

GUIDANCE DOCUMENT

ON THE

IMPLEMENTATION OF THE

REGULATIONS GOVERNING SPECIAL EDUCATION

PROGRAMS FOR CHILDREN WITH DISABILITIES

IN VIRGINIA, 2009



Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services
August 2009

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INTRODUCTION

The reauthorization of the *Individuals with Disabilities Education Improvement Act* (“IDEA”), December 3, 2004, and its implementing federal regulations, October 13, 2006, prompted the need to revise Virginia’s special education regulations, *The Regulations Governing Special Education Programs for Children in Virginia* (“Virginia Regulations”). A copy of the Virginia Regulations has been distributed to the Virginia Department of Education’s (“VDOE”) major stakeholders. The document is available at VDOE’s web site at: <http://www.doe.virginia.gov/VDOE/duproc>

This guidance document presents a review of the key elements in the Virginia Regulations. It is not meant to cover all of the changes or substitute for one’s individual review of the requirements.

These Virginia Regulations represent the Board of Education’s approved 2008 document. Subsequent to this approval, the U.S. Department of Education issued additional federal regulations governing special education in December 2008. Further, Virginia’s 2009 General Assembly made two amendments to the *Code of Virginia* that impact children with disabilities. These additional federal and state provisions are referenced in this Guidance Document. In order to incorporate these provisions in the Virginia Regulations, VDOE will initiate an expedited regulatory process under Virginia’s Administrative Process Act, § 2.2-4006, to incorporate the IDEA federal regulations of December 2008 and the *Code of Virginia* amendments at § 22.1-213 and § 22.1-214. VDOE anticipates re-issuing the Virginia Regulations with these additional provisions inserted in early 2010.

Questions about the new Virginia Regulations should be directed to VDOE as follows:

- regulatory issues, including dispute resolution options and matters related to Annual Plans: Office of Dispute Resolution and Administrative Services, at 804-225-2013.
- special education instructional, staffing, or caseload issues: Office of Special Education Instructional Services at 804-225-2932.
- special education instructional issues specific to low incidence populations, including qualifications of interpreters for the deaf and hard-of-hearing students: Office of Instructional Support and Related Services at 804-786-8079.
- parent issues related to special education: Parent Ombudsman: 804-371-7420.
- financial and data issues: Office of Financial and Data Services at 804-225-2701.

Toll free voice: 800-422-2083

Toll free TDD: 800-422-1098

KEY TO ACRONYMS AND ABBREVIATIONS

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|-----------------------------|---|
| BIP | Behavioral Intervention Plan |
| FAPE | Free Appropriate Public Education |
| FBA | Functional Behavioral Assessment |
| IDEA | Individuals with Disabilities Education Improvement Act of 2004 |
| IEP | Individualized Education Program |
| LAC | Local Advisory Committee |
| LEA | Local Educational Agency (referencing local school divisions and State Operated Programs) |
| LRE | Least Restrictive Environment |
| MDR | Manifestation Determination Review |
| OSEP | Office of Special Education Programs, U.S. Department of Education |
| SEA | State Educational Agency (otherwise called Virginia Dept. of Education) |
| SOP | State Operated Program |
| SSEAC | State Special Education Advisory Committee |
| USDOE | United States Department of Education |
| VDOE | Virginia Department of Education |
| Virginia Regulations | The Regulations Governing Special Education Programs for Children in Virginia |

KEY CHANGES

- The Virginia Regulations incorporate the mandates of the IDEA 2004 and its implementing regulations of 2006. VDOE provided guidance relative to these mandates to special education administrators, parents, hearing officers, mediators, and other constituents through Guidance Documents in May 2005 and October 2006. These mandates will not be repeated in this document, except in individual instances to provide clarity. The Guidance Documents remain available at VDOE's web site: <http://www.doe.virginia.gov/VDOE/duproc>
- The terms "child", "children", and "student" are used interchangeably and refer to child/children/student with a disability.
- Appendix A of this document contains a list of technical assistance documents that staff in the Division of Special Education and Student Services have revised and/or are developing to provide further guidance on implementing these new requirements.

DEFINITIONS 8 VAC 20-81-10

Definitions were added or modified to comply with federal requirements or to provide clarity; e.g. core academic subjects, excess costs; highly qualified special education teacher; homeless children, National Instructional Materials Accessibility Standard (NIMAS); etc... Additionally:

"Age of eligibility" was revised to clarify the LEA's FAPE responsibility. The definition refers to children who turn 22 after September 30 remaining eligible for FAPE for the remainder of the school year.

"Change in placement" was revised to reflect current case law and OSEP's guidance.¹ It means any change in the educational setting for a child that does not replicate the elements of the educational program of the child's previous setting.

"Developmental Delay" means a disability affecting a child ages 2 by September 30 through 6 years of age. In the section of "Eligibility", additional provisions, complying with federal regulations, state that:

- A child in this age range cannot be limited to identification with DD if the student can be determined eligible under another disability.
- No school division is required to adopt and use DD as a disability category for any children within its jurisdiction.

¹ 71 Fed. Reg., 46588-46589, 2006; *Letter to Fisher*, OSEP 194; *Letter to Green*, OSEP 1995. *A.W. ex rel. v. Fairfax County Sch. Brd.*, 4th Circuit 2004.

No sub-sets of the age range are permissible.

“Education record” was expanded to parallel federal law.² Such record includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child’s educational program. This is also addressed in the Virginia Regulations to include matters related to IEP meetings, disciplinary actions, or service delivery. (8 VAC 20-81-170 – Procedural Safeguards). Note: please recall that not every e-mail or facsimile communication is necessarily an education record; it must contain personally identifiable information to be an “education record”.

“Emotional disturbance” was changed to “emotional disability”.

“Functional behavioral assessment” includes a review of existing data or new testing data or evaluation as determined by the IEP team.

“Interpreting services” was revised to include ‘cued speech/language transliteration services’ and to indicate that ‘interpreting services’ includes interpreting services for children who are deaf-blind. Language was added to the definition that clarifies that a child who is not deaf or hard of hearing, but who has expressive or receptive language needs may receive sign language services if directed by the child’s IEP.

“Mental retardation” was changed to “intellectual disability”.

“Parent” was expanded to include:

- a minor who is emancipated under § 16.1-333 of the *Code of Virginia*.
- a validly married minor who has not pursued emancipation may assert implied emancipation based on the minor’s marriage record, therefore, assuming the responsibility of “parent” for IDEA purposes.

For clarity, a provision was added that custodial stepparents have the right to access the child’s record; however, noncustodial stepparents do not have this right.

NOTE: The 2009 Virginia General Assembly amended the *Code of Virginia*, at § 22.1-213, which defines several terms related to special education. This amendment created a new § 22.1-213.1 with a definition of “parent”. The amendment tracks the language of the IDEA federal regulation, at § 300.30, and added a provision that requires school divisions to provide the biological or adoptive parents of a child in foster care with written notice informing the biological or adoptive parent that the school division will deal with, and rely upon the decisions of, the foster parent with regard to the child’s special education and related services, until the biological/adoptive parent attempts to act as the parent. See VDOE Guidance Document for Implementing New Special Education Requirements for the Definition of Parent, May 2009, available at: <http://www.doe.virginia.gov/VDOE/dueproc> As noted earlier, this provision will be included in the revision to these Virginia Regulations when VDOE initiates steps under Virginia’s Administrative Process Act, to incorporate the 2009 Code amendments.

² Family Education Rights and Privacy Act, 34 CFR § 99.3.

“Severe disability” was deleted.

“Social work services in schools” clarifies that a local school division, in its discretion, may expand the role of 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.

The following provides additional clarification relative to the changes in certain disability categories of: “severe disability”, “intellectual disability”, “emotional disability”, and “developmental delay”.

1. Are LEAs being required to immediately evaluate a child with severe disability and revise the child’s disability category?

An LEA may wait until the natural progression of the re-evaluation process to revise the category of a child with SD. If circumstances warrant in an individual case, based on the child’s educational needs, an LEA may certainly re-evaluate the child earlier than the triennial date in order to revise the disability category. For children who currently have the SD category, the child’s eligibility for special education and related services is not in question; only the disability category. Therefore, the child’s FAPE entitlement remains preserved by waiting until the triennial process to change the disability category.

2. Are LEAs required to immediately evaluate children with the prior categories of “mental retardation” and “emotional disturbance” in order to comport with the new terminology?

No, these changes in terminology are technical in nature. We recommend that LEAs notify the parents of these respective children that this technical change has been prompted by the change in these regulations. An IEP team is not required to make this technical change. In the alternative, the issue may be reviewed at the time of the child’s annual IEP review and the changes made then.

3. For children who are 7 or 8 years old with the disability category of developmental delay, are LEAs required to immediately re-evaluate these children?

DD is the only category that has an age limitation. The LEA is expected to follow the same process as currently required when the child ages out of the DD category. To that end, the LEA must complete the re-evaluation process within a reasonable time, not to exceed one year, for any child with DD who is older than the newly mandated age range.

**RESPONSIBILITY OF THE STATE DEPARTMENT OF EDUCATION
8 VAC 20-81-20**

Examples of VDOE’s responsibilities include such areas as:

- ensure children are included in all state-wide and division-wide assessments, including those students who are long-termed removed;
- ensure compliance with the requirements of the McKinney-Vento Act as it impacts the provision of special education and related services to children;
- ensure that a practical method is developed and implemented to determine if significant disproportionality based on race and ethnicity is occurring in LEAs, and if so, that VDOE takes the steps required by federal mandates to address the disproportionality.
- ensure a practical method is developed and implemented to examine data to determine if significant discrepancies occur in the rate of long-term suspensions and expulsions for children.
- monitor, enforce, and provide technical assistance regarding the IDEA 2004, in accordance with the federal special education regulations.
- revised the due date for the State Special Education Advisory Committee’s annual report to the Board of Education from July 1st of each year to October 1st.

**RESPONSIBILITY OF THE LOCAL SCHOOL DIVISIONS
AND STATE OPERATED PROGRAMS
8 VAC 20-81-30**

This entire section was restructured to address many residency issues that school divisions face when establishing responsibility for providing a free appropriate public education (“FAPE”) for children. Provisions were added in order to clarify existing areas of ambiguity, address emancipated minors, and refine the language regarding residency disputes between LEAs, or between a parent and the LEA. Examples of these provisions:

- Children are entitled to FAPE regardless of citizenship or immigration status.
- For children who are placed long-term in a State Operated Program for non-educational reasons, the child’s LEA of residence continues to be responsible for the provision of FAPE in the LRE. The state-operated program is required to notify the school division of the child’s admission, status, and meetings associated with the child receiving a free appropriate public education.

- A provision was added to address a non-educational option that is expanding in Virginia. If a child is placed for non-educational reasons in a sponsored residential home, licensed in accordance with 12 VAC 35-105-10 et seq., the child is a resident of the school division where the parent resides.
- If a child is living with the parent in the residence of the LEA, the LEA is FAPE-responsible even if the enrollment requirements for the child are not completed within a reasonable period of the parents' request to enroll the child. This provision was added on the advice of the Attorney General's Office based on the interpretation that completion of enrollment requirements may not present a barrier to a child's FAPE entitlement.

Note: This provision is distinguished from a later provision in the section on transfer students. That section contains a provision that mirrors the federal requirement that if the new LEA is unable to obtain the IEP from the previous LEA or the parent, the new LEA is not required to provide the student with special education and related services. Rather, the student may be placed in a general education setting, pending an evaluation, if an evaluation is necessary.

SPECIAL EDUCATION STAFFING REQUIREMENTS 8 VAC 20-81-40

- Provisions were added to require that special education teachers be "highly qualified", in accordance with the IDEA requirements.
- Previous provisions regarding alternative special education staffing plans were modified to indicate that an alternative staffing plan may only be approved if the LEA is seeking to implement an innovative program with which normal staffing requirements are inconsistent. For additional guidance on this subject, see VDOE's guidance document referenced in Appendix A.
- Revised the provision that special education teachers who are the teachers of record shall be highly qualified, by deleting the previous provision that these teachers are the teachers of record for instructing one or more federal core subjects to students with disabilities. U.S. DOE advised VDOE that special education teachers must be highly qualified regardless of whether or not the teacher is providing instruction in one or more of the federal core subjects.
- Revised the provisions related to educational interpreting services. For additional guidance on this subject, we recommend that you refer to VDOE's technical assistance document referenced in Appendix A.
- Added a provision to give IEP teams flexibility in providing services for a child who is not deaf or hard of hearing but needs sign language services. This provision permits the IEP team to determine that such a child needs sign language services to

address expressive or receptive language needs, and the provider shall meet the requirements determined appropriate by the school division.

CHILD FIND 8 VAC 20-81-50

- “Wards of the State” must now be included in each LEA’s child find program.
- Children must be screened for scoliosis.
- Replaced the requirements for screenings with a provision requiring school divisions to have screening procedures, which include timelines, to document that children are screened in accordance with the requirements of the *Code of Virginia* and other state regulations. For additional guidance on this subject, see VDOE’s guidance document on Local Screening Requirements referenced in Appendix A.
- Replaced the requirements for public awareness with one provision requiring each LEA to have procedures to document its public awareness campaign.
- Reference to Child Study Committee was deleted and a framework for a school-based structure for referrals was inserted, including timelines, required team members, and procedures for the referral process, as well as permitting LEAs the flexibility to use scientific, response to intervention methods with procedural protections for the child suspected of having a disability.
- Revised the provision requiring LEAs consulting with appropriate representatives of private school children, home-instructed or home-tutored children to also include representatives of parents of parentally-placed private school children, on how to implement the child find and evaluation activities.
- Revised the timeline for referrals to be forwarded to the special education administrator or designee within three (3) business days if the team determines that the child should be referred for an evaluation for special education and related services.
- Referrals may be in writing, oral or electronic.
- The school-based team must document their decisions in writing, including information upon which any decision was based, and provide parent(s) with prior written notice.

Remember:

- (1) VDOE prohibits State and LEA personnel from requiring parents of children to obtain a prescription for a controlled substance on behalf of their child as a condition of the

child attending school, or receiving an evaluation or special education and related services. However, LEA personnel may share classroom-based observations with the parents regarding a student's performance, or need to be evaluated.

- (2) The LEA is responsible for all child find activities for those parentally-placed private school students attending school within the LEA's jurisdiction.

REFERRAL FOR INITIAL EVALUATION 8 VAC 20-81-60

- A referral for an initial evaluation may be made by any source, the VDOE or any state agency.
- Provisions were added to clarify the initial evaluation requirements, identifying the information to be obtained and the comprehensive nature of the assessments.
- Exceptions to the 65 business day timeline for completion of the evaluation are noted; e.g., the parent repeatedly fails or refuses to produce the child for evaluation.
- The parent and eligibility group may agree in writing to extend the 65 day timeline to obtain additional data for any eligibility determination. This federal requirement pertains to children suspected of having a significant learning disability; however, the Virginia Regulations extends this provision to all disability categories.
- Virginia continues to maintain the 65-business day timeline for completion of the evaluation-eligibility process. The timeline is triggered from the point the special education administrator or designee receives the referral. This timeline also applies if the special education administrator or designee routes the referral to the school-based committee for review and action.

EVALUATION AND REEVALUATION 8 VAC 20-81-70

- A reevaluation must be completed at least every three years, unless the parent and the LEA agree that an evaluation is unnecessary.
- The team must determine what additional data is necessary to determine the child's educational needs, and present level of academic achievement and related developmental needs.
- Assessments and other evaluation materials used to assess a child must:
 - be 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;
- be used for the purposes for which the assessments or measures are valid and reliable; and
 - are administered by trained and knowledgeable personnel in accordance with the instructions provided by the producer of the assessments.
- Where appropriate, provisions that apply to both evaluations and reevaluations were consolidated.
 - Removed the provision that a triennial evaluation be initiated no less than 65 business days prior to the third anniversary of the last date of eligibility.

NOTE: If the reevaluation is for purposes other than triennial, the timeline of 65 business days applies, from the receipt of the referral by the special education administrator or designee.

- Added a provision that a LEA is not required to evaluate a child who graduates with a standard or advanced studies diploma, but the parent must receive prior written notice of the change in placement.
- A written copy of the evaluation report must be provided at no cost to the parent. The Virginia Regulations establish a timeline for this event: the report must be provided to the parent either 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.

Remember:

A LEA must not conduct a reevaluation more than once a year, unless the LEA and parent agree otherwise.

ELIGIBILITY³ **8 VAC 20-81-80**

- The Virginia Regulations apply the federal provisions relative to eligibility determinations for specific learning disabilities to all eligibility determinations; for example:

³ Technical assistance documents are being developed on eligibility and evaluations, including eligibility criteria. See Appendix A for further reference information.

- ✓ The eligibility group must include the parents and school personnel who are qualified to conduct, as appropriate:
 - individual assessments;
 - interpret assessment and intervention data and apply critical analysis to those data; and
 - develop appropriate educational and transition recommendations based on the assessments.
- ✓ The eligibility group's composition must now include a special education teacher and special education administrator/designee, even though they may be the same person). The group must also include both a regular education teacher and as noted above, someone qualified to conduct individual diagnostic examinations. Requiring these two roles for all eligibility meetings is new.
- In addition to determining whether or not a child is eligible for special education and related services, the eligibility group must determine the educational needs of the child.
- Parental consent must be obtained before personally identifiable information is released for children who are parentally-placed in a private school outside their LEA of residence.
- The eligibility section was restructured to include eligibility criteria for each eligibility category.
- If the eligibility group determines that there is not a change in eligibility and educational needs, the IEP team is not required to convene unless the parent requests it.
- The parent is entitled to a copy of the documentation of the eligibility determination at no cost.

Remember:

- For a student who was involved in RTI, the documentation of eligibility must include a statement of instructional strategies used and the student-centered data collected. Additionally, the information must include that the child's parents were notified about:
 - ✓ VDOE's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided.⁴

⁴ The underscored section was inadvertently omitted in these regulations. It is included in the federal language (34 CFR § 300.311(a)(6)). This will be included as a technical amendment in the revision to these regulations later this year.

- ✓ the strategies that were used to increase the child’s rate of learning; and
- ✓ the parent’s right to request an evaluation.
- LEAs must provide parents prior written notice if the eligibility group determines the child ineligible for special education and related services.

**TERMINATION OF SPECIAL EDUCATION AND RELATED SERVICES
8 VAC 20-81-90**

- Each LEA must complete a summary of academic achievement and functional performance when a student graduates with a standard or advanced studies diploma or reaches the age of 22.

For clarity, the Virginia Regulations include a provision for completing the summary in the following instances:

If a student leaves school before graduating with a standard or advanced studies diploma, prior to age 22, the LEA may complete a summary of academic achievement and functional performance then, rather than waiting until the child reaches the age of 22.

- For example, this may be triggered if the student graduates with a diploma other than a standard or advanced studies diploma, if the child receives a general educational development (“GED”) credential, or if the child drops-out.
- If the student returns to school after receiving the summary, but prior to age 22, the LEA must complete an updated summary of academic achievement or functional performance when one of the following occurs: the student leaves school, graduates with a standard or advanced studies diploma, or reaches the age of 22.
- All of the Virginia-specific parental consent provisions remain intact.

Remember:

LEAs must provide parents with prior written notice relative to any complete or partial termination of services.

**FREE APPROPRIATE PUBLIC EDUCATION
8 VAC 20-81-100**

- FAPE must be provided to children who need special education and related services, even if they have not failed or been retained in a course or grade, and even if they have received a GED.

- VDOE's goal of providing full educational opportunity to required children is by 2015. LEAs are not required to establish such a goal. This latter provision was removed from Virginia's Regulations in order to minimize the state regulations that exceed the federal requirements.
- LEAs are not obligated to provide FAPE to children who are eligible under IDEA Part B, but who choose to receive early intervention services under IDEA Part C.
- LEAs are responsible for ensuring that children are protected from disability harassment.
- FAPE must be provided to children who meet the age of eligibility requirements, and to children who reside within the school division but do not hold a valid U.S. citizenship or student visa.
- For preschool-aged children, the IEP team determines the length of the school day.
- FAPE does not apply to children who are covered under Part C services.

Remember:

- LEAs may not limit the provision of ESY services to only the summer.
- Commutes of students with disabilities must be comparable in length to those of students without disabilities unless the child's IEP team determines that something different is required.

INDIVIDUALIZED EDUCATION PROGRAM 8 VAC 20-81-110

- The LEA must obtain the consent of the parent or adult student to invite a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services.
- The LEA must, at the request of the parent, invite the Part C coordinator or other representative of the Part C system to attend the initial IEP meeting to assist with the smooth transition of services. The notice of this initial IEP meeting must inform the parent of this right.
- During the development, review, and revision of a child's IEP, the team must consider the academic, developmental, and functional needs of the child. A provision was deleted that required that the team also consider the results of the child's performance on any general state or division wide assessment program.

- The 30-day timeline which applies to the development of the IEP following the initial eligibility determination, also applies to the development of an IEP following a reevaluation and eligibility process, if the IEP team determines that changes are necessary.
- The LEA determines the school personnel to fill the roles of the required IEP team members.
- The LEA must provide the parent with a copy of the child's IEP at no cost to the parent at the IEP meeting, or within a reasonable period of time after the IEP meeting, not to exceed 10 calendar days.
- The IEP team must consider the child's need for benchmarks or short-term objectives, regardless of whether or not the child is participating in Virginia's Alternate Assessment Program. The team must consider whether the child requires benchmarks or short-term objectives in order to receive FAPE. The team's consideration must be documented.
- The IEP team must determine whether or not the child must take an alternate assessment instead of a particular state assessment of student achievement, and include a statement of:

New:

- ✓ 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

Continuing Requirement

- ✓ 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.
- Transition services must be initiated for a student prior to the student entering secondary school but not later than the first IEP to be in effect when the student turns 14. The IEP must include, if appropriate, a statement of interagency responsibilities or any needed linkages.
- Additional provisions clarify the difference regarding the LEA's responsibilities for providing transition services to a child at age 14 versus age 16.
 - ✓ 14: The IEP must include age-appropriate measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. The transition services must be based on the individual child's needs, taking into account the child's strengths, preferences, and interests.

- ✓ 16 (or younger if determined appropriate by the IEP team): In addition to the above referenced requirements for 14-year old students, the IEP must include:

New:

- A statement, if appropriate, of interagency responsibilities or any linkages.

Continuing Requirement

- For a student pursuing a modified standard diploma, the IEP team must consider the student's need for occupational readiness upon school completion, including consideration of courses to prepare the student as a career and technical education program completer.
- The Virginia Regulations currently contain a provision that beginning at least one year before a student reaches the age of majority, the student's IEP must include a statement that the student has been informed about the transfer of rights. This provision now also extends to the parent being informed about the transfer of rights.
- If the parent of a preschool child, age two through five (on or before September 30), elects for the child to receive services under Part B, an IEP must be developed and the IEP team must consider the content of the IFSP, which was developed under Part C.

CHILDREN WHO TRANSFER 8 VAC 20-81-120

- The new LEA must provide FAPE to the child in consultation with the parent, including services comparable to those described in the child's IEP from the previous LEA until the new LEA adopts and implements the child's current IEP with parental consent, or conducts an evaluation, if necessary, and develops and implements a new IEP with parental consent.
- If the new LEA is unable to obtain the IEP from the previous LEA or the parent, the new LEA is not required to provide the student with special education and related services. Rather, the student may be placed in a general education setting, pending an evaluation, if an evaluation is necessary.
- The LEA may develop and implement an interim IEP with parental consent while obtaining and reviewing the information needed to develop a new IEP.

If the LEA and parent are unable to agree on a new or interim IEP, the parent or the LEA may initiate the dispute resolution options of mediation or due process to resolve the dispute. During the resolution of the dispute, the LEA must provide FAPE to the child in consultation with the parent including services comparable to those described in the child's IEP from the previous LEA.

- If the LEA determines that an evaluation is necessary, the LEA must comply with the requirements for notice, to initiate and conduct an evaluation, determine eligibility and develop an IEP.
 - ✓ During the evaluation period, the LEA must provide services to the child in accordance with the existing IEP, excluding the sections of the IEP that are not in accordance with the Virginia Regulations.
 - ✓ The LEA must inform the parents of the sections of the existing IEP that are not in accordance with the Virginia Regulations.
- If a student is placed in a private residential school under the Comprehensive Services Act (“CSA”), a 30-day transition period is triggered during which time the former CSA team is responsible for funding services, and the new LEA must review and revise, if necessary, and implement a new IEP.

**LEAST RESTRICTIVE ENVIRONMENT AND PLACEMENTS
8 VAC 20-81-130**

Language was added to clarify that the provisions regarding LRE apply to preschool students; for example,

- “That to the maximum extent appropriate, children with disabilities, aged two to 21, inclusive, including those in public or private institutions or other care facilities are educated with children without disabilities...”.

**PLACEMENT OF CHILDREN AT THE VIRGINIA SCHOOL FOR THE DEAF
AND THE BLIND AT STAUNTON
8 VAC 20-81-140**

With the consolidation of the two schools, all references in this section of the Virginia Regulations relate only to the current Virginia School for the Deaf and the Blind at Staunton.

**PRIVATE SCHOOL PLACEMENT
8 VAC 20-81-150**

The changes made in the Virginia Regulations mirror the IDEA 2004 requirements. The primary provision is that a LEA is no longer responsible for those children who are residents of the LEA, and who are parentally-placed in private schools, located outside the LEA. In these instances, the LEA where the private school is located, is responsible for completing child find and for providing equitable services, as appropriate.

The VDOE technical assistance documents that remain in effect to guide school divisions in this regard are:

- Supts. Memo, No. 1, Interpretive, February 9, 2007, regarding parentally placed provisions specific to “for-profit” and “nonprofit” private schools.
- Informational Report from H. Douglas Cox to Special Education Administrators, November 15, 2007, providing a copy of U.S. Department of Education’s Office of Special Education Programs (OSEP) letter on private schools that are non-profit, *Letter to Chapman*, 49 IDELR 163, August 22, 2007.
- Informational Memo (electronic) from H. Douglas Cox to Special Education Administrators, December 14, 2007, regarding LEA of the location of the private school is responsible for ensuring child find activities for those students in “for profit” schools.
- “Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools”, U.S. Department of Education’s Office of Special Education and Rehabilitative Services, March 2006; <http://idea.ed.gov>

Additional provisions to comply with federal requirements:

- LEAs must include representatives of parents of parentally-placed private school children with disabilities in consulting on how to carry out the child find activities.
- The former regulation requiring the “Child Count” be conducted by December 1 of each year has been revised to say: “...ensure that the count is conducted on a date between October 1 and December 1 of each year, as determined by the Superintendent of Public Instruction or designee...”.
- Under the LEA’s responsibilities to consult with private school representatives and representatives of parents of parentally placed private school children, the LEA must advise the private representatives on how and when the decisions will be made regarding the apportioned funds. This provision includes now advising the private representatives of how parents, teachers, and private school officials will be informed of the process.

DISCIPLINE PROCEDURES

8 VAC 20-81-160

The changes made in this section mirror the federal requirements, including:

- ✓ the standard for making the manifestation determination review decision, and
- ✓ the change when a functional behavioral assessment (“FBA”) is required. The mandate for initiating the FBA is: (1) when the IEP team determines that there is

a manifestation and the student does not have a behavioral intervention plan (“BIP”), or (2) sooner if the student’s behavior interferes with the student’s learning or that of others.

- The first provision in this section mirrors the federal requirement that 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. Additional language was inserted to reinforce the requirement that in the event that the child’s behavior impedes the child’s learning or that of others, the IEP team must consider the use of positive behavioral interventions, strategies, and supports to address the behavior. The IEP team must consider either:
 - ✓ developing goals and services specific to the child’s behavioral needs, or
 - ✓ conducting a FBA and determining the need for a BIP to address the child’s behavioral needs.

Additional language was inserted to reinforce the understanding that in considering the unique circumstances on a case-by-case basis, school personnel may:

- ✓ review the child’s IEP and any BIP, and/or consult with the child’s teacher(s) to provide further guidance in considering any unique circumstances related to the incident.
 - ✓ convene an IEP team for this purpose.
- To assist school administrators and parents in understanding procedural protections for parents who disagree with an evaluation obtained by the LEA as part of the FBA process, language was added to clarify that:
 - ✓ The FBA may include a review of existing data or new testing data or evaluation as determined by the IEP team.
 - ✓ If the IEP team determines that the FBA will include obtaining new testing data or evaluation, then the parent is entitled to an independent educational evaluation (IEE) if the parent disagrees with the evaluation or a component of the evaluation obtained by the LEA.

PROCEDURAL SAFEGUARDS 8 VAC 20-81-170

The section regarding parental consent has been reorganized to clarify when parental consent is required and the LEA’s obligations when consent is withheld or refused. Additional key provisions include:

- A parent is entitled to one IEE at public expense each time the LEA conducts an evaluation component with which the parent disagrees.
- Consent is not required prior to providing FAPE to children who transfer to LEAs in Virginia. Recall that the LEA must provide FAPE to the child in consultation with the parent, including services comparable to those described in the child’s IEP from the previous LEA until the new LEA adopts and implements the child’s current IEP with parental consent, or conducts an evaluation, if necessary, and develops and implements a new IEP with parental consent.
- If a LEA makes the option available, parents of a child may elect to receive Prior Written Notice, the Procedural Safeguards Document, and notice of a request for due process by electronic mail.
- If an electronic document contains an electronic signature, the electronic signature has the legal effect and enforceability of an original signature. Definition of electronic signature is included in the Virginia Regulations.
- The LEA’s posting its Procedural Safeguards Document (“PSD”) on its website does not satisfy the requirement to provide the PSD to the parent as required in the regulations.
- The LEA must ensure that electronic communications via e-mails 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.
- Audio recordings are permissible for meetings for IEPs, eligibility, and manifestation determinations.

Revocation of Consent: U.S. DOE issued federal regulations further implementing IDEA 2004, in part, specific to parental revocation of consent. VDOE issued a guidance document, December 2008, on these new requirements. Additionally, VDOE issued a model written prior notice form for LEAs to use when parents revoke consent. Both documents are available on VDOE’s Web site at: <http://www.doe.virginia.gov/VDOE/duproc>. As noted earlier, this provision will be included in the revision to these Virginia Regulations when VDOE initiates steps under Virginia’s Administrative Process Act, to incorporate these requirements.

Remember:

- A child’s placement in an Interim Alternative Education Setting (IAES) is an exception to the requirement that IEP teams determine a child’s placement.⁵

TRANSFER OF RIGHTS

⁵ IAES is triggered by disciplinary incidents related to drugs, weapons, and/or serious bodily injury.

TO STUDENTS WHO REACH THE AGE OF MAJORITY
8 VAC 20-81-180

To comply with the modifications to the *Code of Virginia*, § 37.2-806, the Virginia Regulations were revised to indicate that an adult student is not considered competent if admitted to a facility for the training, treatment, and habilitation of persons with mental retardation. Additionally, a previous provision was deleted that said that an adult student will not be considered competent if in a coma and eligible for admission to a state hospital.

MEDIATION
8 VAC 20-81-190

No major changes. The federal provisions permitted SEAs to process complaints regarding the enforceability of mediation agreements. VDOE determined not to adopt this option. Such challenges are to be done in state courts or federal district courts, and not by hearing officers in due process hearings, or complaints specialists through VDOE's complaint resolution procedures.

Remember:

Parents and school divisions may request mediation at any time there is a dispute related to issues under the IDEA, including the identification, evaluation, educational placement, or services of the child, the provision of a free appropriate public education to the child, prior to filing a state complaint or requesting a due process hearing. In other words, the parties do not have to wait for a request for a due process hearing or the parent filing a complaint before requesting mediation.

COMPLAINT RESOLUTION PROCEDURES
8 VAC 20-81-200

The Virginia Regulations apply the federal provisions to the complaint resolution system that were delineated in VDOE's October 2006 Guidance Document on the revisions occasioned by the federal regulations. These include such provisions as:

- A complaint must be filed within one year from the date the alleged violation occurred and the date the complaint is received.
- The 60-day timeline for the SEA to issue findings in a complaint may be extended if the complainant and the LEA agree to mediate or use other alternative means of dispute resolution.
- The complainant must forward a copy of the complaint to the LEA serving the child at the same time the complainant files the complaint with the SEA.

NOTE: VDOE has revised its Complaints Resolution Procedures. These procedures are available at the following web site: <http://www.doe.virginia.gov/VDOE/dueproc>

DUE PROCESS HEARING 8 VAC 20-81-210

- Based on advice from the Office of the Attorney General, language regarding VDOE’s certification process for special education hearing officers was added to the Virginia Regulations.
 - ✓ In accordance with the Virginia Supreme Court’s “Rules of Administration”, VDOE provides the Office of the Executive Secretary, Supreme Court of Virginia, annually the names of those special education hearing officers who are recertified to serve in this capacity.
 - ✓ Provisions are included for the continued eligibility and disqualification requirements of special education hearing officers under VDOE’s authority to evaluate each hearing officer and assess the hearing officer’s continued eligibility annually.
 - ✓ Effective July 7, 2009, individuals on the special education hearing officers list are subject to VDOE’s review of recertification based on past and current performance.
- The hearing officer has the authority to permit either party to raise issues at the hearing that were not raised in the due process notice. In application this means that:

The party that requests the due process hearing does not have an absolute right to raise additional issues during the hearing that were not part of the request for the hearing. The party requesting the hearing may raise additional issues at hearing only if the other party agrees, except as follows.

If the other party will not agree to the additional issues being heard, the party requesting the hearing must initiate another request for a due process hearing to be heard separately on the additional issues.

In the event that the party requesting the hearing requests the hearing officer to include additional issues *in response to* facts, issues or arguments raised by the other party, then the hearing officer has the discretionary authority to permit the additional issues to be raised at the hearing, even if the other party does not agree.

- The record of the hearing and the findings of fact and decisions must be provided at no cost to the parents, even though the applicable appeal period has expired.

- An Implementation Plan is now only required for fully adjudicated decisions, and not for decisions of the hearing officer involving the dismissal of a case or the withdrawal of the due process request.
- The hearing officer has the authority to determine when an IDEA due process notice also indicates a Section 504 dispute whether or not to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute.
[Please note that the hearing officer decides this matter even if one or both parties disagrees.]
- The timeline for submission of documents in an expedited hearing is revised from 2 business days to 5 business days.
- The hearing officer’s authority over a due process proceeding ends with the issuance of the hearing officer’s decision, or if the Supreme Court of Virginia revokes such authority by removing or disqualifying the special education hearing officer.

NOTE: The Virginia Regulations incorporate the federal requirement that the party filing the request for due process must forward a copy of the request to VDOE. OSEP has left it to each SEA to determine if the mandated 45-day timeline does not start until both the LEA and SEA have the due process hearing request.⁶ VDOE has adopted this position.

NOTE regarding 8 VAC 20-81-210 T.1. The 2009 Virginia General Assembly amended the *Code of Virginia*, at § 22.1-214 D, to mandate that any party aggrieved by the due process decision may “within 180 days of such findings and decision” appeal to the circuit court for the jurisdiction in which the school division is located. The federal statute of limitations of 90 days to appeal in a federal district court remains in effect. As noted earlier, this provision will be included in the revision to these Virginia Regulations when VDOE initiates steps under Virginia’s Administrative Process Act, to incorporate the 2009 Code amendments.

SURROGATE PARENT PROCEDURES

8 VAC 20-81-220

- The LEA must appoint a surrogate parent for a child who is a ward of the state, or who is an unaccompanied homeless youth if a parent cannot be identified, or if, after reasonable efforts, the parent cannot be located.
- A surrogate parent must be appointed within 30 calendar days of a determination that a surrogate is necessary.

⁶ “Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities”, revised June 2009, Question C-1.

- A temporary surrogate, who is a staff member of an emergency shelter, transition shelter, independent living program, or street outreach program, may be appointed to an unaccompanied homeless youth, even though the surrogate is employed by an agency involved in the education or care of the child, if the surrogate otherwise meets the qualifications to be a surrogate parent.
- The Virginia Regulations no longer require that a surrogate parent reside in the same general geographic area as the child.
- Surrogate parents are no longer required to complete a LEA approved training session prior to representing the child, or to attend annual training thereafter; however, they must have knowledge and skills to ensure adequate representation of the child.

**LOCAL EDUCATIONAL AGENCY ADMINISTRATION AND GOVERNANCE
8 VAC 20-81-230**

Local Advisory Committees (“LAC”)

- The majority of the committee must be parents of children with disabilities or individuals with disabilities.
- The LAC must include one teacher. Additional LEA personnel may serve but only as consultants to the committee.

Annual Plan

- LEAs are no longer required to submit copies of their policies and procedures, or the revisions of those policies and procedures to VDOE for approval. However, the school division’s local policies and procedures must be approved by their school board and reviewed by their LAC.
- LEAs are no longer required to develop and implement a comprehensive system of personnel development.

Transition Planning

The LEA must participate in transition planning conferences when notified by the designated local Part C early intervention agency: not less than 90 days and not more than nine months before the child is eligible for preschool services.

Additional

Incorporated the federal requirements that VDOE outlined in previous guidance documents relative to: Early Intervening Services; NIMAS; Migratory Children.

**ELIGIBILITY FOR FUNDING
8 VAC 20-81-240**

No major changes.

**STATE FUNDS FOR LOCAL SCHOOL DIVISIONS
8 VAC 20-81-250**

- To comply with the *Code of Virginia*, § 22.1-101.1 B and C, provisions were expanded to outline VDOE’s obligation to reimburse LEAs for the education of children who are not residents, but who are in the LEA as a result of a placement in foster care, a group home, or an orphanage or children’s home.
- Provisions regarding reimbursing school divisions for children with disabilities placed in regional special educational programs were revised to provide greater flexibility.

**FEDERAL FUNDS
8 VAC 20-81-260**

- Provisions were added relative to Early Intervening Services including the LEA’s relationship to a determination by VDOE that significant disproportionality based on race and ethnicity is occurring within the LEA in the identification of children with disabilities. Note: These provisions apply to local school divisions, not state-operated programs.
- Incorporated federal requirements that VDOE outlined in previous guidance documents relative to: excess costs and maintenance of effort.
- Part B funds may be used to supplement, but not supplant state and local expenditures for special education and related services. (Language, which previously permitted the awarding of “sliver grants”, was deleted).

**FUNDS TO ASSIST WITH THE EDUCATION OF CHILDREN WITH
DISABILITIES RESIDING IN STATE OPERATED PROGRAMS
8 VAC 20-81-270**

- A provision in 8 VAC 20-81-250 E requires that VDOE provide state funds to local school divisions to reimburse the instructional costs spent serving children with disabilities in local and regional jails. A parallel provision was also inserted in this section of the Virginia Regulations. However, since jails are not state-operated programs, to ensure clarity, 8 VAC 20-81-270 I will be deleted when VDOE initiates steps under Virginia’s Administrative Process Act this year, to incorporate the 2009 *Code of Virginia* amendments.

FUNDING, WITHHOLDING, AND RECOVERY OF FUNDS
8 VAC 20-81-280

- If a LEA is notified in writing by VDOE of a decision to withhold funds, the LEA must provide public notice to its jurisdiction regarding the pendency of the action.
- Language was added to clarify that the withdrawal of state and federal funds for special education may occur if a LEA fails to comply with applicable laws and regulations, but only following reasonable notice, and an opportunity for a hearing by the Board of Education.
- To comply with the *Code of Virginia*, § 22.1-214 E, a provision now outlines that if the LEA fails to comply with the regulations established by the Virginia Board of Education, the Board may withhold the LEA's state and federal funds for the education of children with disabilities, and use those funds to ensure the provision of special education and related services to such children.

APPEAL OF ADMINISTRATIVE DECISION REGARDING FUNDING
8 VAC 20-81-290

- A LEA must appeal within 20 days of a decision made during an administrative hearing for VDOE to withhold its funding.

USE OF PUBLIC AND PRIVATE INSURANCE
8 VAC 20-81-300

- As with private insurance, if a LEA seeks to access a child's public benefits or insurance to provide the child with services required for FAPE, the LEA must obtain informed parental consent each time that access to the child's public benefits or insurance is sought. Additionally, the LEA must provide the parent with notice containing specific elements, including the parent's right to refuse to allow access and that such refusal does not relieve the LEA of its responsibility to provide FAPE to the child at no cost.

ATTORNEYS' FEES
8 VAC 20-81-310

- Outlines who is the "prevailing party" eligible for the court awarding attorneys' fees relative to due process hearings; for example, if the prevailing party is the parent of a child with a disability, the LEA, or VDOE.
- Attorneys' fees may not be awarded relative to a resolution session.

ADDITIONAL RESPONSIBILITIES OF STATE BOARDS, AGENCIES, AND INSTITUTIONS FOR EDUCATION AND TRAINING OF CHILDREN WITH DISABILITIES IN RESIDENCE OR CUSTODY
8 VAC 20-81-320

- Personnel must be appropriately and adequately prepared and trained, including related services providers and paraprofessionals. This provision cross-references to the responsibilities of VDOE to establish and maintain qualifications to ensure that personnel providing special education and related services are adequately prepared and trained, including that these personnel have the content knowledge and skills to serve children with disabilities (8 VAC 20-81-20, 19(e)). See also 8 VAC 20-81-40 on special education staffing requirements.

COMPLIANCE WITH § 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED
8 VAC 20-81-330

- For clarity, a provision was added indicating that if the LEA uses the due process procedures as provided in federal and state special education regulations to resolve § 504 complaints, the LEA is responsible for 100% of the reimbursement costs.
- A provision was also added to clarify that VDOE trains the special education hearing officers on the requirements of § 504.

SPECIAL EDUCATION CASELOAD STAFFING REQUIREMENTS
8 VAC 20-81-340

This section contains charts detailing the staffing requirements.

- Clarified in one provision that there are no caseload standards for Level II children with Speech or Language Impairment.

APPENDIX A

VDOE's Division of Special Education and Student Services has revised or developed or is in the process of revising or developing the following technical assistance documents on matters related to implementing the Virginia Regulations. These documents are or will be posted to VDOE's web site at:

<http://www.doe.virginia.gov/VDOE/SESS>

- Revised VDOE's Model Procedural Safeguards Document
- Model Policies and Procedures Document for LEAs and SOPs
- Guidance Document for Local Screening Requirements in Virginia's Public Schools
- Revised VDOE Complaint Resolution Procedures
- Educational Interpreter Qualifications in Virginia Public Schools, Frequently Asked Questions
- Technical Assistance Document on Matters Related to Residency and FAPE Responsibilities for Virginia's Public Schools
- Revised Complaint Appeal Procedures
- Revised Technical Assistance Document on Discipline Requirements
- Revised Alternative Staffing Plan Procedures
- Technical Assistance Document on Eligibility-Evaluations, including eligibility criteria, sample eligibility forms
- Guidance Document on Speech-Language Requirements
- Technical Assistance Document on School-based Teams
- Revised VDOE Model IEP Form, Standards-based IEP form, Secondary Transition IEP form
- Guidance Document on Autism
- Guidance Document on Brain Injury and the Schools – TBI Guidelines
- Fact Sheets for Parents:

- ✓ Change in category name from MR to ID; Emotional Disturbance to Emotional Disability
- ✓ Phasing out of the SD category
- ✓ Explanation for the age change to the DD category