developing each child's IEP, the IEP team shall consider:
 - a. The strengths of the child;
 - b. The concerns of the parent(s) for enhancing the education of their child;
 - c. The results of the initial or most recent evaluation of the child; and
 - d. The academic, developmental, and functional needs of the child.
 2. The IEP team also shall: (34 CFR 300.324(a))
 - a. In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions, strategies, and supports to address the behavior;
 - b. In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

- c. In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media, including an evaluation of the child's future needs for instruction in Braille or the use of Braille, that instruction in Braille or the use of Braille is not appropriate for the child;
- d. Consider the communication needs of the child;
- e. Consider the child's needs for benchmarks or short-term objectives;
- f. In the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
- g. Consider whether the child requires assistive technology devices and services.

3. If, in considering the special factors, the IEP team determines that a child needs a particular device or service, including an intervention, accommodation, or other program modification in order for the child to receive a free appropriate public education, the IEP team shall include a statement to that effect in the child's IEP. (34 CFR 300.324(b)(2))
 4. The regular education teacher of a child with a disability, as a member of the IEP team, shall participate, to the extent appropriate, in the development, review, and revision of the child's IEP, including assisting in the determination of: (34 CFR 300.324(a)(3))
 - a. Appropriate positive behavioral interventions and supports and other strategies for the child; and
 - b. Supplementary aids and services, accommodations, program modifications or supports for school personnel that will be provided for the child.
 5. Nothing in this section shall be construed to require: (34 CFR 300.320(d))
 - a. The IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP; or
 - b. That additional information be included in the child's IEP beyond what is explicitly required in this chapter.
 6. The IEP team shall consider all factors identified under a free appropriate public education in [8VAC20-81-100](#), as appropriate, and work toward consensus. If the IEP team cannot reach consensus, the local educational agency shall provide the parent(s) with prior written notice of the local educational agency's proposals or refusals, or both, regarding the child's educational placement or provision of a free appropriate public education in accordance with [8VAC20-81-170 C](#).
- G. Content of the individualized education program. The IEP for each child with a disability shall include:
1. A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general curriculum or, for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities. (34 CFR 300.320(a)(1))
 - a. The statement shall be written in objective measurable terms, to the extent possible. Test scores, if appropriate, shall be self-explanatory or an explanation shall be included.
 - b. The present level of performance shall directly relate to the other components of the IEP.
 2. A statement of measurable annual goals, including academic and functional goals designed to: (34 CFR 300.320(a)(2))

- a. Meet the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum, or for preschool children, as appropriate, to participate in appropriate activities; and
- b. Meet each of the child's other educational needs that result from the child's disability.

3. If determined appropriate by the IEP team, as outlined in subdivision F 2 of this section, a description of benchmarks or short-term objectives. For children with disabilities who take alternate assessments aligned to alternate achievement standards, the IEP shall include a description of benchmarks or short-term objectives. (34 CFR 300.320(a)(2))
4. The IEP team shall document its consideration of the inclusion in the child's IEP of benchmarks or short-term objectives.
5. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided for the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child: (34 CFR 300.320(a)(4))
 - a. To advance appropriately toward attaining the annual goals;
 - b. To be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and
 - c. To be educated and participate with other children with disabilities and children without disabilities in the activities described in this section.
6. An explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class and in the activities described in this section. (34 CFR 300.320(a)(5))
7. The following information concerning state and division wide assessments shall be included: (34 CFR 300.320(a)(6))
 - a. A statement of any individual appropriate accommodations or modifications that are necessary to measure the child's academic achievement and functional performance, in accordance with the guidelines approved by the Board of Education, in the administration of state assessments of student achievement that are needed in order for the child to participate in the assessment;
 - b. If the IEP team determines that the child must take an alternate assessment instead of a particular state assessment of student achievement (or part of an assessment), a statement of:
 - (1) Why the child cannot participate in the regular assessment;
 - (2) Why the particular assessment selected is appropriate for the child, including that the child meets the criteria for the alternate assessment; and
 - (3) How the child's nonparticipation in the assessment will impact the child's promotion; graduation with a modified standard, standard, or advanced studies diploma; or other matters.

- c. A statement that the child shall participate in either a state assessment for all children that is part of the state assessment program or the state's alternate assessment;
 - d. A statement of any individual appropriate accommodations or modifications approved for use in the administration of divisionwide assessments of student achievement that are needed in order for the child to participate in the assessment;
 - e. If the IEP team determines that the child must take an alternate assessment instead of a particular divisionwide assessment of student achievement (or part of an assessment), a statement of:
 - (1) Why the child cannot participate in the regular assessment;
 - (2) Why the particular alternate assessment selected is appropriate for the child; and
 - (3) How the child's nonparticipation in the assessment will impact the child's courses; promotion; graduation with a modified standard, standard, or advanced studies diploma; or other matters.
8. The projected dates (month, day, and year) for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications. (34 CFR 300.320(a)(7))
9. A statement of: (34 CFR 300.320(a)(3))
- a. How the child's progress toward the annual goals will be measured; and
 - b. When periodic reports on the progress the child is making toward meeting the annual goals will be provided; for example, through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, and at least as often as parents are informed of the progress of their children without disabilities.
10. Initial transition services (34 CFR 300.101(b) and 34 CFR 300.323(b))
- a. In the case of a preschool-aged child with a disability, age two (on or before September 30) through age five (on or before September 30), whose parent(s) elect to receive services under Part B of the Act, the local educational agency shall develop an IEP.
 - b. The IEP team shall consider an IFSP that contains the IFSP content described under Part C of the Act (§ 1431 et seq.) including:
 - (1) A statement regarding natural environments; and
 - (2) A component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills.
 - c. These components of the child's IFSP may be incorporated into the child's IEP.

11. Secondary transition services. (34 CFR 300.43 and 34 CFR 300.320(b))

- a. Prior to the child entering secondary school but not later than the first IEP to be in effect when the child turns 14, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP shall include age-appropriate:
 - (1) Measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills; and
 - (2) Transition services, including courses of study, needed to assist the child in reaching those goals. Transition services shall be based on the individual child's needs, taking into account the child's strengths, preferences, and interests.
- b. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team, and updated annually, in addition to the requirements of subdivision 10(a) of this subsection, the IEP shall also include a statement, if appropriate, of interagency responsibilities or any linkages.
- c. For a child pursuing a modified standard diploma, the IEP team shall consider the child's need for occupational readiness upon school completion, including consideration of courses to prepare the child as a career and technical education program completer.

12. Beginning at least one year before a student reaches the age of majority, the student's IEP shall include a statement that the student and parent(s) have been informed of the rights under this chapter, if any, that will transfer to the student on reaching the age of majority. (34 CFR 300.320(c))

H. Agency responsibilities for secondary transition services. (34 CFR 300.324(c))

1. If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP of a student with a disability, the local educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student set out in the IEP.
2. Nothing in this part relieves any participating agency, including a state vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

I. Additional requirements for eligible students with disabilities in state, regional, or local adult or juvenile correctional facilities. (34 CFR 300.324(d) and 34 CFR 300.102(a)(2); Regulations Establishing Standards for Accrediting Public Schools in Virginia ([8VAC20-131](#)))

1. A representative of the state from a state, regional, or local adult or juvenile correctional facility may participate as a member of the IEP team.
2. All requirements regarding IEP development, review, and revision in this section apply to students with disabilities in state, regional, or local adult or juvenile correctional facilities, including assessment requirements to graduate with a modified standard, standard, or advanced studies diploma. The requirements related to least restrictive environment in [8VAC20-81-130](#) do not apply.
3. The following additional exceptions to subdivision 2 of this subsection apply only to students with disabilities who are convicted as an adult under state law and incarcerated in adult prisons:
 - a. The IEP team may modify the student's IEP or placement if the state has demonstrated to the IEP team a bona fide security or compelling penological interest that cannot be otherwise accommodated.
 - b. IEP requirements regarding participation in state assessments, including alternate assessments, do not apply.
 - c. IEP requirements regarding transition planning and transition services do not apply to students whose eligibility for special education and related services will end because of their age before they will be eligible for release from the correctional facility based on consideration of their sentence and their eligibility for early release.

Statutory Authority

§§ [22.1-16](#) and [22.1-214](#) of the Code of Virginia; 20 USC § 1400 et seq.; 34 CFR Part 300.

VII. 8VAC20-81-160. DISCIPLINE PROCEDURES.

- A. General. (§ [22.1-277](#) of the Code of Virginia; 34 CFR 300.530(a); 34 CFR 300.324(a)(2)(i))
 1. A child with a disability shall be entitled to the same due process rights that all children are entitled to under the Code of Virginia and the local educational agency's disciplinary policies and procedures.
 2. In the event that the child's behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions, strategies, and supports to address the behavior. The IEP team shall consider either:
 - a. Developing goals and services specific to the child's behavioral needs; or
 - b. Conducting a functional behavioral assessment and determining the need for a behavioral intervention plan to address the child's behavioral needs.

3. School personnel may consider any unique circumstances on a case-by-case basis when deciding whether or not to order a change in placement for a child with a disability that violates a code of student conduct.
 - a. In reviewing the disciplinary incident, school personnel may review the child's IEP and any behavioral intervention plan, or consult with the child's teacher(s) to provide further guidance in considering any unique circumstances related to the incident.
 - b. School personnel may convene an IEP team for this purpose.

B. Short-term removals.

1. A short-term removal is for a period of time of up to 10 consecutive school days or 10 cumulative school days in a school year. (34 CFR 300.530(b))
 - a. School personnel may short-term remove a child with a disability from the child's current educational setting to an appropriate interim alternative educational setting, another setting, or suspension, to the extent those alternatives are applied to a child without disabilities.
 - b. Additional short-term removals may apply to a child with a disability in a school year for separate incidents of misconduct as long as the removals do not constitute a pattern. If the short-term removals constitute a pattern, the requirements of subsection C of this section apply.
 - (1) The local educational agency determines when isolated, short-term removals for unrelated instances of misconduct are considered a pattern.
 - (2) These removals only constitute a change in placement if the local educational agency determines there is a pattern.
2. Services during short-term removals.
 - a. The local educational agency is not required to provide services during the first 10 school days in a school year that a child with a disability is short-term removed if services are not provided to a child without a disability who has been similarly removed. (34 CFR 300.530(b)(2))
 - b. For additional short-term removals, which do not constitute a pattern, the local educational agency shall provide services to the extent determined necessary to enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals of the student's IEP. School personnel, in consultation with the student's special education teacher, make the service determinations. (34 CFR 300.530(b)(2))
 - c. For additional short-term removals that do not constitute a pattern, the local educational agency shall ensure that children with disabilities are included in the Virginia Department of Education and divisionwide assessment programs in

accordance with the provisions of subdivision 4 of 8VAC20-81-20. (20 USC § 1412(a)(16)(A))

C. Long-term removals.

1. A long-term removal is for more than 10 consecutive school days; or (34 CFR 300.530; 34 CFR 300.536)
2. The child has received a series of short-term removals that constitutes a pattern:
 - a. Because the removals cumulate to more than 10 school days in a school year;
 - b. Because the child's behavior is substantially similar to the child's behavior in previous incidents that results in a series of removals; and
 - c. Because of such additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another.
3. The local educational agency determines on a case-by-case basis whether a pattern of removals constitutes a change in placement. This determination is subject to review through due process and judicial proceedings. (34 CFR 300.530(a) and (b) and 34 CFR 300.536)
4. On the date on which the decision is made to long-term remove the student because of a violation of a code of student conduct, the local educational agency shall notify the parent(s) of the decision and provide the parent(s) with the procedural safeguards. (34 CFR 300.530(h))
5. Special circumstances. (34 CFR 300.530(g))
 - a. School personnel may remove a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if:
 - (1) The child carries a weapon to or possesses a weapon at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education; or
 - (2) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education; or

- (3) The child inflicts serious bodily injury upon another person at school, on school premises, or at a school function under the jurisdiction of a local educational agency or the Virginia Department of Education.
 - b. For purposes of this part, "weapon," "controlled substance," and "serious bodily injury" have the meaning given the terms under 8VAC20-81-10.
- 6. Services during long-term removals.
 - a. A child with a disability who is long-term removed receives services during the disciplinary removal so as to enable the student to: (34 CFR 300.530(d))
 - (1) Continue to receive educational services so as to enable the student to continue to participate in the general educational curriculum, although in another setting;
 - (2) Continue to receive those services and modifications including those described in the child's current IEP that will enable the child to progress toward meeting the IEP goals; and
 - (3) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.
 - b. For long-term removals, the local educational agency shall ensure that children with disabilities are included in the Virginia Department of Education and divisionwide assessment programs in accordance with the provisions of subdivision 4 of 8VAC20-81-20. (20 USC § 1412(a)(16)(A))
 - c. The IEP team determines the services needed for the child with a disability who has been long-term removed. (34 CFR 300.530(d)(5) and 34 CFR 300.531)
- D. Manifestation determination. (34 CFR 300.530(c), (e), (f), and (g))
 - 1. Manifestation determination is required if the local educational agency is contemplating a removal that constitutes a change in placement for a child with a disability who has violated a code of student conduct of the local educational agency that applies to all students.
 - 2. The local educational agency, the parent(s), and relevant members of the child's IEP team, as determined by the parent and the local educational agency, constitute the IEP team that shall convene immediately, if possible, but not later than 10 school days after the date on which the decision to take the action is made.
 - 3. The IEP team shall review all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent(s).
 - 4. The IEP team then shall determine the conduct to be a manifestation of the child's disability:

- (1) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (2) If the conduct in question was the direct result of the local educational agency's failure to implement the child's IEP.
5. If the IEP team determines that the local educational agency failed to implement the child's IEP, the local educational agency shall take immediate steps to remedy those deficiencies.
 6. If the IEP team determines that the child's behavior was a manifestation of the child's disability:
 - a. The IEP team shall return the child to the placement from which the child was removed unless the parent and the local educational agency agree to a change in placement as part of the modification of the behavioral intervention plan. The exception to this provision is when the child has been removed for not more than 45 school days to an interim alternative educational setting for matters described in subdivision C(5)(a) of this section. In that case, school personnel may keep the student in the interim alternative educational setting until the expiration of the 45-day period.
 - (1) Conduct a functional behavioral assessment, unless the local educational agency had conducted this assessment before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan for the child.
 - (a) A functional behavioral assessment may include a review of existing data or new testing data or evaluation as determined by the IEP team.
 - (b) If the IEP team determines that the functional behavioral assessment will include obtaining new testing data or evaluation, then the parent is entitled to an independent educational evaluation in accordance with [8VAC20-81-170 B](#) if the parent disagrees with the evaluation or a component of the evaluation obtained by the local educational agency; or
 - (2) If a behavioral intervention plan already has been developed, review this plan, and modify it, as necessary, to address the behavior.
 7. If the IEP team determines that the child's behavior was not a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that services shall be provided in accordance with subdivision C(6)(a) of this section.

E. Appeal. (34 CFR 300.532(a) and (c))

1. If the child's parent(s) disagrees with the determination that the student's behavior was not a manifestation of the student's disability or with any decision regarding placement under these disciplinary procedures, the parent(s) may request an expedited due process hearing.
2. A local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may request an expedited due process hearing.
3. The local educational agency is responsible for arranging the expedited due process in accordance with the Virginia Department of Education's hearing procedures at 8VAC20-81-210.
 - a. The hearing shall occur within 20 school days of the date the request for the hearing is filed.
 - b. The special education hearing officer shall make a determination within 10 school days after the hearing.
 - c. Unless the parent(s) and the local educational agency agree in writing to waive the resolution meeting, or agree to use the mediation process:
 - (1) A resolution meeting shall occur within 7 calendar days of receiving the request for a hearing.
 - (2) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the request for a hearing.
 - d. The decisions on expedited due process hearings are appealable consistent with 8VAC20-81-210.

F. Authority of the special education hearing officer. (34 CFR 300.532(a) and (b))

1. A local educational agency may request an expedited due process hearing under the Virginia Department of Education's due process hearing procedures to effect a change in placement of a child with a disability for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the local educational agency believes that the child's behavior is substantially likely to result in injury to self or others.
2. The special education hearing officer under 8VAC20-81-210 may:
 - a. Return the child with a disability to the placement from which the child was removed if the special education hearing officer determines that the removal was a violation of subsections C and D of this section, or that the child's behavior was a manifestation of the child's disability; or

b. Order a change in the placement to an appropriate interim alternative educational setting for not more than 45 school days if the special education hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the student or others.

3. A local educational agency may ask the special education hearing officer for an extension of 45 school days for the interim alternative educational setting of a child with a disability when school personnel believe that the child's return to the regular placement would result in injury to the student or others.

G. Placement during appeals. (34 CFR 300.533)

1. The child shall remain in the interim alternative educational setting pending the decision of the special education hearing officer; or
2. Until the expiration of the time for the disciplinary period set forth in this section, whichever comes first, unless the parent and the local educational agency agree otherwise.

H. Protection for children not yet eligible for special education and related services. (34 CFR 300.534)

1. A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violates a code of student conduct of the local educational agency may assert any of the protections provided in this chapter if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
2. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:
 - a. The parent(s) of the child expressed concern in writing (or orally if the parent(s) does not know how to write or has a disability that prevents a written statement) to school personnel that the child is in need of special education and related services;
 - b. The parent(s) of the child requested an evaluation of the child to be determined eligible for special education and related services; or
 - c. A teacher of the child or school personnel expressed concern about a pattern of behavior demonstrated by the child directly to the director of special education of the local educational agency or to other supervisory personnel of the local educational agency.
3. A local educational agency would not be deemed to have knowledge that a child is a child with a disability if:
 - a. The parent of the child has not allowed a previous evaluation of the child or has refused services; or

- b. The child has been evaluated in accordance with [8VAC20-81-70](#) and [8VAC20-81-80](#) and determined ineligible for special education and related services.
 - 4. If the local educational agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures applied to a child without a disability who engages in comparable behaviors.
 - 5. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this section, the evaluation shall be conducted in an expedited manner.
 - a. Until the evaluation is completed, the child remains in the educational placement determined by the school personnel, which can include suspension or expulsion without educational services.
 - b. If the child is determined to be a child with a disability, taking into consideration information from the evaluations conducted by the local educational agency and information provided by the parent(s), the local educational agency shall provide special education and related services as required for a child with a disability who is disciplined.
- I. Referral to and action by law enforcement and judicial authorities. (34 CFR 300.535)
 - 1. Nothing in this chapter prohibits a local educational agency from reporting a crime by a child with a disability to appropriate authorities, or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability to the extent such action applies to a student without a disability.
 - 2. In reporting the crime, the local educational agency shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom school personnel report the crime. Transmission of such records shall be in accordance with requirements under the Management of the Student's Scholastic Record in the Public Schools of Virginia ([8VAC20-150](#)).
- J. Information on disciplinary actions. (34 CFR 300.229)
 - 1. The Virginia Department of Education requires that local educational agencies include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child.
 - 2. Local educational agencies are responsible for transmitting the statement to the Virginia Department of Education upon request to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled students.

3. The statement may include:
 - a. A description of any behavior engaged in by the child who required disciplinary action;
 - b. A description of the disciplinary action; and
 - c. Any other information that is relevant to the safety of the child and other individuals involved with the child.
4. If the child transfers from one school to another, the transmission of any of the child's records shall include the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

Statutory Authority

§§ 22.1-16 and 22.1-214 of the Code of Virginia; 20 USC § 1400 et seq.; 34 CFR Part 300.

VIII. 8VAC20-81-170. PROCEDURAL SAFEGUARDS.

- A. Opportunity to examine records; parent participation. (34 CFR 300.322(e), 34 CFR 300.500 and 34 CFR 300.501; 8VAC20-150)
1. Procedural safeguards. Each local educational agency shall establish, maintain, and implement procedural safeguards as follows:
 - a. The parent(s) of a child with a disability shall be afforded an opportunity to:
 - (1) Inspect and review all education records with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of a free appropriate public education to the child.
 - (2) Participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.
 - b. Parent participation in meetings.
 - (1) Each local educational agency shall provide notice to ensure that the parent(s) of a child with a disability has the opportunity to participate in meetings described in subdivision 1 a (2) of this subsection, including notifying the parent(s) of the meeting early enough to ensure that the parent has an opportunity to participate. The notice shall:
 - (a) Indicate the purpose, date, time, and location of the meeting and who will be in attendance;
 - (b) Inform the parent(s) that at their discretion or at the discretion of the local educational agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, may participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child;
 - (c) Inform the parent that the determination of the knowledge or special expertise shall be made by the party who invited the individual; and
 - (d) Inform the parent(s), in the case of a child who was previously served under Part C that an invitation to the initial IEP team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of Part C to assist with the smooth transition of services.
 - (2) A meeting does not include informal or unscheduled conversations involving local educational agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory

activities that local educational agency personnel engage in to develop a proposal or a response to a parent proposal that will be discussed at a later meeting.

c. Parent involvement in placement decisions.

- (1) Each local educational agency shall ensure that a parent(s) of each child with a disability is a member of the IEP team that makes decisions on the educational placement of their child or any Comprehensive Services Act team that makes decisions on the educational placement of their child.
- (2) In implementing the requirements of subdivision 1 c (1) of this subsection, the local educational agency shall provide notice in accordance with the requirements of 8VAC20-81-110 E.
- (3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the local educational agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.
- (4) A placement decision may be made by the IEP or Comprehensive Services Act team without the involvement of the parent(s) if the local educational agency is unable to obtain the parents' participation in the decision. In this case, the local educational agency shall have a record of its attempt to ensure the parents' involvement.
- (5) The local educational agency shall take whatever action is necessary to ensure that the parent(s) understand and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for a parent(s) with deafness, or whose native language is other than English.
- (6) The exception to the IEP team determination regarding placement is with disciplinary actions involving interim alternative education settings for 45-day removals under 8VAC20-81-160 D 6 a. (34 CFR 300.530(f)(2) and (g))

B. Independent educational evaluation.

1. General. (34 CFR 300.502(a))

- a. The parent(s) of a child with a disability shall have the right to obtain an independent educational evaluation of the child.
- b. The local educational agency shall provide to the parent(s) of a child with a disability, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the applicable criteria for independent educational evaluations.

2. Parental right to evaluation at public expense. (34 CFR 300.502(b) and (e))
 - a. The parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation component obtained by the local educational agency.
 - b. If the parent(s) requests an independent educational evaluation at public expense, the local educational agency shall, without unnecessary delay, either:
 - (1) Initiate a due process hearing to show that its evaluation is appropriate; or
 - (2) Ensure that an independent educational evaluation is provided at public expense, unless the local educational agency demonstrates in a due process hearing that the evaluation obtained by the parent(s) does not meet the local educational agency's criteria.
 - c. If the local educational agency initiates a due process hearing and the final decision is that the local educational agency's evaluation is appropriate, the parent(s) still has the right to an independent educational evaluation, but not at public expense.
 - d. If the parent(s) requests an independent educational evaluation, the local educational agency may ask the reasons for the parent's objection to the public evaluation. However, the explanation by the parent(s) may not be required and the local educational agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.
 - e. A parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.
 - f. If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the local educational agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria, a local educational agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.
3. Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the local educational agency an evaluation obtained at private expense, the results of the evaluation: (34 CFR 300.502(c))
 - a. Shall be considered by the local educational agency, if it meets local educational agency criteria, in any decision regarding the provision of a free appropriate public education to the child; and

- b. May be presented by any party as evidence at a hearing under 8VAC20-81-210.
4. Requests for evaluations by special education hearing officers. If a special education hearing officer requests an independent educational evaluation for an evaluation component, as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense. (34 CFR 300.502(d))
- C. Prior written notice by the local educational agency; content of notice.
1. Prior written notice shall be given to the parent(s) of a child with a disability within a reasonable time before the local educational agency: (34 CFR 300.503(a))
- a. Proposes to initiate or change the identification, evaluation, or educational placement (including graduation with a standard or advanced studies diploma) of the child, or the provision of a free appropriate public education for the child; or
 - b. Refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education for the child.
2. The notice shall include: (34 CFR 300.503(b))
- a. A description of the action proposed or refused by the local educational agency;
 - b. An explanation of why the local educational agency proposes or refuses to take the action;
 - c. A description of any other options the IEP team considered and the reasons for the rejection of those options;
 - d. A description of each evaluation procedure, assessment, record, or report the local educational agency used as a basis for the proposed or refused action;
 - e. A description of any other factors that are relevant to the local educational agency's proposal or refusal;
 - f. A statement that the parent(s) of a child with a disability have protection under the procedural safeguards of this chapter and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
 - g. Sources for the parent(s) to contact in order to obtain assistance in understanding the provisions of this section.
- 3.
- a. The notice shall be: (i) written in language understandable to the general public; and (ii) provided in the native language of the parent(s) or other mode of communication used by the parent(s), unless it is clearly not feasible to do so. (34 CFR 300.503(c))

- b. If the native language or other mode of communication of the parent(s) is not a written language, the local educational agency shall take steps to ensure that:
 - (1) The notice is translated orally or by other means to the parent(s) in their native language or other mode of communication;
 - (2) The parent(s) understand the content of the notice; and
 - (3) There is written evidence that the requirements of subdivisions (1) and (2) of this subdivision have been met.

D. Procedural safeguards notice. (34 CFR 300.504)

- 1. A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency only one time a school year, except that a copy shall be given to the parent(s) upon:
 - a. Initial referral for or parent request for evaluation;
 - b. If the parent requests an additional copy;
 - c. Receipt of the first state complaint during a school year;
 - d. Receipt of the first request for a due process hearing during a school year; and
 - e. On the date on which the decision is made to make a disciplinary removal that constitutes a change in placement because of a violation of a code of student conduct.
- 2. The local educational agency may place a current copy of the procedural safeguards notice on its Internet website if a website exists, but the local educational agency does not meet its obligation under subdivision 1 of this subsection by directing the parent to the website. The local educational agency shall offer the parent(s) a printed copy of the procedural safeguards notice in accordance with subdivision 1 of this subsection.
- 3. The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available relating to:
 - a. Independent educational evaluation;
 - b. Prior written notice;
 - c. Parental consent;
 - d. Access to educational records;
 - e. Opportunity to present and resolve complaints through the due process procedures;
 - f. The availability of mediation;

- g. The child's placement during pendency of due process proceedings;
 - h. Procedures for students who are subject to placement in an interim alternative educational setting;
 - i. Requirements for unilateral placement by parents of children in private schools at public expense;
 - j. Due process hearings, including requirements for disclosure of evaluation results and recommendations;
 - k. Civil actions, including the time period in which to file those actions;
 - l. Attorneys' fees; and
 - m. The opportunity to present and resolve complaints through the state complaint procedures, including:
 - (1) The time period in which to file a complaint;
 - (2) The opportunity for the local educational agency to resolve the complaint; and
 - (3) The difference between the due process and the state complaint procedures, including the applicable jurisdiction, potential issues, and timelines for each process.
4. The notice required under this subsection shall meet the prior notice requirements regarding understandable language in subdivision C 3 of this section.

E. Parental consent.

1. Required parental consent. Informed parental consent is required before:
 - a. Conducting an initial evaluation or reevaluation, including a functional behavioral assessment if such assessment is not a review of existing data conducted at an IEP meeting; (34 CFR 300.300(a)(1)(i))
 - b. An initial eligibility determination or any change in categorical identification;
 - c. Initial provision of special education and related services to a child with a disability; (34 CFR 300.300(b)(1))
 - d. Any revision to the child's IEP services;
 - e. Any partial or complete termination of special education and related services, except for graduation with a standard or advance studies diploma;

- f. The provision of a free appropriate public education to children with disabilities who transfer between public agencies in Virginia or transfer to Virginia from another state in accordance with [8VAC20-81-120](#);
 - g. Accessing a child's public benefits or insurance or private insurance proceeds in accordance with subsection F of this section; and (34 CFR 300.154)
 - h. Inviting to an IEP meeting a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services. (34 CFR 300.321(b)(3))
2. Parental consent not required. Parental consent is not required before:
- a. Review of existing data as part of an evaluation or a reevaluation, including a functional behavioral assessment; (34 CFR 300.300(d)(1))
 - b. Administration of a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of the parent(s) of all children; (34 CFR 300.300(d)(1))
 - c. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation; (34 CFR 300.302)
 - d. Administration of a test or other evaluation that is used to measure progress on the child's IEP goals and is included in the child's IEP;
 - e. A teacher's or related service provider's observations or ongoing classroom evaluations;
 - f. Conducting an initial evaluation of a child who is a ward of the state and who is not residing with his parent(s) if: (34 CFR 300.300(a)(2))
 - (1) Despite reasonable efforts, the local educational agency cannot discover the whereabouts of the parent(s);
 - (2) The parent's rights have been terminated; or
 - (3) The rights of the parent(s) to make educational decisions have been subrogated by a judge and an individual appointed by the judge to represent the child has consented to the initial evaluation.
3. Revoking consent.
- a. If at any time subsequent to the initial provision of special education and related services the parent revokes consent in writing for the continued provision of special education and related services: (34 CFR 300.300(b)(4))
 - (1) The local educational agency may not continue to provide special education and related services to the child, but must provide prior written notice in accordance

with 8VAC20-81-170 C before ceasing the provision of special education and related services;

- (2) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;
 - (3) The local educational agency's failure to provide the special education and related services to the child will not be considered a violation of the requirement to provide FAPE; and
 - (4) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the further provision of special education and related services.
- b. If a parent revokes consent, that revocation is not retroactive in accordance with the definition of "consent" at [8VAC20-81-10](#).
4. Refusing consent.
- a. If the parent(s) refuses consent for initial evaluation or a reevaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))
 - b. If the parent(s) refuses to consent to the initial provision of special education and related services: (34 CFR 300.300(b)(3))
 - (1) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;
 - (2) The local educational agency's failure to provide the special education and related services to the child for which consent is requested is not considered a violation of the requirement to provide FAPE; and
 - (3) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the special education and related services for which the local educational agency requests consent. However, the local educational agency may convene an IEP meeting and develop an IEP to inform the parent about the services that may be provided with parental consent.
 - c. If the parent(s) of a parentally placed private school child refuses consent for an initial evaluation or a reevaluation, the local educational agency: (34 CFR 300.300(d)(4))

- (1) May not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the evaluation of the child may be completed; and
 - (2) Is not required to consider the child as eligible for equitable provision of services in accordance with 8VAC20-81-150.
- d. A local educational agency may not use a parent's refusal to consent to one service or activity to deny the parent(s) or child any other service, benefit, or activity of the local educational agency, except as provided by this chapter. (34 CFR 300.300(d)(3))
5. Withholding consent.
- a. If the parent(s) fails to respond to a request to consent for an initial evaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))
 - b. Informed parental consent need not be obtained for reevaluation if the local educational agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent(s) has failed to respond. (34 CFR 300.300(c)(2))
 - c. If the parent(s) fails to respond to a request to provide consent for the initial provision of special education and related services, the local educational agency follows the provisions of subdivision 4 b of this subsection. (34 CFR 300.300(b)(3) and (4))
6. Consent for initial evaluation may not be construed as consent for initial provision of special education and related services. (34 CFR 300.300(a)(1)(ii))
7. The local educational agency shall make reasonable efforts to obtain informed parental consent for an initial evaluation and the initial provision of special education and related services. (34 CFR 300.300(a)(1)(iii) and (b)(2))
8. To meet the reasonable measures requirement of this section, the local educational agency shall have a record of its attempts to secure the consent, such as: (34 CFR 300.322(d) and 34 CFR 300.300(a), (b), (c) and (d)(5))
- a. Detailed records of telephone calls made or attempted and the results of those calls;
 - b. Copies of correspondence (written, electronic, or facsimile) sent to the parent(s) and any responses received; and
 - c. Detailed records of visits made to the parent's home or place of employment and the results of those visits.

- F. Parental rights regarding use of public or private insurance. Each local educational agency using Medicaid or other public benefits or insurance programs to pay for services required under this chapter, as permitted under the public insurance program, and each local educational agency using private insurance to pay for services required under this chapter, shall provide notice to the parent(s) and obtain informed parental consent in accordance with 8VAC20-81-300. (34 CFR 300.154)
- G. Confidentiality of information.
1. Access rights. (34 CFR 300.613)
 - a. The local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8VAC20-81-160 and 8VAC20-81-210, or resolution session in accordance with 8VAC20-81-210, and in no case more than 45 calendar days after the request has been made.
 - b. The right to inspect and review education records under this section includes:
 - (1) The right to a response from the local educational agency to reasonable requests for explanations and interpretations of the records;
 - (2) The right to request that the local educational agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
 - (3) The right to have a representative of the parent inspect and review the records.
 - c. A local educational agency may presume that a parent has authority to inspect and review records relating to the parent's children unless the local educational agency has been provided a copy of a judicial order or decree, or other legally binding documentation, that the parent does not have the authority under applicable Virginia law governing such matters as guardianship, separation, and divorce.
 2. Record of access. Each local educational agency shall keep a record of parties, except parents and authorized employees of the local educational agency, obtaining access to education records collected, maintained, or used under Part B of the Act, including the name of the party, the date of access, and the purpose for which the party is authorized to use the records. (34 CFR 300.614)
 3. Record on more than one child. If any education record includes information on more than one child, the parent(s) of those children have the right to inspect and review only the information relating to their child or to be informed of the specific information requested. (34 CFR 300.615)

4. List of types and locations of information. Each local educational agency shall provide a parent(s) on request a list of the types and locations of education records collected, maintained, or used by the local educational agency. (34 CFR 300.616)
5. Fees. (34 CFR 300.617)
 - a. Each local educational agency may charge a fee for copies of records that are made for a parent(s) under this chapter if the fee does not effectively prevent the parent(s) from exercising their right to inspect and review those records.
 - b. A local educational agency may not charge a fee to search for or to retrieve information under this section.
 - c. A local educational agency may not charge a fee for copying a child's IEP that is required to be provided to the parent(s) in accordance with [8VAC20-81-110 E 7](#).
6. Amendment of records at parent's request. (34 CFR 300.618)
 - a. A parent(s) who believes that information in the education records collected, maintained, or used under this chapter is inaccurate or misleading or violates the privacy or other rights of the child may request the local educational agency that maintains the information to amend the information.
 - b. The local educational agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.
 - c. If the local educational agency decides to refuse to amend the information in accordance with the request, it shall inform the parent(s) of the refusal and advise the parent(s) of the right to a hearing under subdivision 7 of this subsection.
7. Opportunity for a hearing. The local educational agency shall provide on request an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. (34 CFR 300.619)
8. Results of hearing. (34 CFR 300.620)
 - a. If, as a result of the hearing, the local educational agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.
 - b. If, as a result of the hearing, the local educational agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the child's education records a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

- c. Any explanation placed in the records of the child under this section shall:
 - (1) Be maintained by the local educational agency as part of the records of the child as long as the record or contested portion is maintained by the local educational agency; and
 - (2) If the records of the child or the contested portion is disclosed by the local educational agency to any party, the explanation shall also be disclosed to the party.
- 9. Hearing procedures. A hearing held under subdivision 7 of this subsection shall be conducted in accordance with the procedures under 34 CFR 99.22 of the Family Educational Rights and Privacy Act. (20 USC § 1232g; 34 CFR 300.621)
 - a. The local educational agency may:
 - (1) Develop local procedures for such a hearing process; or
 - (2) Obtain a hearing officer from the Supreme Court of Virginia's special education hearing officer list in accordance with the provisions of [8VAC20-81-210 H](#).
- 10. Consent. (34 CFR 300.32; 34 CFR 300.622)
 - a. Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act. (20 USC § 1232g).
 - b. Parental consent is not required before personally identifiable information is disclosed to officials of the local educational agencies collecting, maintaining, or using personally identifiable information under this chapter, except:
 - (1) Parental consent, or the consent of a child who has reached the age of majority, shall be obtained before personally identifiable information is released to officials of any agency or institution providing or paying for transition services.
 - (2) If a child is enrolled, or is going to enroll in a private school that is not located in the local educational agency where the parent(s) resides, parental consent shall be obtained before any personally identifiable information about the child is released between officials in the local educational agency where the private school is located, and officials in the local educational agency where the parent(s) resides.
- 11. Safeguards. (34 CFR 300.623)

- a. Each local educational agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
- b. Each local educational agency shall ensure that electronic communications via emails or facsimiles regarding any matter associated with the child, including matters related to IEP meetings, disciplinary actions, or service delivery, be part of the child's educational record.
- c. One official at each local educational agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.
- d. All persons collecting, maintaining, or using personally identifiable information shall receive training or instruction on Virginia's policies and procedures for ensuring confidentiality of the information.
- e. Each local educational agency shall maintain for public inspection a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

12. Destruction of information. (34 CFR 300.624)

- a. The local educational agency shall inform parents when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide educational services to the child.
- b. This information shall be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed shall be maintained without time limitation.
- c. The local educational agency shall comply with the Records Retention and Disposition Schedule of the Library of Virginia.

H. Electronic mail. If the local educational agency makes the option available, parent(s) of a child with a disability may elect to receive prior written notice, the procedural safeguards notice, and the notice of a request for due process, by electronic mail. (34 CFR 300.505)

I. Electronic signature. If an electronically filed document contains an electronic signature, the electronic signature has the legal effect and enforceability of an original signature. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. (Chapter 42.1 (§ [59.1-479](#) et seq.) of Title 59.1 of the Code of Virginia)

J. Audio and video recording.

- 1. The local educational agency shall permit the use of audio recording devices at meetings convened to determine a child's eligibility under [8VAC20-81-80](#); to develop, review, or revise the child's IEP under [8VAC20-81-110](#) F; and to review discipline

matters under 8VAC20-81-160 D. The parent(s) shall inform the local educational agency before the meeting in writing, unless the parents cannot write in English, that they will be audio recording the meeting. If the parent(s) does not inform the local educational agency, the parent(s) shall provide the local educational agency with a copy of the audio recording. The parent(s) shall provide their own audio equipment and materials for audio recording. If the local educational agency audio records meetings or receives a copy of an audio recording from the parent(s), the audio recording becomes a part of the child's educational record.

2. The local educational agency may have policies that prohibit, limit, or otherwise regulate the use of:
 - a. Video recording devices at meetings convened pursuant to this chapter; or
 - b. Audio or video recording devices at meetings other than those meetings identified in subdivision 1 of this subsection.
3. These policies shall:
 - a. Stipulate that the recordings become part of the child's educational record;
 - b. Ensure that the policy is uniformly applied; and
 - c. If the policy prohibits the use of the devices, the policy shall provide for exceptions if they are necessary to ensure that the parent(s) understands the IEP, the special education process, or to implement other parental rights guaranteed under this chapter.

Statutory Authority

§§ 22.1-16 and 22.1-214 of the Code of Virginia.

IX. 8VAC20-81-190. MEDIATION.

- A. Each local educational agency shall ensure that the parent(s) of a child with a disability are informed of the option of mediation to resolve disputes involving any matter arising under Part B of the Act, including the identification, evaluation, or educational placement and services of the child, the provision of a free appropriate public education to the child, and matters arising prior to the filing of a state complaint or request for a due process hearing. Mediation is available to resolve these issues at any time a joint request is made to the Virginia Department of Education from a school representative and a parent. (§ 22.1-214 B of the Code of Virginia; 34 CFR 300.506(a))
- B. The local educational agency shall use the Virginia Department of Education's mediation process to resolve such disputes. The procedures shall ensure that the process is: (§ 22.1-214 B of the Code of Virginia; 34 CFR 300.506(b)(1))
1. Voluntary on the part of both the local educational agency and parent;
 2. Not used to deny or delay a parent's(s') right to a due process hearing or to deny any other rights afforded under the Act; and
 3. Conducted by a qualified and impartial mediator who is trained in effective mediation techniques and who is knowledgeable in laws and regulations relating to the provision of special education and related services.
- C. The local educational agency or the Virginia Department of Education may establish procedures to offer parents and schools who choose not to use the mediation process an opportunity to meet, at a time and location convenient to them, with a disinterested party who is under contract with a parent training and information center or community parent resource center in Virginia established under § 1471 or 1472 of the Act; or an appropriate alternative dispute resolution entity. The purpose of the meeting would be to explain the benefits of and encourage the parent(s) to use the mediation process. (34 CFR 300.506(b)(2))
- D. In accordance with the Virginia Department of Education's procedures: (34 CFR 300.506(b)(3) and (4))
1. The Virginia Department of Education maintains a list of individuals who are qualified mediators, knowledgeable in laws and regulations relating to the provision of special education and related services, and trained in effective mediation techniques;
 2. The mediator is chosen on a rotation basis; and
 3. The Virginia Department of Education bears the cost of the mediation process, including costs in subsection C of this section.
- E. The mediation process shall: (34 CFR 300.506(b)(5) through (b)(8))

1. Be scheduled in a timely manner and held in a location that is convenient to the parties to the dispute;
2. Conclude with a written legally binding agreement, if an agreement is reached by the parties to the dispute, that:
 - a. States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
 - b. Is signed by both the parent and a representative of the local educational agency who has the authority to bind the local educational agency; and
 - c. Is enforceable in any state or federal court of competent jurisdiction.
3. Guarantee that discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings of any state or federal court. Parties to the mediation process may be required to sign a consent form to mediate containing a confidentiality pledge prior to the commencement of the mediation process.

F. An individual who serves as a mediator: (34 CFR 300.506(c))

1. May not be an employee of any local educational agency or the Virginia Department of Education if it is providing direct services to a child who is the subject of the mediation process;
2. Shall not have a personal or professional conflict of interest, including relationships or contracts with schools or parents outside of mediations assigned by the Virginia Department of Education; and
3. Is not an employee of the local educational agency or the Virginia Department of Education solely because the person is paid by the agency to serve as a mediator.

Statutory Authority

§§ [22.1-16](#) and [22.1-214](#) of the Code of Virginia; 20 USC § 1400 et seq.; 34 CFR Part 300.

X. 8VAC20-81-200. COMPLAINT RESOLUTION PROCEDURES.

- A. The Virginia Department of Education maintains and operates a complaint system that provides for the investigation and issuance of findings regarding violations of the rights of parents or children with disabilities. The Superintendent of Public Instruction or designee is responsible for the operation of the complaint system. (34 CFR 300.151)
- B. A complaint may be filed with the Virginia Department of Education by any individual, organization, or an individual from another state and shall: (34 CFR 300.153)
1. Be in writing;
 2. Include the signature and contact information for the complainant;
 3. Contain a statement that a local educational agency has violated the Act or these special education regulations;
 4. Include the facts upon which the complaint is based;
 5. If alleging violations with respect to a specific child, include:
 - a. The name and address of the residence of the child;
 - b. The name of the school the child is attending;
 - c. In the case of a homeless child or youth (within the meaning of § 725(2) of the McKinney-Vento Homeless Act (42 USC 11434a(2)), available contact information for the child, and the name of the school the child is attending;
 - d. A description of the nature of the problem of the child, including facts relating to the problem; and
 - e. A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed;
 6. Address an action that occurred not more than one year prior to the date the complaint is received;
 7. Contain all relevant documents; and
 8. Be provided simultaneously to the local educational agency or public agency serving the child.
- C. Within seven days of a receipt of a complaint, the Virginia Department of Education determines if the complaint is sufficient according to subsection B of this section. If it is determined that the complaint is insufficient, the Virginia Department of Education notifies the complainant and the local educational agency in writing. The complainant is given directions for resubmission of the complaint to the Virginia Department of Education.

- D. Upon receipt of a valid complaint, the Virginia Department of Education shall initiate an investigation to determine whether the local educational agency is in compliance with applicable law and regulations in accordance with the following procedures: (34 CFR 300.151 and 34 CFR 300.152)
1. Within seven business days of the receipt of a valid complaint, the Virginia Department of Education shall send written notification to each complainant and the local educational agency against which the violation has been alleged, acknowledging receipt of a complaint.
 - a. The notification sent to the local educational agency shall include:
 - (1) A copy of the complaint;
 - (2) An offer of technical assistance in resolving the complaint;
 - (3) A statement that the local educational agency has the opportunity to propose, at the local educational agency's discretion, a resolution of the complaint;
 - (4) Notification of the opportunity for the parties to engage voluntarily in mediation;
 - (5) A request that the local educational agency submit within 10 business days of receipt of the letter of notification either:
 - (a) Written documentation that the complaint has been resolved; or
 - (b) If the complaint was not resolved, a written response, including all requested documentation. A copy of the response, along with all submitted documentation, shall simultaneously be sent by the local educational agency to the parent(s) of the child who is the subject of the complaint or their attorney. If the complaint was filed by another individual, the local educational agency shall also simultaneously send the response and submitted documentation to that individual if a release signed by the parent(s) has been provided.
 - b. The notification sent to the complainant and the local educational agency shall provide the complainant and the local educational agency with an opportunity to submit additional information about the allegations in the complaint, either orally or in writing. The Virginia Department of Education shall establish a timeline in the notification letter for submission of any additional information so as not to delay completion of the investigation within 60 calendar days.
 - c. If the complaint is filed by an individual other than the child's parent(s) and/or their legal counsel, the Virginia Department of Education sends written notification to the complainant acknowledging receipt of the complaint. The complainant is notified that the parent will be informed of the receipt of the complaint and provided a copy of the complaint and pertinent correspondence. The Virginia Department of Education's

- final determination of compliance or noncompliance will be issued to the parent(s) and the local educational agency, unless the complainant has obtained and filed the appropriate consent for release of information.
2. If a reply from the local educational agency is not filed with the Virginia Department of Education within 10 business days of the receipt of the notice, the Virginia Department of Education shall send a second notice to the local educational agency advising that failure to respond within seven business days of the date of such notice will result in review by the Superintendent of Public Instruction or designee for action regarding appropriate sanctions.
 3. The Virginia Department of Education shall review the complaint and reply filed by the local educational agency to determine if further investigation or corrective action needs to be taken.
 - a. If the complaint is also the subject of a due process hearing or if it contains multiple issues of which one or more are part of that due process hearing, the Virginia Department of Education shall:
 - (1) Set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing; and
 - (2) Resolve any issue in the complaint that is not a part of the due process hearing involving the same parties.
 - b. If an issue raised in the complaint has previously been decided in a due process hearing involving the same parties, the Virginia Department of Education shall inform the complainant that the due process hearing decision is binding.
 - c. The Virginia Department of Education shall resolve a complaint alleging that the local educational agency has failed to implement a due process hearing decision.
 4. During the course of the investigation, the Virginia Department of Education shall:
 - a. Conduct an investigation of the complaint that shall include a complete review of all relevant documentation and may include interviews with appropriate individuals, and an independent on-site investigation, if necessary.
 - b. Consider all facts and issues presented and the applicable requirements specified in law, regulations, or standards.
 - c. Make a determination of compliance or noncompliance on each issue in the complaint based upon the facts and applicable law, regulations, or standards and notify the parties in writing of the findings and the bases for such findings.
 - (1) The Virginia Department of Education has 60 calendar days after the valid written complaint is received to carry out the investigation and to resolve the complaint.

- (2) An extension of the 60-calendar-day time limit may occur if exceptional circumstances exist with respect to a particular complaint or if the parties involved agree to extend the time to engage in mediation or other alternative means of dispute resolution.
 - (3) Both parties to the complaint will be notified in writing by the Virginia Department of Education of the exceptional circumstances, if applicable, and the extended time limit.
 - d. Ensure that the Virginia Department of Education's final decision is effectively implemented, if needed, through:
 - (1) Technical assistance activities;
 - (2) Negotiations; and
 - (3) Corrective actions to achieve compliance.
 - e. Report findings of noncompliance and corresponding recommendations to the party designated by the Superintendent of Public Instruction for review, or where appropriate, directly to the Superintendent of Public Instruction for further action.
 - f. Notify the parties in writing of any needed corrective actions and the specific steps that shall be taken by the local educational agency to bring it into compliance with applicable timelines.
5. In resolving a complaint in which a failure to provide appropriate services is found, the Virginia Department of Education shall address:
- a. The failure to provide appropriate services, including corrective action appropriate to address the needs of the child, including compensatory services, monetary reimbursement, or other corrective action appropriate to the needs of the child; and
 - b. Appropriate future provision of services for all children with disabilities.
- E. Parties to the complaint procedures shall have the right to appeal the final decision to the Virginia Department of Education within 30 calendar days of the issuance of the decision in accordance with procedures established by the Virginia Department of Education.
- F. When the local educational agency develops a plan of action to correct the violations, such plan shall include timelines to correct violations not to exceed 30 business days unless circumstances warrant otherwise. The plan of action will also include a description of all changes contemplated and shall be subject to approval of the Virginia Department of Education.
- G. If the local educational agency does not come into compliance within the period of time set forth in the notification, the matter will be referred to the Superintendent of Public Instruction

or designee for an agency review and referral to the Virginia Board of Education, if deemed necessary.

- H. If, after reasonable notice and opportunity for a hearing by the Virginia Board of Education, under the provisions of 8VAC20-81-290, it is determined that the local educational agency has failed to comply with applicable laws and regulations and determines that compliance cannot be secured by voluntary means, then the Superintendent of Public Instruction shall issue a decision in writing stating that state and federal funds for the education of children with disabilities shall not be made available to that local educational agency until there is no longer any failure to comply with the applicable law or regulation. (§ 22.1-214 E of the Code of Virginia)
- I. The Virginia Department of Education's complaint procedures shall be widely disseminated to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities. (34 CFR 300.151)

Statutory Authority

§§ 22.1-16 and 22.1-214 of the Code of Virginia; 20 USC § 1400 et seq.; 34 CFR Part 300.

XI. 8VAC20-81-210. DUE PROCESS HEARING.

- A. The Virginia Department of Education provides for an impartial special education due process hearing system to resolve disputes between parents and local educational agencies with respect to any matter relating to the: (§ 22.1-214 of the Code of Virginia; 34 CFR 300.121 and 34 CFR 300.507 through 34 CFR 300.518)
 1. Identification of a child with a disability, including initial eligibility, any change in categorical identification, and any partial or complete termination of special education and related services;
 2. Evaluation of a child with a disability (including disagreements regarding payment for an independent educational evaluation);
 3. Educational placement and services of the child; and
 4. Provision of a free appropriate public education to the child.
- B. The Virginia Department of Education uses the impartial hearing officer system that is administered by the Supreme Court of Virginia.
- C. The Virginia Department of Education uses the list of hearing officers maintained by the Office of the Executive Secretary of the Supreme Court of Virginia and its Rules of Administration for the names of individuals to serve as special education hearing officers. In accordance with the Rules of Administration, the Virginia Department of Education provides the Office of the Executive Secretary annually the names of those special education hearing officers who are recertified to serve in this capacity.
- D. The Virginia Department of Education establishes procedures for:
 1. Providing special education hearing officers specialized training on the federal and state special education law and regulations, as well as associated laws and regulations impacting children with disabilities, knowledge of disabilities and special education programs, case law, management of hearings, and decision writing.
 2. Establishing the number of special education hearing officers who shall be certified to hear special education due process cases.
 - a. The Virginia Department of Education shall review annually its current list of special education hearing officers and determine the recertification status of each hearing officer.
 - b. Notwithstanding anything to the contrary in this subdivision, individuals on the special education hearing officers list on July 7, 2009, shall be subject to the Virginia Department of Education's review of recertification status based on past and current performance.
 - c. The ineligibility of a special education hearing officer continuing to serve in this capacity shall be based on the factors listed in subdivision 3 c of this subsection.
 3. Evaluation, continued eligibility, and disqualification requirements of special education hearing officers:

- a. The Virginia Department of Education shall establish procedures for evaluating special education hearing officers.
- b. The first review of the recertification status of each special education hearing officer will be conducted within a reasonable time following July 7, 2009.
- c. In considering whether a special education hearing officer will be certified or recertified, the Virginia Department of Education shall determine the number of hearing officers needed to hear special education due process cases, and consider matters related to the special education hearing officer's adherence to the factors in subdivision H 5 of this section, as well as factors involving the special education hearing officer's:
 - (1) Issuing an untimely decision, or failing to render decision within regulatory time frames;
 - (2) Unprofessional demeanor;
 - (3) Inability to conduct an orderly hearing;
 - (4) Inability to conduct a hearing in conformity with the federal and state laws and regulations regarding special education;
 - (5) Improper ex parte contacts;
 - (6) Violations of due process requirements;
 - (7) Mental or physical incapacity;
 - (8) Unjustified refusal to accept assignments;
 - (9) Failure to complete training requirements as outlined by the Virginia Department of Education;
 - (10) Professional disciplinary action; or
 - (11) Issuing a decision that contains:
 - (a) Inaccurate appeal rights of the parents; or
 - (b) No controlling case or statutory authority to support the findings.
- d. When a special education hearing officer has been denied certification or recertification based on the factors in subdivision 3 c of this section, the Virginia Department of Education shall notify the special education hearing officer and the Office of the Executive Secretary of the Supreme Court of Virginia that the hearing officer is no longer certified to serve as a special education hearing officer. Upon notification of denial of certification or recertification, the hearing officer may, within 10 calendar days of the postmark of the letter of notification, request of the Superintendent of Public Instruction, or his designee, reconsideration of the decision. Such request shall be in writing and shall contain any additional information desired for consideration. The Superintendent of Public Instruction, or his designee, shall render a decision within 10 calendar days of receipt of the request for reconsideration. The Virginia Department of Education shall notify the hearing officer and the Office of the Executive Secretary of the Supreme Court of Virginia of its decision.

4. Reviewing and analyzing the decisions of special education hearing officers, and the requirement for special education hearing officers to reissue decisions, relative to correct use of citations, readability, and other errors such as incorrect names or conflicting data, but not errors of law that are reserved for appellate review.
- E. Filing the request for a due process hearing. If any of the following provisions are challenged by one of the parties in a due process hearing, the special education hearing officer determines the outcome of the case going forward.
1. The request for due process shall allege a violation that happened not more than two years before the parent(s) or the local educational agency knew or should have known about the alleged action that forms the basis of the request for due process. This timeline does not apply if the request for a due process hearing could not be filed because: (34 CFR 300.507(a) and 34 CFR 300.511(e) and (f))
 - a. The local educational agency specifically misrepresented that it had resolved the issues identified in the request; or
 - b. The local educational agency withheld information that it was required to provide under the IDEA.
 2. A local educational agency may initiate a due process hearing to resolve a disagreement when the parent(s) withholds or refuses consent for an evaluation or an action that requires parental consent to provide services to a student who has been identified as a student with a disability or who is suspected of having a disability. However, a local educational agency may not initiate a due process hearing to resolve parental withholding or refusing consent for the initial provision of special education to the child. (34 CFR 300.300(a)(3)(i) and 34 CFR 300.300(b)(3))
 3. In circumstances involving disciplinary actions, the parent(s) of a student with a disability may request an expedited due process hearing if the parent(s) disagrees with: (34 CFR 300.532)
 - a. The manifestation determination regarding whether the child's behavior was a manifestation of the child's disability; or
 - b. Any decision regarding placement under the disciplinary procedures.
 4. In circumstances involving disciplinary actions, the local educational agency may request an expedited hearing if the school division believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. (34 CFR 300.532)
- F. Procedure for requesting a due process hearing. (34 CFR 300.504(a)(2), 34 CFR 300.507, 34 CFR 300.508 and 34 CFR 300.511)
1. A request for a hearing shall be made in writing to the Virginia Department of Education. A copy of that request shall be delivered contemporaneously by the requesting party to the other party.

- a. If the local educational agency initiates the due process hearing, the local educational agency shall advise the parent(s) and the Virginia Department of Education in writing of this action.
 - b. If the request is received solely by the Virginia Department of Education, the Virginia Department of Education shall immediately notify the local educational agency by telephone or by facsimile and forward a copy of the request to the local educational agency as soon as reasonably possible, including those cases where mediation is requested.
 - c. The request for a hearing shall be kept confidential by the local educational agency and the Virginia Department of Education.
2. A party may not have a due process hearing until that party or the attorney representing the party files a notice that includes:
 - a. The name of the child;
 - b. The address of the residence of the child (or available contact information in the case of a homeless child);
 - c. The name of the school the child is attending;
 - d. A description of the nature of the child's problem relating to the proposed or refused initiation or change, including facts relating to the problem; and
 - e. A proposed resolution of the problem to the extent known and available to the parent(s) at the time of the notice.
 3. The due process notice shall be deemed sufficient unless the party receiving the notice notifies the special education hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements listed in subdivision 2 of this subsection.
 4. The party receiving the notice may challenge the sufficiency of the due process notice by providing a notification of the challenge to the special education hearing officer within 15 calendar days of receipt the due process request. A copy of the challenge shall be sent to the other party and the Virginia Department of Education.
 5. Within five calendar days of receipt of the notification challenging the sufficiency of the due process notice, the special education hearing officer shall determine on the face of the notice whether the notification meets the requirements in subdivision 2 of this subsection.
 6. The special education hearing officer has the discretionary authority to permit either party to raise issues at the hearing that were not raised in the notice by the party requesting the due process hearing in light of particular facts and circumstances of the case.
 7. The local educational agency shall upon receipt of a request for a due process hearing, inform the parent(s) of the availability of mediation described in [8VAC20-81-190](#) and of any free or low-cost legal and other relevant services available in the area. The local educational agency also shall provide the parent(s) with a copy of the procedural safeguards notice upon receipt of the parent's(s') first request for a due process hearing in a school year.

G. Amendment of due process notice. (34 CFR 300.508(d)(3))

1. A party may amend its due process notice only if:
 - a. The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or
 - b. The special education hearing officer grants permission, except that the special education hearing officer may only grant such permission at any time not later than five calendar days before a due process hearing occurs.
2. The applicable timeline for a due process hearing under this part shall begin again at the time the party files an amended notice, including the timeline for resolution sessions.

H. Assignment of the special education hearing officer. (34 CFR 300.511)

1. Within five business days of receipt of the request for a non-expedited hearing and three business days of receipt of the request for an expedited hearing:
 - a. The local educational agency shall contact the Supreme Court of Virginia for the appointment of the special education hearing officer.
 - b. The local educational agency contacts the special education hearing officer to confirm availability, and upon acceptance, notifies the special education hearing officer in writing, with a copy to the parent(s) and the Virginia Department of Education of the appointment.
2. Upon request, the Virginia Department of Education shall share information on the qualifications of the special education hearing officer with the parent(s) and the local educational agency.
3. Either party has five business days after notice of the appointment is received or the basis for the objection becomes known to the party to object to the appointment by presenting a request for consideration of the objection to the special education hearing officer.
 - a. If the special education hearing officer's ruling on the objection does not resolve the objection, then within five business days of receipt of the ruling the party may proceed to file an affidavit with the Executive Secretary of the Supreme Court of Virginia. The failure to file a timely objection serves as a waiver of objections that were known or should have been known to the party.
 - b. The filing of a request for removal or disqualification shall not stay the proceedings or filing requirements in any way except that the hearing may not be conducted until the Supreme Court of Virginia issues a decision on the request in accordance with its procedures.
 - c. If a special education hearing officer recuses himself or is otherwise disqualified, the Supreme Court of Virginia shall ensure that another special education hearing officer is promptly appointed.
4. A hearing shall not be conducted by a person who:

- a. Has a personal or professional interest that would conflict with that person's objectivity in the hearing;
 - b. Is an employee of the Virginia Department of Education or the local educational agency that is involved in the education and care of the child. A person who otherwise qualifies to conduct a hearing is not an employee of the agency solely because he is paid by the agency to serve as a special education hearing officer; or
 - c. Represents schools or parents in any matter involving special education or disability rights, or is an employee of any parent rights agency or organization, or disability rights agency or organization.
5. A special education hearing officer shall:
- a. Possess knowledge of, and the ability to understand, the provisions of the Act, federal and state regulations pertaining to the Act, and legal interpretations of the Act by federal and state courts;
 - b. Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
 - c. Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.
- I. Duration of the special education hearing officer's authority.
- 1. The special education hearing officer's authority begins with acceptance of the case assignment.
 - 2. The special education hearing officer has authority over a due process proceeding until:
 - a. Issuance of the special education hearing officer's decision; or
 - b. The Supreme Court of Virginia revokes such authority by removing or disqualifying the special education hearing officer.
- J. Child's status during administrative or judicial proceedings. (34 CFR 300.518; 34 CFR 300.533)
- 1. Except as provided in [8VAC20-81-160](#), during the pendency of any administrative or judicial proceeding, the child shall remain in the current educational placement unless the parent(s) of the child and local educational agency agree otherwise;
 - 2. If the proceeding involves an application for initial admission to public school, the child, with the consent of the parent(s), shall be placed in the public school until the completion of all the proceedings;
 - 3. If the decision of a special education hearing officer agrees with the child's parent(s) that a change of placement is appropriate, that placement shall be treated as an agreement between the local educational agency and the parent(s) for the purposes of subdivision 1 of this section;
 - 4. The child's placement during administrative or judicial proceedings regarding a disciplinary action by the local educational agency shall be in accordance with [8VAC20-81-160](#);

5. The child's placement during administrative or judicial proceedings regarding a placement for non-educational reasons by a Comprehensive Services Act team shall be in accordance with [8VAC20-81-150](#); or
 6. If the proceeding involves an application for initial services under Part B of the Act from Part C and the child is no longer eligible for Part C services because the child has turned three, the school division is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, the school division shall provide those special education and related services that are not in dispute between the agency and the school division.
- K. Rights of parties in the hearing. (§ [22.1-214](#) C of the Code of Virginia; 34 CFR 300.512)
1. Any party to a hearing has the right to:
 - a. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
 - b. Present evidence and confront, cross-examine, and request that the special education hearing officer compel the attendance of witnesses;
 - c. Move that the special education hearing officer prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
 - d. Obtain a written or, at the option of the parent(s), electronic, verbatim record of the hearing; and
 - e. Obtain written or, at the option of the parent(s), electronic findings of fact and decisions.
 2. Additional disclosure of information shall be given as follows:
 - a. At least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing; and
 - b. A special education hearing officer may bar any party that fails to comply with subdivision 2(a) of this subsection from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
 3. Parental rights at hearings.
 - a. A parent(s) involved in a hearing shall be given the right to:
 - (1) Have the child who is the subject of the hearing present; and
 - (2) Open the hearing to the public.
 - b. The record of the hearing and the findings of fact and decisions shall be provided at no cost to the parent(s), even though the applicable appeal period has expired.
- L. Responsibilities of the Virginia Department of Education. The Virginia Department of Education shall: (34 CFR 300.513(d), 34 CFR 300.509 and 34 CFR 300.511)

1. Maintain and monitor the due process hearing system and establish procedures for its operation;
2. Ensure that the local educational agency discharges its responsibilities in carrying out the requirements of state and federal statutes and regulations;
3. Develop and disseminate a model form to be used by the parent(s) to give notice in accordance with the contents of the notice listed in subdivision F 2 of this section;
4. Maintain and ensure that each local educational agency maintains a list of persons who serve as special education hearing officers. This list shall include a statement of the qualifications of each special education hearing officer;
5. Provide findings and decisions of all due process hearings to the state special education advisory committee and to the public after deleting any personally identifiable information;
6. Review and approve implementation plans filed by local educational agencies pursuant to hearing officer decisions in hearings that have been fully adjudicated; and
7. Ensure that noncompliance findings identified through due process or court action are corrected as soon as possible, but in no case later than one year from identification.

M. Responsibilities of the parent. In a due process hearing, the parent(s) shall: (34 CFR 300.512)

1. Decide whether the hearing will be open to the public;
2. Make timely and necessary responses to the special education hearing officer personally or through counsel or other authorized representatives;
3. Assist in clarifying the issues for the hearing and participate in the pre-hearing conference scheduled by the special education hearing officer;
4. Provide information to the special education hearing officer to assist in the special education hearing officer's administration of a fair and impartial hearing;
5. Provide documents and exhibits necessary for the hearing within required timelines; and
6. Comply with timelines, orders, and requests of the special education hearing officer.

N. Responsibilities of the local educational agency. The local educational agency shall: (34 CFR 300.504, 34 CFR 300.506, 34 CFR 300.507 and 34 CFR 300.511)

1. Maintain a list of the persons serving as special education hearing officers. This list shall include a statement of the qualifications of each special education hearing officer;
2. Upon request, provide the parent(s) a form for use to provide notice that they are requesting a due process hearing;
3. Provide the parent(s) a copy of their procedural safeguards upon receipt of the parent's(s)' first request for a due process hearing in a school year;
4. Inform the parent(s) at the time the request is made of the availability of mediation;
5. Inform the parent(s) of any free or low-cost legal and other relevant services if the parent(s) requests it, or anytime the parent(s) or the local educational agency initiates a hearing;
6. Assist the special education hearing officer, upon request, in securing the location, transcription, and recording equipment for the hearing;

7. Make timely and necessary responses to the special education hearing officer;
 8. Assist in clarifying the issues for the hearing and participate in the pre-hearing conference scheduled by the special education hearing officer;
 9. Upon request, provide information to the special education hearing officer to assist in the special education hearing officer's administration of a fair and impartial hearing;
 10. Provide documents and exhibits necessary for the hearing within required timelines;
 11. Comply with timelines, orders, and requests of the special education hearing officer;
 12. Maintain a file, which is a part of the child's scholastic record, containing communications, exhibits, decisions, and mediation communications, except as prohibited by laws or regulations;
 13. Forward all necessary communications to the Virginia Department of Education and parties as required;
 14. Notify the Virginia Department of Education when a special education hearing officer's decision has been appealed to court by either the parent(s) or the local educational agency;
 15. Forward the record of the due process proceeding to the appropriate court for any case that is appealed;
 16. Develop and submit to the Virginia Department of Education an implementation plan, with copy to the parent(s), within 45 calendar days of the hearing officer's decision in hearings that have been fully adjudicated.
 - a. If the decision is appealed or the school division is considering an appeal and the decision is not an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, then the decision and submission of implementation plan is held in abeyance pursuant to the appeal proceedings.
 - b. In cases where the decision is an agreement by the hearing officer with the parent(s) that a change in placement is appropriate, the hearing officer's decision must be implemented while the case is appealed and an implementation plan must be submitted by the local educational agency.
 - c. The implementation plan:
 - (1) Must be based upon the decision of the hearing officer;
 - (2) Shall include the revised IEP if the decision affects the child's educational program; and
 - (3) Shall contain the name and position of a case manager in the local educational agency charged with implementing the decision; and
 17. Provide the Virginia Department of Education, upon request, with information and documentation that noncompliance findings identified through due process or court action are corrected as soon as possible but in no case later than one year from issuance of the special education hearing officer's decision.
- O. Responsibilities of the special education hearing officer. The special education hearing officer shall: (34 CFR 300.511 through 34 CFR 300.513; and 34 CFR 300.532)

1. Within five business days of agreeing to serve as the special education hearing officer, secure a date, time, and location for the hearing that are convenient to both parties, and notify both parties to the hearing and the Virginia Department of Education, in writing, of the date, time, and location of the hearing.
2. Ascertain whether the parties will have attorneys or others assisting them at the hearing. The special education hearing officer shall send copies of correspondence to the parties or their attorneys.
3. Conduct a prehearing conference via a telephone conference call or in person unless the special education hearing officer deems such conference unnecessary. The prehearing conference may be used to clarify or narrow issues and determine the scope of the hearing. If a prehearing conference is not held, the special education hearing officer shall document in the written prehearing report to the Virginia Department of Education the reason for not holding the conference.
4. Upon request by one of the parties to schedule a prehearing conference, determine the scope of the conference and conduct the conference via telephone call or in person. If the special education hearing officer deems such conference unnecessary, the special education hearing officer shall document in writing to the parties, with copy to the Virginia Department of Education, the reason(s) for not holding the conference.
5. At the prehearing stage:
 - a. Discuss with the parties the possibility of pursuing mediation and review the options that may be available to settle the case;
 - b. Determine when an IDEA due process notice also indicates a Section 504 dispute, whether to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute; and
 - c. Document in writing to the parties, with copy to the Virginia Department of Education, prehearing determinations including a description of the right to appeal the case directly to either a state or federal court.
6. Monitor the mediation process, if the parties agree to mediate, to ensure that mediation is not used to deny or delay the right to a due process hearing, that parental rights are protected, and that the hearing is concluded within regulatory timelines.
7. Ascertain from the parent(s) whether the hearing will be open to the public.
8. Ensure that the parties have the right to a written or, at the option of the parent(s), an electronic verbatim record of the proceedings and that the record is forwarded to the local educational agency for the file after making a decision.
9. Receive a list of witnesses and documentary evidence for the hearing (including all evaluations and related recommendations that each party intends to use at the hearing) no later than five business days prior to the hearing.
10. Ensure that the local educational agency has appointed a surrogate parent in accordance with [8VAC20-81-220](#) when the parent(s) or guardian is not available or cannot be located.

11. Ensure that an atmosphere conducive to fairness is maintained at all times in the hearing.
12. Not require the parties or their representatives to submit briefs as a condition of rendering a decision. The special education hearing officer may permit parties to submit briefs, upon the parties' request.
13. Base findings of fact and decisions solely upon the preponderance of the evidence presented at the hearing and applicable state and federal law and regulations.
14. Report findings of fact and decisions in writing to the parties and their attorneys and the Virginia Department of Education. If the hearing is an expedited hearing, the special education hearing officer may issue an oral decision at the conclusion of the hearing, followed by a written decision within 10 school days of the hearing being held.
15. Include in the written findings:
 - a. Findings of fact relevant to the issues that are determinative of the case;
 - b. Legal principles upon which the decision is based, including references to controlling case law, statutes, and regulations;
 - c. An explanation of the basis for the decision for each issue that is determinative of the case; and
 - d. If the special education hearing officer made findings that required relief to be granted, then an explanation of the relief granted may be included in the decision.
16. Subject to the procedural determinations described in subdivision 17 of this subsection, the decision made by a special education hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
17. In matters alleging a procedural violation, a special education hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:
 - a. Impeded the child's right to a free appropriate public education;
 - b. Significantly impeded the parent's(s)' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
 - c. Caused a deprivation of educational benefits. Nothing in this subdivision shall be construed to preclude a special education hearing officer from ordering a local educational agency to comply with procedural requirements under 34 CFR 300.500 through 34 CFR 300.536.
18. Maintain a well-documented record and return the official record to the local educational agency upon conclusion of the case.
19. Determine in a hearing regarding a manifestation determination whether the local educational agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements in [8VAC20-81-160](#).

- P. Authority of the special education hearing officer. The special education hearing officer has the authority to: (§ [22.1-214](#) B of the Code of Virginia; 34 CFR 300.515, 34 CFR 300.512 and 34 CFR 300.532)
1. Exclude any documentary evidence that was not provided and any testimony of witnesses who were not identified at least five business days prior to the hearing;
 2. Bar any party from introducing evaluations or recommendations at the hearing that have not been disclosed to all other parties at least five business days prior to the hearing without the consent of the other party;
 3. Issue subpoenas requiring testimony or the productions of books, papers, and physical or other evidence:
 - a. The special education hearing officer shall rule on any party's motion to quash or modify a subpoena. The special education hearing officer shall issue the ruling in writing to all parties with copy to the Virginia Department of Education.
 - b. The special education hearing officer or a party may request an order of enforcement for a subpoena in the circuit court of the jurisdiction in which the hearing is to be held.
 - c. Any person so subpoenaed may petition the circuit court for a decision regarding the validity of such subpoena if the special education hearing officer does not quash or modify the subpoena after objection;
 4. Administer an oath to witnesses testifying at a hearing and require all witnesses to testify under oath or affirmation when testifying at a hearing;
 5. Stop hostile or irrelevant pursuits in questioning and require that the parties and their attorneys, advocates, or advisors comply with the special education hearing officer's rules and with relevant laws and regulations;
 6. Excuse witnesses after they testify to limit the number of witnesses present at the same time or sequester witnesses during the hearing;
 7. Refer the matter in dispute to a conference between the parties when informal resolution and discussion appear to be desirable and constructive. This action shall not be used to deprive the parties of their rights and shall be exercised only when the special education hearing officer determines that the best interests of the child will be served;
 8. Require an independent educational evaluation of the child. This evaluation shall be at public expense and shall be conducted in accordance with [8VAC20-81-170](#);
 9.
 - a. At the request of either party for a non-expedited hearing, grant specific extensions of time beyond the periods set out in this chapter, if in the best interest of the child. This action shall in no way be used to deprive the parties of their rights and shall be exercised only when the requesting party has provided sufficient information that the best interests of the child will be served by the grant of an extension. The special education hearing officer may grant such requests for cause, but not for personal attorney convenience. Changes in hearing dates or timeline extensions shall be noted in writing and sent to all parties and to the Virginia Department of Education.

- b. In instances where neither party requests an extension of time beyond the period set forth in this chapter, and mitigating circumstances warrant an extension, the special education hearing officer shall review the specific circumstances and obtain the approval of the Virginia Department of Education to the extension;
- 10. Take action to move the case to conclusion, including dismissing the pending proceeding if either party refuses to comply in good faith with the special education hearing officer's orders;
- 11. Set guidelines regarding media coverage if the hearing is open to the public;
- 12. Enter a disposition as to each determinative issue presented for decision and identify and determine the prevailing party on each issue that is decided; and
- 13. Hold an expedited hearing when a parent of a child with a disability disagrees with any decision regarding a change in placement for a child who violates a code of student conduct, or a manifestation determination, or a local educational agency believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.
 - a. The hearing shall occur within 20 school days of the date the due process notice is received. The special education hearing officer shall make a determination within 10 school days after the hearing.
 - b. Unless the parents and local educational agency agree in writing to waive the resolution meeting or agree to use the mediation process:
 - (1) A resolution meeting shall occur within seven days of receiving notice of the due process notice; and
 - (2) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process notice.
 - c. Once a determination is made, the special education hearing officer may:
 - (1) Return the child with a disability to the placement from which the child was removed if the special education hearing officer determines that the removal was a violation of special education disciplinary procedures or that the child's behavior was a manifestation of the child's disability; or
 - (2) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the special education hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Q. Timelines for non-expedited due process hearings. (34 CFR 300.510 and 34 CFR 300.515)

- 1. Resolution meeting.
 - a. Within 15 days of receiving notice of the parent's(s)' due process notice, and prior to the initiation of the due process hearing, the school division shall convene a meeting with the parent and the relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the due process notice that:

- (1) Includes a representative of the local educational agency who has decision making authority on behalf of the local educational agency; and
 - (2) May not include an attorney of the local educational agency unless the parent is accompanied by an attorney.
 - b. The purpose of the meeting is for the parent of the child to discuss the due process issues, and the facts that form the basis of the due process request, so that the local educational agency has the opportunity to resolve the dispute that is the basis for the due process request.
 - c. The meeting described in subdivisions 1 a and 1 b of this subsection need not be held if:
 - (1) The parent and the local educational agency agree in writing to waive the meeting; or
 - (2) The parent and the local educational agency agree to use the mediation process described in this chapter.
 - d. The parent and the local educational agency determine the relevant members of the IEP Team to attend the meeting.
 - e. The parties may enter into a confidentiality agreement as part of their resolution agreement. There is nothing in this chapter, however, that requires the participants in a resolution meeting to keep the discussion confidential or make a confidentiality agreement a condition of a parents' participation in the resolution meeting.
2. Resolution period.
- a. If the local educational agency has not resolved the due process issues to the satisfaction of the parent within 30 calendar days of the receipt of the due process notice, the due process hearing may occur.
 - b. Except as provided in subdivision 3 of this subsection, the timeline for issuing a final decision begins at the expiration of this 30-calendar-day period.
 - c. Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding subdivisions 2 a and 2 b of this subsection, the failure of the parent filing a due process notice to participate in the resolution meeting delays the timelines for the resolution process and the due process hearing until the meeting is held.
 - d. If the local educational agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented in accordance with the provision in [8VAC20-81-110 E 4](#)), the local educational agency may at the conclusion of the 30-calendar-day period, request that a special education hearing officer dismiss the parent's due process request.
 - e. If the local educational agency fails to hold the resolution meeting specified in subdivision 1(a) of this subsection within 15 calendar days of receiving notice of a parent's request for due process or fails to participate in the resolution meeting, the parent may seek the intervention of a special education hearing officer to begin the due process hearing timeline.

3. Adjustments to 30-calendar-day resolution period. The 45-calendar-day timeline for the due process starts the day after one of the following events:
 - a. Both parties agree in writing to waive the resolution meeting;
 - b. After either the mediation or resolution meeting starts but before the end of the 30-calendar-day period, the parties agree in writing that no agreement is possible; or
 - c. If both parties agree in writing to continue the mediation at the end of the 30-calendar-day resolution period, but later, the parent or local educational agency withdraws from the mediation process.
4. Written settlement agreement. If a resolution to the dispute is reached at the meeting described in subdivisions 1 a and 1 b of this subsection, the parties shall execute a legally binding agreement that is:
 - a. Signed by both the parent and a representative of the local educational agency who has the authority to bind the local educational agency; and
 - b. Enforceable in any Virginia court of competent jurisdiction or in a district court of the United States.
5. Agreement review period. If the parties execute an agreement pursuant to subdivision 4 of this subsection, a party may void the agreement within three business days of the agreement's execution.
6. The special education hearing officer shall ensure that, not later than 45 calendar days after the expiration of the 30-calendar-day period under subdivision 2 or the adjusted time periods described in subdivision 3 of this subsection:
 - a. A final decision is reached in the hearing; and
 - b. A copy of the decision is mailed to each of the parties.
7. The special education hearing officer shall document in writing, within five business days, changes in hearing dates or extensions and send documentation to all parties and the Virginia Department of Education.
8. Each hearing involving oral arguments shall be conducted at a time and place that is reasonably convenient to the parent(s) and child involved.
9. The local educational agency is not required to schedule a resolution session if the local educational agency requests the due process hearing. The 45-day timeline for the special education hearing officer to issue the decision after the local educational agency's request for a due process hearing is received by the parent(s) and the Virginia Department of Education. However, if the parties elect to use mediation, the 30-day resolution process is still applicable.

R. Timelines for expedited due process hearings. (34 CFR 300.532(c))

1. The expedited due process hearing shall occur within 20 school days of the date the due process request is received. The special education hearing officer shall make a determination within 10 school days after the hearing.

2. Unless the parents and local educational agency agree in writing to waive the resolution meeting or agree to use the mediation process described in [8VAC20-81-190](#):
 - a. A resolution meeting shall occur within seven days of receiving notice of the due process complaint.
 - b. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.
 - c. The resolution period is part of, and not separate from, the expedited due process hearing timeline.
3. Document in writing within five business days any changes in hearing dates and send documentation to all parties and the Virginia Department of Education.

S. Costs of due process hearing and attorneys' fees. (34 CFR 300.517)

1. The costs of an independent educational evaluation ordered by the special education hearing officer, special education hearing officer, court reporters, and transcripts are shared equally by the local educational agency and the Virginia Department of Education.
2. The local educational agency is responsible for its own attorneys' fees.
3. The parent(s) are responsible for their attorneys' fees. If the parent(s) is the prevailing party, the parent(s) has the right to petition either a state circuit court or a federal district court for an award of reasonable attorneys' fees as part of the costs.
4. A state circuit court or a federal district court may award reasonable attorneys' fees as part of the costs to the parent(s) of a child with a disability who is the prevailing party.
5. The court may award reasonable attorneys' fees only if the award is consistent with the limitations, exclusions, exceptions, and reductions in accordance with the Act and its implementing regulations and [8VAC20-81-310](#).

T. Right of appeal. (34 CFR 300.516; § [22.1-214](#) D of the Code of Virginia)

1. A decision by the special education hearing officer in any hearing, including an expedited hearing, is final and binding unless the decision is appealed by a party in a state circuit court within 180 days of the issuance of the decision, or in a federal district court within 90 days of the issuance of the decision. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy. The district courts of the United States have jurisdiction over actions brought under § 1415 of the Act without regard to the amount in controversy.
2. On appeal, the court receives the record of the administrative proceedings, hears additional evidence at the request of a party, bases its decision on a preponderance of evidence, and grants the relief that the court determines to be appropriate.
3. If the special education hearing officer's decision is appealed in court, implementation of the special education hearing officer's order is held in abeyance except in those cases where the special education hearing officer has agreed with the child's parent(s) that a change in placement is appropriate in accordance with subsection J of this section. In

those cases, the special education hearing officer's order shall be implemented while the case is being appealed.

4. If the special education hearing officer's decision is not implemented, a complaint may be filed with the Virginia Department of Education for an investigation through the provisions of 8VAC20-81-200.

- U. Nothing in this chapter prohibits or limits rights under other federal laws or regulations. (34 CFR 300.516)

Statutory Authority

§§ 22.1-16 and 22.1-214 of the Code of Virginia.

APPENDIX C

TELL YOUR STORY WORKSHEET

What's the point?

Who are the characters?

When did this happen?

Where did it happen?

What do your characters want?

Create a title for your story:

SAMPLE REQUEST FOR INITIAL EVALUATIONS LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Principal]
[Address]
[City, State Zip]

Dear Principal:

I am writing to formally refer my student for evaluations to determine whether my student, [Student's name], is eligible for special education services. I am requesting that my student be evaluated because my student is diagnosed with [medical diagnosis] and this disability is interfering with my student's ability to learn.

I understand that my request must be responded to within ten (10) business days and that I must be provided with a written notice of the school's decision.

Please schedule a meeting as soon as possible so we can work together to get the evaluation process started. I can be contacted at the address provided, or by telephone at [TELEPHONE NUMBER] or by email at [EMAIL ADDRESS].

Thank you for your immediate attention to this matter.

Sincerely,

SAMPLE NOTICE OF INTENT TO RECORD MEETINGS LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

This email/letter is to inform you that, pursuant to my rights as stated at 8VAC20-81-170(J)(1) quoted below, going forward, I will record every meeting held regarding my student's special education needs.

8VAC20-81-170(J)(1)

1. The local educational agency shall permit the use of audio recording devices at meetings convened to determine a child's eligibility under 8VAC20-81-80, to develop, review, or revise the child's IEP under 8VAC20-81-110 F; and to review discipline matters under 8VAC20-81-160 D. The parent(s) shall inform the local educational agency before the meeting in writing, unless the parents cannot write in English, that they will be audio recording the meeting. If the parent(s) does not inform the local educational agency, the parent(s) shall provide the local educational agency with a copy of the audio recording. The parent(s) shall provide their own audio equipment and materials for audio recording. If the local educational agency audio records meetings or receives a copy of an audio recording from the parent(s), the audio recording becomes a part of the child's educational record.

Please include this email/letter in my student's permanent educational record.

Sincerely,

SAMPLE REQUEST FOR IEE LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

I am the parent of [CHILD'S NAME], a student at [NAME OF SCHOOL]. I am writing to request an Independent Education Evaluation (IEE) for [CHILD'S NAME].

[CHILD'S NAME] had a [TYPE OF EVALUATION] evaluation conducted on [DATE OF EVALUATION]. I disagree with the findings of that evaluation. I am therefore request an independent [TYPE OF EVALUATION] evaluation at public expense, pursuant to my rights as outlined at 8 VAC 20-81-170 and 34 C.F.R. § 300.502.

I am requesting that this IEE to be conducted as soon as possible. Please provide me with a copy of the school's criteria/guidelines for an IEE. If you have any further questions, or need more information, I may be reached at the address provided, by telephone at [TELEPHONE NUMBER], or by email at [EMAIL ADDRESS].

Please place a copy of this request in my student's permanent educational record.

I look forward to your prompt response.

Sincerely,

SAMPLE REQUEST FOR IEP MEETING LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

I am writing to request an IEP meeting to review and revise my student, [Student's name], IEP. Specifically, I would like to discuss my student's failure to make progress towards the written annual IEP goals.

The Virginia regulations governing special education at 8VAC20-81-110(4) states that the school division is responsible for conducting meetings for this purpose. The Virginia regulations at 8VAC20-81-110(7) give me the right, as a parent, to request a meeting for the purpose of revising my child's IEP.

8VAC20-81-110(9) states that the school division AND the parent may choose to make changes without convening an IEP meeting. I insist on convening an IEP meeting to review and revise my son's IEP. Please provide me with potential dates that an IEP meeting can be scheduled to discuss my concerns. I can be contacted at the address provided, and by telephone at [TELEPHONE NUMBER] or by email at [EMAIL ADDRESS].

Please place a copy of this letter in my student's permanent educational record.

Sincerely,

SAMPLE REQUEST FOR MEDIATION LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

I am writing to formally request mediation. I am requesting mediation because the school members of the IEP team and I have been unable to resolve the following issues related to my student's special education needs:

- [List issue]
- [List issue]

The Virginia regulations governing special education indicate that parents and school divisions have:

the option of mediation to resolve disputes involving any matter arising under Part B of the [IDEA], including the identification, evaluation, or educational placement and services of the child, the provision of a free appropriate public education to the child, and matters arising prior to the filing of a state complaint or request for a due process hearing. Mediation is available to resolve these issues at any time a joint request is made to the Virginia Department of Education from a school representative and a parent. 8VAC20-81-190(A)

I am interested in continuing to work collaboratively with the school member of the team. I believe mediation is appropriate to help us resolve the previously listed issues. If the school team members are willing to participate in the mediation process, please inform me of the school team's decisions and begin the process of scheduling a mediation session.

I have attached a signed mediation request form as provided by the Virginia Department of Education. Please place a copy of this request in my student's permanent educational record.

Thank you for your time and attention to this matter.

Sincerely,

SAMPLE REQUEST FOR FBA LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

I am writing to formally request a functional behavioral assessment (FBA) for my student, *[Student's name]*, a student found eligible for special education services in *[name of School District]*. I am requesting a functional behavioral assessment because my student has behaviors which significantly impede *[his or her]* access to learning.

IDEA and the Virginia regulations governing special education indicate that a functional behavioral assessment should be done when a student's behavior impedes his learning or that of other students. My student's behavior significantly impedes *[his or her]* access to learning, therefore I am formally requesting that the school conduct a functional behavioral assessment so a behavior intervention plan can be developed and implemented to support my student's successful access to the education.

Please schedule an IEP meeting so the team can identify the behaviors which need to be addressed. I will also provide consent for *[name of School District]* to conduct an FBA from which a behavior intervention plan can be created.

I can be reached at the address provided, and by telephone at [TELEPHONE NUMBER} or email at [EMAIL ADDRESS].

Thank you for your time and attention to this matter.

Sincerely,

SAMPLE REQUEST FOR INTERNAL ADMINISTRATIVE REVIEW LETTER

[Your Name]
[Your address]
[City, State Zip]

[Date]

[Name of School District]
[Special Education Director]
[Address]
[City, State Zip]

Dear Special Education Director:

I am writing to formally request an internal administrative review of my student's manifestation determination review (MDR). I am requesting this internal administrative review because I disagree with the findings of my student's MDR. The Virginia regulations require that, when conducting an MDR, the IEP team review all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent(s). See 8VAC20-81-160(D)(3). I do not believe the team considered my student's:

- [List information which should have been considered]
- [List information which should have been considered]

I am also aware that the Virginia regulations provide me with the right to request an expedited due process hearing if I disagree with the findings of the MDR. See 8VAC20-160(E)(1). I am, however, interested in continuing to work collaboratively with the school division. I believe an internal administrative review is appropriate to help us resolve this issue. If the school team members are willing to participate in an internal administrative review, please inform me of the school team's decision and begin the process of scheduling an administrative review.

I can be reached at the address provided, and by telephone at [TELEPHONE NUMBER] or email at [EMAIL ADDRESS].

Please place a copy of this request in my student's permanent educational record.

Thank you for your time and attention to this matter.

Sincerely,

SPECIAL EDUCATION IN VIRGINIA: A GUIDEBOOK FOR PARENTS

This manual will help you...

...learn to advocate for your child using information from federal law, state law, and the Virginia Department of Education

...have statutory language at your fingertips, so you can speak to educators and attorneys in a language they understand

...understand what triggers Special Education law

...ensure that your child receives appropriate special education and related services

WHAT MANUAL USERS ARE SAYING...

"I wish that I had known this information earlier."—

Daphne E.

"A comprehensive tool for parents."—Cheryl W.

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