

**REGULATIONS GOVERNING  
SPECIAL EDUCATION  
PROGRAMS FOR CHILDREN  
WITH DISABILITIES  
IN VIRGINIA**

EFFECTIVE JANUARY 25, 2010

## FOREWORD

The reauthorization of the Individuals with Disabilities Education Improvement Act, December 3, 2004, (IDEA '04) and its implementing federal regulations, October 13, 2006, prompted the need to revise Virginia's special education regulations. Input was received from a Stakeholders Group that included school personnel, parents, consumers, professionals, and members of the State Special Education Advisory Committee. The Virginia Department of Education adhered to the requirements of Virginia's Administrative Process Act in the development and review of these regulations.

The Virginia Department of Education also relied on the federal regulations, at 34 CFR § 300.199 (a) and (b) for additional guidance in the formulation of these regulations. Under this federal mandate, each state shall:

- 1) Ensure that any State rules, regulations, and policies relating to the IDEA '04 conform to the requirements of the federal statute and regulations;
- 2) Identify in writing to local educational agencies located in the State and the Secretary of Education any such rule, regulation, or policy as a State-imposed requirement that is not required by the federal statute and regulations; and
- 3) Minimize the number of rules, regulations, and policies to which the local educational agencies and schools located in the State are subject under the federal statute and regulations.

This federal regulation also requires that State rules, regulations, and policies under the IDEA '04 shall support and facilitate local educational agency and school-level system improvement designed to enable children with disabilities to meet the challenging State student achievement standards.

The regulations were adopted by the Board of Education on May 28, 2009 and became effective on July 7, 2009. The regulations include reference to the federal regulations, state statute, or state regulations that serve as the source of the requirements.

The Department of Education staff members are grateful to those persons who provided comment.

Copies of these regulations, including Braille copies, audio tapes, and large print versions are available at no cost from the Virginia Department of Education. Please forward your request to the Virginia Department of Education, P. O. Box 2120, Richmond, Virginia 23218-2120, or by calling 1-800-292-3820. Copies of these regulations are also available on the Virginia Department of Education's Web site at: [www.doe.virginia.gov/VDOE/dueproc](http://www.doe.virginia.gov/VDOE/dueproc)

## PREAMBLE

The Virginia Constitution delineates the General Assembly's responsibility for education: "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth ..." (Article VIII, section 1). The *Code of Virginia* delineates the Commonwealth's responsibility for education of children with disabilities, as follows:

"The Board of Education shall prepare and supervise the implementation by each school division of a program of special education designed to educate and train children with disabilities ..." (§ 22.1-214);

" 'Children with disabilities' means those persons who are aged two to twenty-one, inclusive ... are disabled as defined by the Board of Education, and ... need special education" (§ 22.1-213);

"Each state board, state agency and state institution having children in residence or in custody shall have responsibility for providing for the education and training to such children which is at least comparable to that which would be provided to such children in the public school system" (§ 22.1-7); and

"Each school division shall provide free and appropriate education, including special education, for the children with disabilities residing within its jurisdiction in accordance with the regulations of the Board of Education" (§ 22.1-215).

These regulations set forth the requirements of the Board of Education regarding the provision of special education and related services to children with disabilities in the Commonwealth, reflecting both state and federal requirements. The regulations are applicable to all local school divisions, state-operated programs, the Virginia School for the Deaf and the Blind at Staunton, and private schools in the Commonwealth that provide special education and related services to children with disabilities.

In addition to these requirements, the following statutes and regulations are applicable to children with disabilities: all regulations promulgated by the Board of Education, provisions of the *Code of Virginia* (COV), the requirements of section 504 of the Rehabilitation Act of 1973 (as amended), the Americans with Disabilities Act, the Education Department General Administrative Rules (for federal grant requirements), the Virginians with Disabilities Act, and the No Child Left Behind Act of 2001.

These requirements are based on the fundamental notion that special education and related services are to be designed to meet the unique educational needs of children with disabilities, provide educational opportunity in the general curriculum to the extent possible in accordance with each child's individualized education program, and prepare children with disabilities for opportunities in post-secondary education, employment, and independent living.

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## Part I Definitions

### **8VAC20-81-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

**"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 divisionwide assessment to the extent that the school division has one, for measuring student performance against alternate achievement standards for students 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 students 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 a 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, 18VAC30-20; 34 CFR 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 (lip-reading), 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 day"** 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 8VAC20-81-150 B 4 a (2)). (34 CFR 300.11)

**"Calendar days"** means consecutive days, inclusive of Saturdays and 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. (34 CFR 300.11)

**"Career and technical education"** means organized educational activities that offer a sequence of courses that: (20 USC § 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 requirements 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 the local educational agency recognizes this category as a disability in accordance with 8VAC20-81-80 M.3. If it is 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 a local educational agency 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.
  - a. 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.).
  - b. If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the local educational agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

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 and the local educational agency 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. The local educational agency and parent(s) should document their agreement.

**"Controlled substance"** means a drug or other substance identified under schedules I, II, or 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 (8VAC20-22))

**"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 the 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 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;
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 educational 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 a local educational agency. 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. Each local educational agency 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 educational 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 a local educational agency 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, arts, 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 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. (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, 8VAC20-131-180)

**"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 § 11434a) 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 the 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 the local educational agency 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 8VAC20-81-110 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 a local educational agency, 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 8VAC20-81-40 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 22VAC20-30; 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 their 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 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 preparing to enroll in an elementary school 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's 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 the 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 8VAC20-81-30 H means those hospital placements that 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. The 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 educational 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 such 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 the local educational agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the local educational agency 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 (18VAC85-80-10 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 and § 22.1-213.1 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, even if the biological or adoptive parent's rights have not been terminated, but subject to subdivision 8 of this subsection;
  - 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 biological 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;
  - e. If no party qualified under subdivisions 1.a. through 1.d. of this subsection can be identified, or those parties are unwilling to act as parent, a surrogate parent who has been appointed in accordance with requirements detailed under 8VAC20-81-220; 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 1 a through 1 e 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 a parent, shall be presumed to be the parent for purposes of this section unless the biological or adoptive

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

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.

8. The local educational agency shall provide written notice to the biological or adoptive parents at their last known address that a foster parent is acting as the parent under this section, and the local educational agency is entitled to rely upon the actions of the foster parent under this section until such time that the biological or adoptive parent attempts to act as the parent.

**"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, 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, 18VAC112-20; 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 a local school division or a Comprehensive Services Act team in accordance with 8VAC20-81-150. (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 the local educational agency 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 the 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 the local educational agency 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 8VAC20-81-150. (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, 8VAC20-22-660; 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.

A local educational agency, in its discretion, may expand the role of a 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 to do mathematical calculations, including conditions such 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 the local educational agency 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 needs, 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))

**Part II**  
**Responsibilities of the State Department of Education**

***8VAC20-81-20. Functions of the Virginia Department of Education.***

The Virginia Department of Education (state educational agency) shall perform the following functions:

1. Ensure that all children with disabilities, aged two to 21, inclusive, residing in Virginia have a right to a free appropriate public education, including, but not limited to, children with disabilities who: (34 CFR 300.2 and 34 CFR 300.101)
  - a. Are migrant;
  - b. Are homeless;
  - c. Have been suspended or expelled from school, in accordance with this chapter;
  - d. Are incarcerated in a state, regional, or local adult or juvenile correctional facility, with the exception of those provisions identified in 8VAC20-81-110 I;
  - e. Are receiving special education and related services, even though they have not failed or been retained in a course or grade, and are advancing from grade to grade;
  - f. Are in state-operated programs; or
  - g. Are in public charter schools in accordance with the Code of Virginia.
2. Except as provided in 8VAC20-81-170 E 4 b (3), ensure that each local school division develops an IEP for each child with a disability served by that local school division and that an IEP is developed for each child with a disability placed in a private school by a local school division or Comprehensive Services Act team. (34 CFR 300.112 and 34 CFR 300.300(b)(4)(ii))
3. Review and submit to the Virginia Board of Education for approval a plan for the provision of special education and related services from each local educational agency responsible for providing educational services to children with disabilities. (§ 22.1-215 of the Code of Virginia; 34 CFR 300.200)
4. Ensure that each local educational agency includes all children with disabilities in all general Virginia Department of Education and divisionwide assessment programs, including assessments described in § 1111 of ESEA, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act at § 1412. (20 USC § 1412(a)(16)(A))
5. Ensure that each local educational agency takes steps for its children with disabilities to have available to them the variety of educational programs and services available to nondisabled children in the areas served by the local educational agency, including art, music, industrial arts, consumer and homemaking education, and career and technical education. (34 CFR 300.110)
6. Ensure that each educational program for children with disabilities administered within Virginia: (34 CFR 300.149(a))
  - a. Is under the general supervision of the persons responsible for educational programs for children with disabilities in Virginia; and
  - b. Meets the educational standards of the Virginia Department of Education.

In carrying out these requirements with respect to homeless children, the requirements of Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act (42 USC § 11431 et seq.) are met.

7. Prior to the adoption of any policies and procedures to comply with the Act, or submitting a state plan in accordance with the Act, VDOE shall ensure that public hearings are convened, adequate notice of the hearings are provided, and an opportunity for comment is made available to the public, members of the state special education advisory committee, and private special education schools. (34 CFR 300.165)

8. Develop procedures for implementing state and federal laws and regulations pertaining to the education of children with disabilities. (§ 22.1-214 of the Code of Virginia; 34 CFR 300.199 and 34 CFR 300.129)

9. Assist local educational agencies and other participating state agencies in the implementation of state and federal laws and regulations pertaining to LRE requirements by: (34 CFR 300.119)

- a. Ensuring that teachers and administrators are fully informed about their responsibilities for implementing LRE requirements; and
- b. Providing them with technical assistance and training necessary to assist them in this effort.

10. Ensure that the requirements for LRE are implemented by each local educational agency. If there is evidence that a local educational agency's placements are inconsistent with LRE requirements, the Virginia Department of Education shall: (34 CFR 300.120)

- a. Review the local educational agency's justification for its actions; and
- b. Assist in planning and implementing any necessary corrective action.

11. Review and evaluate compliance of local educational agencies with state and federal laws and regulations pertaining to the education of children with disabilities and require corrective actions where needed. (34 CFR 300.149, 34 CFR 300.151 and 34 CFR 300.507)

- a. Administer a special education due process hearing system that provides procedures for training of special education hearing officers, evaluating special education hearing officers, and management and monitoring of hearings.
- b. Maintain and operate a complaint system that provides for the investigation and issuance of findings regarding alleged violations of the educational rights of parents or children with disabilities. Allegations may be made by public or private agencies, individuals or organizations.

12. Establish and implement a mediation process in accordance with the Act. (§ 22.1-214 of the Code of Virginia; (34 CFR 300.506)

13. Review and evaluate compliance of private nonsectarian special education schools that are licensed or have a certificate to operate in order to ensure that each child with a disability placed in the school by a local school division or Comprehensive Services Act team is provided special education and related services at no cost to the parent(s) in conformance with an IEP that meets the requirements of this chapter and meets the standards that apply to education provided by local educational agencies. (34 CFR 300.129, 34 CFR 300.146 and 34 CFR 300.147)

- a. Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

- b. Provide copies of all Virginia regulations and standards; and
- c. Provide an opportunity for these schools to participate in the development and revision of Virginia's regulations that apply to them.

14. Review and evaluate compliance of the Virginia School for the Deaf and the Blind at Staunton to ensure that each child with a disability placed in the school by a local school division is provided special education and related services at no cost to the parent(s) in accordance with an IEP that meets the requirements of this chapter and meets the standards that apply to education provided by local educational agencies. (34 CFR 300.149)

15. Establish and maintain a state special education advisory committee composed of individuals involved in or concerned with the education of children with disabilities. (34 CFR 300.167 through 34 CFR 300.169)

a. Membership. The membership shall consist of individuals appointed by the Superintendent of Public Instruction or designee who are involved in, or concerned with, the education of children with disabilities. The majority shall be individuals with disabilities or parents of children with disabilities (ages birth through 26). Membership shall include one or more of the following:

- (1) Parents of children with disabilities (ages birth through 26);
- (2) Individuals with disabilities;
- (3) Teachers;
- (4) Representatives of institutions of higher education that prepare special education and related services personnel;
- (5) State and local education officials, including officials who carry out activities under Subtitle B of Title VII of the McKinney-Vento Homeless Act (42 USC § 11431 et seq.);
- (6) Administrators of programs for children with disabilities;
- (7) Representatives of other state agencies involved in the financing or delivery of related services to children with disabilities;
- (8) Representatives of private schools and public charter schools;
- (9) At least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;
- (10) A representative from Virginia's juvenile and adult corrections agencies; and
- (11) A representative from Virginia's child welfare agency responsible for foster care.

b. Duties. The state special education advisory committee shall:

- (1) Advise the Virginia Department of Education and the Virginia Board of Education of unmet needs within the state in the education of children with disabilities;
- (2) Comment publicly on any rules or regulations proposed by the Virginia Board of Education regarding the education of children with disabilities;
- (3) Advise the Virginia Department of Education in developing evaluations and reporting on data to the U.S. Secretary of Education under the Act;
- (4) Advise the Virginia Department of Education in developing corrective action plans to address findings identified in federal monitoring reports under the Act;
- (5) Advise the Virginia Department of Education in developing and implementing policies relating to the coordination of services for children with disabilities; and
- (6) Review the annual plan submitted in accordance with 8VAC20-81-230 B 2 submitted by state-operated programs and the Virginia School for the Deaf and the Blind at Staunton.

c. Procedures.

- (1) The state special education advisory committee shall meet as often as necessary to conduct its business.
- (2) By October 1 of each year, the state special education advisory committee shall submit an annual report of committee activities and suggestions to the Virginia Board of Education.

The report shall be made available to the public in a manner consistent with other public reporting requirements of Part B of the Act.

(3) Official minutes shall be kept on all committee meetings and shall be made available to the public on request.

(4) All meetings and agenda items shall be publicly announced enough in advance of the meeting to afford interested parties a reasonable opportunity to attend, and meetings shall be open to the public.

(5) Interpreters and other necessary accommodations shall be provided for advisory committee members or participants.

(6) The advisory committee shall serve without compensation, but the Virginia Department of Education shall reimburse the committee for reasonable and necessary expenses for attending meetings and performing duties.

16. Provide a report annually to the state special education advisory committee on the Virginia Department of Education's dispute resolution systems, including information related to due process hearings and decisions. This report and due process hearing decisions, with all personally identifiable information deleted, are made available to the public on the Virginia Department of Education's website. (34 CFR 300.513(d))

17. Establish goals for the performance of children with disabilities that: (34 CFR 300.157(a))

a. Promote the purposes of the Act;

b. Are the same as Virginia's objectives for progress by children in its definition of adequate yearly progress, including Virginia's objectives for progress by children with disabilities, under § 1111(b)(2)(C) of the ESEA, 20 USC § 6311;

c. Address graduation rates and drop out rates, as well as such other factors as Virginia may determine; and

d. Are consistent, to the maximum extent appropriate, with any other goals and academic standards for children as established by Virginia.

18. Establish performance indicators Virginia will use to assess progress toward achieving the goals in subdivision 17 of this section, including measurable annual objectives for progress by children with disabilities under § 1111(b)(2)(C)(v)(II)(cc) of the ESEA, 20 USC § 6311. Annually report to the public and the United States Secretary of Education on the progress of children with disabilities in Virginia, toward meeting the goals described in subdivision 17 of this section, which may include elements of the reports required under § 1111(h) of the ESEA. (34 CFR 300.157(b) and (c))

19. Establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. These requirements include: (34 CFR 300.156(a) through (d))

a. Related services personnel and paraprofessionals. The qualifications shall:

(1) Be consistent with any Virginia-approved or Virginia-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(2) Ensure that related services personnel who deliver services in their discipline or profession have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(3) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with state law, regulation, or written policy, in meeting the requirements of this

chapter to be used to assist in the provision of special education and related services to children with disabilities.

b. Ensuring that each person employed as a public school special education teacher in Virginia who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in § 1119(a)(2) of the ESEA.

c. Requiring local educational agencies to take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services to children with disabilities.

20. Respond to complaints filed by a parent about staff qualifications as provided for under this chapter. Notwithstanding any other individual right of action that a parent or student may maintain under this chapter, nothing in this chapter shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of the Virginia Department of Education or local educational agency employee to be highly qualified. (34 CFR 300.156(e))

21. Secure agreements with state agency heads regarding appropriate roles and responsibilities for the identification, evaluation, placement, and delivery of or payment for educational and related services in order to ensure that a free appropriate public education is provided to all children with disabilities. The agreements shall address financial responsibility for each nonpublic educational agency for the provision of services. The agreements shall include procedures for resolving interagency disputes and for securing reimbursement from other agencies, including procedures under which local educational agencies may initiate proceedings. (34 CFR 300.154)

22. Disburse the appropriated funds for the education of children with disabilities in Virginia to local school divisions and state-operated programs that are in compliance with state and federal laws and regulations pertaining to the education of children with disabilities. (34 CFR 300.705 and 34 CFR 300.816)

23. Ensure that a practical method is developed and implemented to determine which children, including children with disabilities who are homeless or are wards of the state, are currently receiving needed special education and related services. Report and certify annually to the United States Department of Education the number of children with disabilities in local educational agencies who are receiving special education and related services on a date between October 1 and December 1 of each year determined by the Superintendent of Public Instruction or designee. The annual report of children served shall meet the provisions of 34 CFR 300.641 through 34 CFR 300.645. (34 CFR 300.111 and 34 CFR 300.640)

24. Ensure that a practical method is developed and implemented to determine if significant disproportionality based on race and ethnicity is occurring in the local educational agencies. This method shall include the collection and examination of data with respect to: (34 CFR 300.646(a) and 34 CFR 300.173)

a. The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in 8VAC20-81-10, "Child with a disability";

b. The placement in particular educational settings of these children; and

c. The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

25. Ensure that in the case of the determination of significant disproportionality, as outlined in subdivision 24 of this section, the Virginia Department of Education shall: (34 CFR 300.646(b))

- a. Review and, if appropriate, provide for the revision of the policies, procedures, and practices used by the local educational agency in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of this chapter;
- b. Require any local educational agency determined to have a significant disproportionality to reserve the maximum amount of funds under this chapter to provide comprehensive coordinated early intervening services to serve children in the local educational agency, particularly, but not exclusively, children in those groups that were significantly overidentified; and
- c. Require the local educational agency to publicly report on the revision of policies, practices, and procedures addressing the disproportionality.

26. Establish procedures designed to fully inform parents and children with disabilities of educational rights and due process procedures, and ensure that each local educational agency is informed of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that local educational agency. (34 CFR 300.121 and 34 CFR 300.150)

27. Ensure that requirements regarding use of public or private insurance to pay for services required under this chapter are met. (34 CFR 300.154(d) and (e))

28. Ensure that if the Virginia Department of Education provides direct services to children with disabilities, it complies with state and federal requirements as if it is a local educational agency and uses federal funds under Part B of the Act to provide services. (34 CFR 300.175)

- a. The Virginia Department of Education may use payments that would otherwise have been available to a local educational agency under Part B of the Act to provide special education services directly to children with disabilities residing in the local school division or served by a state-operated program in accordance with the conditions of the excess cost requirements as outlined in 8VAC20-81-260.
- b. The Virginia Department of Education may provide special education and related services in the manner and at the location it considers appropriate, consistent with least restrictive environment requirements.

29. Ensure that children who participate in early intervention services assisted under Part C of the Act and who will participate in preschool programs assisted under Part B of the Act experience a smooth and effective transition to early childhood special education programs in a manner consistent with the Virginia Part C lead agency's early intervention policies and procedures as follows: (34 CFR 300.124)

- a. For those children who at age two (on or before September 30) are found eligible for Part B early childhood special education programs, IEPs are developed and implemented for those children; and
- b. The local educational agency will participate in transition planning conferences arranged by the designated local Part C early intervention agency.

30. Ensure the protection of the confidentiality of any personally identifiable information collected, maintained, or used under Part B of the Act. This shall include notice to fully inform parents about the confidentiality of information as specified in 34 CFR 300.612, and policies and procedures that are used in the event that parents refuse to provide consent for disclosure of education records. These policies and procedures shall comply with the

provisions of 34 CFR 300.612 through 34 CFR 300.626. (34 CFR 300.123 and 34 CFR 300.610)

31. Ensure that a practical method is developed and implemented to: (34 CFR 300.170)
  - a. Examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies occur in the rate of long-term suspensions and expulsions with children with disabilities:
    - (1) Among local educational agencies in Virginia; or
    - (2) Compared to the rates for nondisabled children within the local school division.
  - b. Review discrepancies and, if appropriate, require the local educational agency to revise its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.
  
32. Adopt the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities. (34 CFR 300.172)
  - a. Ensure that local educational agencies 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; and
  - b. In carrying out the provisions of this subsection, to the maximum extent possible, work collaboratively with the state agency responsible for assistive technology programs.
  
33. Prohibit the Virginia Department of Education and local educational agency personnel from requiring parents to obtain a prescription for substances identified under Schedule I, II, III, IV, or V in § 202(c) of the Controlled Substances Act (21 USC § 812(c)) for a child as a condition of attending school, receiving an evaluation under this chapter, or receiving services under this chapter. (34 CFR 300.174(a))
  
34. Monitor, enforce, and provide technical assistance regarding the implementation of the requirements under the Act. These actions include: (34 CFR 300.600 through 34 CFR 300.609; 34 CFR 300.640 through 34 CFR 300.645; 34 CFR 300.149(b) and 34 CFR 300.165(b))
  - a. Providing the Secretary of Education state performance reports and data collections in accordance with the provisions of 34 CFR 300.600 through 34 CFR 300.602.
  - b. Taking appropriate enforcement and technical assistance measures to assist local educational agencies in complying with the provisions of the Act in accordance with the provisions of 34 CFR 300.600 through 34 CFR 300.602 and 34 CFR 300.608.
  - c. Establishing that the focus of Virginia's monitoring activities is on:
    - (1) Improving educational results and functional outcomes for all children with disabilities; and
    - (2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.
  - d. Using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in 34 CFR 300.600(d), and the indicators established by the U.S. Secretary of Education for the state performance plans.
  - e. Using the targets established in Virginia's performance plan and the priority areas described in 34 CFR 300.600(d) to analyze the performance of each local educational agency.
  - f. Following all the reporting requirements under 34 CFR 300.602(b).

g. Notifying the public of the pendency of an enforcement action taken by the U.S. Department of Education pursuant to 34 CFR 300.604.

h. Prohibiting the local educational agency from reducing the local educational agency's maintenance of effort under 34 CFR 300.203 for any fiscal year if the Virginia Department of Education determines that a local educational agency is not meeting the requirements of Part B of the Act, including the targets in Virginia's state performance plan.

35. Ensure each recipient of assistance under Part B of the Act makes positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act. (34 CFR 300.177(b))

### **Part III**

## **Responsibilities of Local School Divisions and State-Operated Programs**

### ***8VAC20-81-30. Responsibility of local school divisions and state-operated programs.***

A. The requirements set forth in this chapter are applicable to local school divisions and state-operated programs providing education and related services for children with disabilities and are developed in accordance with state and federal laws and regulations.

B. Each local school division shall ensure that all children with disabilities aged two to 21, inclusive, residing in that school division have a right to a free appropriate public education. (§ 22.1-214 of the Code of Virginia; 34 CFR 300.2, 34 CFR 300.101, 34 CFR 300.124 and 34 CFR 300.209)

The children include:

1. Children with disabilities who are migrant;
2. Children with disabilities who are homeless, in accordance with the provisions of the McKinney-Vento Homeless Assistance Act (42 USC § 11431 et seq.);
3. Children with disabilities who are in need of special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade;
4. Children with disabilities who are served in a public nonprofit charter school;
5. Children with disabilities who have been suspended or expelled from school;
6. Children with disabilities who are incarcerated for 10 or more days in a regional or local jail in its jurisdiction, with the exception of those additional provisions identified in 8VAC20-81-110 I;
7. Children with disabilities who are residents of the school division and who are on house arrest, as ordered by a court of competent jurisdiction;
8. Children with disabilities who are in foster care and residents of Virginia;
9. Children with disabilities who are placed for noneducational reasons; and
10. Children with disabilities regardless of citizenship or immigration status.

C. Every child with a disability is deemed to reside in a school division when (§ 22.1-3 of the Code of Virginia):

1. The child is living with a biological parent whose parental rights have not been terminated.
2. The child is living with an adoptive parent.
3. The child is living with an individual:
  - a. Other than the custodial parent but who is defined as a parent in § 22.1-1 of the Code of Virginia, not solely for school purposes; and
  - b. Pursuant to a special power of attorney executed under 10 USC § 1044b by the custodial parent while such custodial parent is deployed outside the United States as a member of the Virginia National Guard or as a member of the United States Armed Forces.
4. The parent(s) of the child is deceased and the child is living with a person in loco parentis who resides within the school division.
5. The parents of the child are unable to care for him and he is living, not solely for school purposes, with another person who resides in the school division and is either:
  - a. The court-appointed guardian, or has legal custody; or
  - b. Acting in loco parentis pursuant to placement of the child by a person or entity authorized to do so under § 63.2-900 of the Code of Virginia.
6. The child is living in the school division not solely for school purposes, as an emancipated minor pursuant to the provisions of the § 16.1-334 of the Code of Virginia.
7. The child is living in the school division not solely for school purposes, as a validly married minor who has not pursued emancipation under § 16.1-333 of the Code of Virginia but who asserts implied emancipation based on the minor's marriage record.
8. The child is in foster care and a resident of Virginia, but not a resident of the school division, under the following conditions: (§ 22.1-215 of the Code of Virginia)
  - a. The child has been placed in foster care or other custodial care within the geographical boundaries of the school division, placed by a Virginia agency, whether state or local, that is authorized by the Code of Virginia to place children; or
  - b. The child has been placed, not solely for school purposes, in a child-caring institution or group home licensed under the provisions of Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia that is located within the geographical boundaries of the school division.
9. The child is in foster care and a resident of Virginia, and a resident of the school division, under the provisions of subdivision 8 of this subsection.

D. If a child with a disability is living with the parent in the residence of the local school division, the local school division is responsible for ensuring that the child receives a free appropriate public education even if the enrollment requirements for the child are not completed within a reasonable period of the parents' request to enroll the child. (34 CFR 300.101)

E. Requirements for children with disabilities who are placed for noneducational reasons:

1. The local school division that is part of the Comprehensive Services Act team that places the child in a private residential placement for noneducational reasons shall ensure that the child's IEP team develops an IEP appropriate for the child's needs while the child is in the residential placement.
  2. If a child in foster care is placed in a local school division of nonresidence and the IEP team of the local school division of nonresidence where the child is placed determines that the child needs to be placed in a private day or residential special education facility for educational reasons, the responsibility for a free appropriate public education transfers to the local school division where the Virginia placing agency is located and is a participant in the community policy and management team of that local school division that has responsibility for the child under the Comprehensive Services Act (Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia).
  3. If placed in a nursing facility, a long stay hospital, or an intermediate care facility for people with intellectual disabilities under funding from the Virginia Department of Medical Assistance Services, the child is a resident of the division where the parent(s) resides.
  4. If placed in a group home by a community services board, a court service unit, or a court of competent jurisdiction, the child is a resident of the division where the parent(s) resides.
  5. If the child is aged 18 or older and placed in a nursing facility, a long stay hospital, or an intermediate care facility for people with intellectual disabilities under funding from the Virginia Department of Medical Assistance Services, and who has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides.
  6. If the child is aged 18 or older and placed in a group home by a community services board and has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides.
  7. If the child is aged 18 or older, who has not been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has not appointed a guardian to make decisions, the adult child's residence is the fixed home to which the adult child will return following the child's return from a facility and at which the adult child intends to stay. No adult child shall have more than one residence at a time.
  8. If the child is aged 18 or older, who has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and for whom the court has appointed a guardian to make decisions, the adult child is a resident of the division where the guardian resides.
  9. If placed in a sponsored residential home, licensed in accordance with 12VAC35-105, the child is a resident of the division where the parent(s) resides.
- F. If there is a dispute between local school divisions regarding the parent's or legal guardian's residence, the local school division of the parent's or legal guardian's last known place of residence is responsible until such dispute is resolved or the parent's or legal guardian's residence is established in another local school division.

G. If there is dispute between the parent or legal guardian of a child with a disability and the local school division regarding residency, the local school division of where the child is last enrolled remains responsible for providing the child with a free appropriate public education until resolution of the dispute.

H. Each state-operated program shall ensure that the requirements in this chapter are applied to children with disabilities, aged two to 21, inclusive, in that institution. (§ 22.1-7 of the Code of Virginia)

1. For children with disabilities who are placed in a state-operated program as a long-term placement, the local educational agency of the parent's residence remains responsible for ensuring that the child receives a free appropriate public education.

2. The state-operated program shall ensure that the local educational agency of the parent's residence is advised of the child's admission, status, and meetings associated with the child receiving a free appropriate public education.

I. Children with disabilities who are not residents of Virginia but are living temporarily with adults who do not otherwise meet the definition of parent(s) residing within a school division may, in the discretion of the local school board's policies and procedures, be admitted to the public schools of the school division for special education and related services. Tuition charges associated with this admittance are subject to the provisions of § 22.1-5 of the Code of Virginia.

***8VAC20-81-40. Special education staffing requirements.***

A. School age programs. The following specifies the staffing patterns for special education services for school age (five to 21, inclusive) children, in addition to the Standards of Quality (§ 22.1.253.13:2 of the Code of Virginia) and Regulations Establishing Standards for Accrediting Public Schools in Virginia (8VAC20-131-240).

1. Staffing shall be in accordance with the requirements of 8VAC20-81-340 in the following settings.

- a. Students with disabilities shall be instructed with students without disabilities in general education settings and classrooms, as appropriate, and in accordance with the Individualized Education Program (IEP). The service level, Level I or II, is based on the amount of time the student receives special education.

- b. When children with disabilities are removed from the general education setting and classroom to provide instruction, special education and related services, they may receive services with children with the same disability or with children with different disabilities.

2. Personnel assignment.

- a. Each student shall receive special education services from special education personnel assigned in accordance with the Virginia Licensure Regulations for School Personnel (8VAC20-22).

- b. Special education teachers who are the teachers of record shall be highly qualified.

- c. General education qualified personnel who are knowledgeable about the students and their special education, may implement special education services in collaboration with special education personnel.

- d. Special education services include those services provided directly to the student and those provided indirectly.

3. Caseload standards.

a. The maximum instructional caseloads for special education teachers and speech-language pathologists, for which public schools receive state funds in accordance with the Virginia Appropriation Act are listed in 8VAC20-81-340. Special education services for children with visual impairment are established, maintained, and operated jointly by the local school board and the Virginia Department for the Blind and Vision Impaired.

b. If children with disabilities in a single building receive academic content area instruction from multiple special education teachers, the teachers' caseloads shall be determined by using a building average.

(1) A building average is computed by dividing the total weights (found in 8VAC20-81-340) for all children served in this fashion by the number of special education teachers providing services. Any itinerant teacher shall be counted according to the amount of time the teacher spends in the school. Subdivision 3 d of this subsection applies for any teacher assigned to administrative duties or to providing services to children who do not have disabilities.

(2) The building average shall not exceed 20 points if services are provided to students receiving Level I services and to children receiving Level II services. The building average shall not exceed 24 points if services are provided only to children receiving Level I services.

(3) No more than 14 children shall be assigned to a single class period if there are similar achievement levels and one subject area and level are taught. No more than 10 students shall be assigned to a single class period when there are varying achievement levels.

c. Special education personnel may also be assigned to serve children who are not eligible for special education and related services under this chapter, as long as special education personnel hold appropriate licenses and endorsements for such assignments.

d. When special education personnel are assigned to provide services for children who do not have a disability under this chapter or are assigned to administrative duties, a reduction in the caseload specified in the Virginia Appropriation Act shall be made in proportion to the percentage of school time on such assignment.

(1) This provision does not apply when special education and related services are provided in a general education class, based on the goals of the IEP of at least one child in that classroom, and children without disabilities incidentally benefit from such services.

(2) When special education personnel provide services in a general education classroom based on the IEP goals of at least one child in that classroom, the special education caseloads do not include children with disabilities who incidentally benefit from such services.

B. Staffing for early childhood special education.

1. Children of preschool ages (two to five, inclusive) who are eligible for special education receive early childhood special education. The amount of services is determined by the child's individualized education program (IEP) team. A schedule comparable in length to school age students shall be made available if determined appropriate by the IEP team.

2. Staffing requirements.

a. Children receiving early childhood special education services may receive services together with other preschool-aged children with the same or with different disabilities.

b. Each student shall receive special education services from special education personnel assigned in accordance with the Virginia Licensure Regulations for School Personnel (8VAC20-22).

c. The maximum special education caseloads, with and without paraprofessionals, are set and funded in the Virginia Appropriation Act. See 8VAC20-81-340 for the funded caseloads. Special education services for children with visual impairment are established, maintained,

and operated jointly by the local school board and the Virginia Department for the Blind and Vision Impaired.

C. Staffing for education programs in regional and local jails. Special education personnel with any special education endorsement, except early childhood special education, may provide instructional services to eligible students with disabilities incarcerated in a regional or local jail.

D. Alternative special education staffing plan. School divisions and private special education schools may offer for consideration of approval, an alternative staffing plan in accordance with Virginia Department of Education procedures. The Virginia Department of Education may grant approval for alternative staffing levels upon request from local school divisions and private special education schools seeking to implement innovative programs that are not consistent with these staffing levels.

E. Educational interpreting services.

1. The qualification requirements for personnel providing interpreting services for children who are deaf or hard of hearing are as follows:

a. Personnel providing educational interpreting services for children using sign language shall:

(1) Have a valid Virginia Quality Assurance Screening (VQAS) Level III; or

(2) Have a passing score on the Educational Interpreter Performance Assessment (EIPA) Written Test along with a minimum of a Level 3.5 on the EIPA Performance Test or any other state qualification or national certification (excluding Certificate of Deaf Interpretation) recognized by the Virginia Department for the Deaf and Hard of Hearing as equivalent to or exceeding the VQAS Level III.

b. Personnel providing educational interpreting services for children using cued speech/language shall have a Virginia Quality Assurance Screening Level III for cued speech or hold a national Transliteration Skills Certificate from the Testing, Evaluation and Certification Unit (TEC Unit) or equivalent recognized by the Virginia Department for the Deaf and Hard of Hearing.

c. Personnel providing educational interpreting services for children requiring oral interpreting shall meet minimum requirements for competency on the Virginia Quality Assurance Screening written assessment of the Code of Ethics.

2. Personnel who provide interpreting services for children who use sign language or cued speech/language and who do not hold the required qualifications may be employed in accordance with the following criteria:

a. Personnel shall have a valid Virginia Quality Assurance Screening Level I, or its equivalent, as determined by the Virginia Department for the Deaf and Hard of Hearing; or

b. Personnel shall have a passing score on the EIPA Written Test and a minimum score of 2.5 on the EIPA Performance Test upon hiring date in any local educational agency in Virginia.

3. The following qualification requirements for personnel providing interpreting services for students who are deaf or hard of hearing will become effective in 2010:

a. Personnel providing educational interpreting services for children using sign language shall hold:

(1) A valid Virginia Quality Assurance Screening (VQAS) Level III; or

(2) A passing score on the Educational Interpreter Performance Assessment (EIPA) Written Test along with a minimum of a Level 3.5 on the EIPA Performance Test or any other state

qualification or national certification (excluding Certificate of Deaf Interpretation) recognized by the Virginia Department for the Deaf and Hard of Hearing as equivalent to or exceeding the VQAS Level III.

(3) Under no circumstances shall local educational agencies or private special education schools hire interpreters who hold qualifications below a VQAS Level II, EIPA Level 3.0 or the equivalent from another state.

(4) Interpreters hired with a VQAS Level II, EIPA Level 3.0 or the equivalent shall have two years from the date of hire to reach the required qualifications.

b. Personnel providing educational interpreting services for children using cued speech/language shall have a valid Virginia Quality Assurance Screening Level III for cued speech/language or hold a national Transliteration Skills Certificate from the Testing, Evaluation and Certification Unit (TEC Unit) or equivalent recognized by the Virginia Department for the Deaf and Hard of Hearing.

(1) Under no circumstances shall local educational agencies or private special education schools hire educational interpreters to provide cued speech services who hold qualifications below a VQAS Level I or the equivalent from another state.

(2) Educational Interpreters to provide cued speech hired with a VQAS Level I or the equivalent have three years from the date of hire to reach the required qualifications.

c. Personnel providing educational interpreting services for children requiring oral interpreting shall hold a national Oral Transliteration Certificate (OTC) or equivalent recognized by the Virginia Department of Deaf and Hard of Hearing.

4. For a child who is not deaf or hard of hearing but for whom sign language services are specified in the IEP to address expressive or receptive language needs, the sign language services shall be provided by an individual meeting the requirements determined appropriate by the local educational agency.

#### **8VAC20-81-50. Child find.**

##### **A. Child find.**

1. Each local school division shall maintain an active and continuing child find program designed to identify, locate and evaluate those children residing in the jurisdiction who are birth to age 21, inclusive, who are in need of special education and related services, including children who: (34 CFR 300.102 and 34 CFR 300.111)

a. Are highly mobile, such as migrant and homeless children;

b. Are wards of the state;

c. Attend private schools, including children who are home-instructed or home-tutored;

d. Are suspected of being children with disabilities under this chapter and in need of special education, even though they are advancing from grade to grade; and

e. Are under age 18, who are suspected of having a disability who need special education and related services, and who are incarcerated in a regional or local jail in its jurisdiction for 10 or more days.

2. Each local school division shall coordinate child find activities for infants and toddlers (birth to age two, inclusive) with the Part C local interagency coordinating council. (34 CFR 300.124)

3. Each local school division shall locate, identify and evaluate children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools. (34 CFR 300.131, 34 CFR 300.133, 34 CFR 300.134)

- a. The child find process shall be designed to ensure:
  - (1) The equitable participation of parentally placed private school children, and
  - (2) An accurate count of those children.
- b. The local school division shall undertake activities similar to the activities undertaken for its public school children.
- c. The cost of carrying out the child find requirements, including individual evaluation, may not be considered in determining if a local educational agency has met its obligation under 34 CFR 300.133.
- d. The child find process shall be completed in a time period comparable to that for students attending public school in the local educational agency.
- e. Each local school division in which private, including religious, elementary and secondary schools, are located, shall include parentally placed private school children, including those who reside in a state other than Virginia, or country other than the United States.
  - (1) If the location of the administration of the private school in which the child attends is different from the school division in which the private school is located, the school division in which the private school is located and which the child attends is responsible for the child find activities.
- f. The local school division shall consult with appropriate representatives of private school children with disabilities, as well as home-instructed or home-tutored children with disabilities, and representatives of parents of parentally placed private school children with disabilities, on how to implement the child find and evaluation activities.

B. Public awareness. Each local school division shall, at least annually, conduct a public awareness campaign to:

1. Inform the community of a person's, ages two to 21, inclusive, statutory right to a free appropriate public education and the availability of special education programs and services;
2. Generate referrals; and
3. Explain the nature of disabilities, the early warning signs of disabilities, and the need for services to begin early.

C. Screening.

1. Each local school division shall have procedures, including timelines, to document the screening of children enrolled in the division, including transfers from out of state as follows:
  - a. Children shall be screened in the areas of hearing and vision in accordance with the requirements of 8VAC20-250-10. (§ 22.1-273 of the Code of Virginia)
  - b. Children shall be screened for scoliosis in accordance with the requirements of 8VAC20-690-20. (§ 22.1-273.1 of the Code of Virginia)
  - c. Children shall be screened in the areas of speech, voice, language, and fine and gross motor functions to determine if a referral for an evaluation for special education and related services is indicated.
  - d. Children who fail any of the above screenings may be rescreened if the original results are not considered valid.
  - e. The local educational agency may recognize screenings reported as part of the child's pre-school physical examination required under the Code of Virginia. (§ 22.1-270 of the Code of Virginia)

f. Children shall be referred to the special education administrator or designee if results suggest that a referral for evaluation for special education and related services is indicated. The referral shall include the screening results.

2. The local school division shall provide all applicable procedural safeguards. These include the following:

- a. Written notice to parents of the scheduled screening and, if the child fails the screening, the results of the screening;
- b. Confidentiality; and
- c. Maintenance of the student's scholastic record.

3. Screening for instructional purposes is not an evaluation. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. (34 CFR 300.302)

#### D. Referrals.

1. Each school shall have procedures to process in a timely manner all referral requests for a child suspected of having a disability.

2. Each school shall have a team to review records and other performance evidence of the child being referred in order to make recommendations to meet the child's educational and behavioral needs.

a. The team shall include:

- (1) The referring source, as appropriate (except if inclusion of a referring source would breach the confidentiality of the child);
- (2) The principal or designee;
- (3) At least one teacher; and
- (4) At least one specialist.

b. Other members may be included according to the school division's procedures, or when the school division determines that the special needs of the child identified in the referral request requires additional information that should be provided by individuals with specialized training or specific knowledge.

c. One member of the team must be knowledgeable about alternative interventions and about procedures required to access programs and services that are available to assist with children's educational needs.

3. Children may be referred through a screening process, or by school staff, the parent(s), or other individuals.

a. The referral may be in written, electronic, or oral form to the principal or designee of the school the child attends, or if initially enrolling in the school division, in the school in the parent's district.

b. If the referral is made to the special education administrator or designee, the administrator shall within three business days:

- (1) Initiate the evaluation eligibility process in accordance with 8VAC20-81-60, 8VAC20-81-70, and 8VAC20-81-80;
- (2) Require that the school-based team review and respond to the request; or
- (3) Deny the request.

If the request is denied, 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 300.507)

4. In reviewing the child's performance, the team may use a process based on the child's response to scientific, research-based interventions or other alternative research-based procedures. (34 CFR 300.307)

a. The team shall ensure that these interventions are documented and do not needlessly delay a child suspected of having a disability from being evaluated for special education and related services.

b. If the child has not made adequate progress after an appropriate period of time during the implementation of the interventions, the team shall refer the child to the special education administrator or designee for an evaluation to determine if the child needs special education and related services. (34 CFR 300.309)

5. Timelines for referral process.

a. The team shall meet within 10 business days following the receipt of the referral.

b. The team shall refer the child to the special education administrator or designee within three business days if the team determines that the child should be referred for an evaluation for special education and related services.

c. If the team decides not to refer for an evaluation 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. (34 CFR 300.507)

6. Actions by the team shall be documented in writing and shall include information upon which a decision was based.

E. Prohibition on mandatory medication (34 CFR 300.174).

1. The Virginia Department of Education prohibits state and local educational agency personnel from requiring parents to obtain a prescription for substances identified under Schedule I, II, III, IV, or V in § 202(c) of the Controlled Substances Act (21 USC § 812(c)) for a child as a condition of attending school, receiving an evaluation under 34 CFR 300.300 through 34 CFR 300.311, or receiving services under this part.

2. Teachers and other school personnel may consult or share classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services.

**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 300.3049(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.

**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 8 VAC 20-81-110 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 nonstandardized 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))

### ***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, 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)

**8VAC20-81-90. Termination of special education and related services.**

A. Termination of a child's eligibility for special education and related services shall be determined by an eligibility group.

1. Termination of special education services occurs if the eligibility group determines that the child is no longer a child with a disability who needs special education and related service.
2. The local educational agency shall evaluate a child with a disability in accordance with 8VAC20-81-70 before determining that the child is no longer a child with a disability under this chapter.

3. Evaluation is not required before the termination of eligibility due to graduation with a standard or advanced studies high school diploma or reaching the age of 22. (34 CFR 300.305(e))

B. The IEP team shall terminate the child's eligibility for a related service without determining that the child is no longer a child with a disability who is eligible for special education and related services. The IEP team shall make this determination based on the current data in the child's education record, or by evaluating the child in accordance with 8VAC20-81-70.

C. Written parental consent shall be required prior to any partial or complete termination of services.

D. Prior to any partial or complete termination of special education and related services, the local educational agency shall comply with the prior written notice requirements of 8VAC20-81-170 C.

E. If the parent(s) revokes consent in writing for the child to continue to receive special education and related services, the local educational agency shall follow the procedures in 8VAC20-81-170 E.3.a. to terminate the child's receipt of special education and related services. (34 CFR 300.9 and 34 CFR 300.300(b)(4))

F. Summary of academic achievement and functional performance. (34 CFR 300.305(e)(3))

1. For a child whose eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22, the local educational agency shall provide the child with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

2. If a child exits school without graduating with a standard or advanced studies high school diploma or reaching the age of 22, including if the child receives a general educational development (GED) credential or an alternative diploma option, the local educational agency may provide the child with a summary of academic achievement and functional performance when the child exits school. However, if the child resumes receipt of educational services prior to exceeding the age of eligibility, the local educational agency shall provide the child with an updated summary when the child exits, or when the child's eligibility terminates due to graduation with a standard or advanced studies high school diploma or reaching the age of 22.

**8VAC20-81-100. Free appropriate public education.**

A. Age of eligibility.

1. A free appropriate public education shall be available to all children with disabilities who need special education and related services, aged two to 21, inclusive, who meet the definition of "age of eligibility" as outlined in 8VAC20-81-10 and who reside within the jurisdiction of each local educational agency. This includes children with disabilities who are in need of special education and related services even though they have not failed or been retained in a course or grade and are advancing from grade to grade, and students who have been suspended or expelled from school in accordance with the provisions of 8VAC20-81-160. The Virginia Department of Education has a goal of providing full educational opportunity

to all children with disabilities aged birth through 21, inclusive, by 2015. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.101 and 34 CFR 300.109)

- a. The services provided to the child under this chapter shall address all of the child's identified special education and related services needs.
- b. The services and placement needed by each child with a disability to receive a free appropriate public education shall be based on the child's unique needs and not on the child's disability.

2. Exceptions. The obligation to make a free appropriate public education to all children with disabilities does not apply to: (34 CFR 300.102(a))

- a. Children with disabilities who have graduated from high school with a standard or advanced studies high school diploma. This exception does not apply to age-eligible students who have graduated but have not been awarded a standard or advanced studies high school diploma, or to those students who have been awarded a general educational development (GED) credential.
- b. Children with disabilities aged 18 to 21, inclusive, who, if in their last educational placement prior to their incarceration in an adult correctional facility, were not identified as being a child with a disability and did not have an IEP. This exception does not apply to children with disabilities, aged 18 to 21, inclusive, who had been identified as children with disabilities and had received services in accordance with their IEPs, but who left school prior to their incarceration or did not have IEPs in their last educational setting but who had actually been identified as children with disabilities under this chapter.
- c. Children with disabilities who are eligible under IDEA Part B, Subpart H, but who receive early intervention services under IDEA Part C.

B. A free appropriate public education shall be available to children with disabilities who reside within a school division but do not hold a valid U.S. citizenship or a student visa.

C. Program options. Each local school division shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to children without disabilities in the area served by the local educational agency, including art, music, industrial arts, consumer and homemaking education, and vocational education. (34 CFR 300.110)

D. Residential placement. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including nonmedical care and room and board, shall be at no cost to the parents of the child. (34 CFR 300.104)

E. Assistive technology devices. (34 CFR 300.34(b) and 34 CFR 300.113)

1. Each local educational agency shall ensure that the following are functioning properly, including completing routine checks:
  - a. Hearing aids worn in school by children with hearing impairments, including deafness; and
  - b. The external components of surgically implanted devices.
2. A local educational agency is not responsible for the postsurgical maintenance, programming, or replacement of a medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

F. Availability of assistive technology. (34 CFR 300.105)

1. Each local educational agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in 8VAC20-81-10, are made available to a child with a disability if required as part of the child's:
  - a. Special education;
  - b. Related services; or
  - c. Supplementary aids and services.
2. On a case-by-case basis, the use of school-purchased or leased assistive technology devices in a child's home or in other settings is required if the child's IEP team determines that the child needs access to those devices in order to receive a free appropriate public education.
3. Local educational agencies are not required to provide personal devices, including eyeglasses or hearing aids that the child requires, regardless of whether the child is attending school, unless the IEP team determines that the device is necessary for the child to receive FAPE.

G. Transportation. (§§ 22.1-221 and 22.1-347 of the Code of Virginia; 34 CFR 300.107)

1. Each child with a disability, aged two to 21, inclusive, placed in an education program, including private special education day or residential placements, by the local school division shall be entitled to transportation to and from such program at no cost if such transportation is necessary to enable such child to benefit from educational programs and opportunities. Children with disabilities and children without disabilities shall share the same transportation unless a child's IEP requires specialized transportation.
2. If the IEP team determines that a child with a disability requires accommodations or modifications to participate in transportation, the accommodations or modifications shall be provided in the least restrictive environment. Transportation personnel may be on the IEP team or be consulted before any modifications or accommodations are written into the student's IEP to ensure that the modifications and accommodations do not violate any state or federal standard or any nationally recognized safety practices.
3. A local educational agency shall ensure that a child with a disability is provided a commute to and from an education program that is comparable in length to the commute provided to children without disabilities, unless the child's IEP team determines that a longer or shorter commute is necessary to ensure the child receives a free appropriate public education.
4. If a local educational agency enters an agreement with another local educational agency for the provision of special education or related services for a child with a disability, such child shall be transported to and from such program at no cost to the parent(s).
5. If a child with a disability is placed in the Virginia School for the Deaf and the Blind at Staunton, the Virginia school shall be responsible for the provision of transportation services. When such children are educated as day students, the local school division shall be responsible for the provision of transportation services to and from school.

H. Nonacademic and extracurricular services and activities. (34 CFR 300.107 and 34 CFR 300.117)

1. Each local educational agency shall take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. (See also 8VAC20-81-130 A 2)

2. Nonacademic and extracurricular services and activities may include but not be limited to counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the local educational agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the local educational agency and assistance in making outside employment available.

I. Physical education. (34 CFR 300.108)

1. General. Physical education services, specially designed if necessary, shall be made available to every child with a disability receiving a free appropriate public education, unless the local educational agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grade.

2. Regular physical education. Each child with a disability shall be afforded the opportunity to participate in the regular physical education program available to children without disabilities, unless:

- a. The child is enrolled full time in a separate facility; or
- b. The child needs specially designed physical education, as prescribed in the child's IEP that cannot be provided in the regular physical education program.

3. Special physical education. If specially designed physical education is prescribed in a child's IEP, the local educational agency responsible for the education of that child shall provide the services directly or make arrangements for those services to be provided through other public or private programs.

4. Education in separate facilities. The local educational agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with this subsection.

J. Extended school year services. (34 CFR 300.106)

1. Each local educational agency shall ensure that extended school year services, including transportation to and from such services, are available as necessary to provide a free appropriate public education consistent with subdivision 2 of this subsection.

2. Extended school year services shall be provided only if a child's IEP team determines on an individual basis in accordance with this chapter that the services are necessary for the provision of a free appropriate public education to the child, because the benefits a child with a disability gains during the regular school year will be significantly jeopardized if extended school year services are not provided.

3. In implementing the requirements of this section, a local educational agency may not:

- a. Limit extended school year services to particular categories of disability;
- b. Unilaterally limit the type, amount, or duration of those services; or

c. Limit the provision of extended school year services to only the summer.

K. Children with disabilities in public charter schools. (34 CFR 300.209)

1. Children with disabilities who attend charter schools shall be served by the local school division in the same manner as children with disabilities in its other schools, including the provision of supplementary and related services on site at the charter school to the same extent to which the local educational agency provides such services on the site to its other public schools.

2. The local school division shall ensure that all requirements of this chapter are met.

L. Length of school day. School-aged students with disabilities shall be provided a school day comparable in length to the day provided to school-aged students without disabilities unless their IEP specifies otherwise. For preschool-aged children with disabilities, the IEP team determines the length of the school day.

M. Methods and payments. (34 CFR 300.103)

1. The Virginia Department of Education may use whatever state, local, federal, and private sources of support that are available to meet the requirements of this part.

2. Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

3. The Virginia Department of Education will ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

N. Disability harassment. Each local educational agency shall have in effect policies that prohibit harassment to children with disabilities. (28 CFR 35.149 and 34 CFR 104.4)

**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 noneducational 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. The IEP team shall document its consideration of the inclusion in the child's IEP of benchmarks or short-term objectives. (34 CFR 300.320(a)(2))

4. 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.
  
5. 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))
  
6. The following information concerning state and divisionwide 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.
  
7. 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))
  
8. 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.

9. 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.

10. 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.

11. 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.

**8VAC20-81-120. Children who transfer.**

A. Children with disabilities who transfer between local educational agencies in Virginia or transfer from a local educational agency outside of Virginia to a local educational agency in Virginia within the same school year are subject to the following provisions. (34 CFR 300.323(e), (f), and (g))

1. The new local educational agency shall take reasonable steps to obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education and related services to the child, from the previous local educational agency in which the child was enrolled. The previous local educational agency shall take reasonable steps to promptly respond to the request from the new local educational agency.
  - a. If the previous local educational agency is not forthcoming in providing the records for the child, the new local educational agency should contact the Virginia Department of Education for assistance in resolving the matter.
  - b. If the new local educational agency is unable to obtain the IEP from the previous local educational agency or from the parent, the new local educational agency is not required to provide special education and related services to the child. The new local educational agency shall place the student in a general educational program and conduct an evaluation if the new local educational agency determines that an evaluation is necessary.
2. The new local educational agency shall provide a free appropriate public education to the child, including ensuring that the child has available special education and related services, in consultation with the parent(s), including services comparable to those described in the child's IEP from the previous local educational agency, until the new local educational agency either:

- a. Adopts and implements the child's IEP from the previous local educational agency with the parent's consent; or
- b. Conducts an evaluation, if determined necessary by the local educational agency, and develops and implements a new IEP with the parent's consent that meets the requirements in this chapter.

3. The new local educational agency may develop and implement an interim IEP with the parent's consent while obtaining and reviewing whatever information is needed to develop a new IEP.

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

B. The new local educational agency shall provide the parent(s) with proper notice regarding actions taken to provide the child with a free appropriate public education.

C. If the local educational agency determines it necessary to conduct an evaluation of the child, the local educational agency shall provide proper notice, initiate evaluation procedures, conduct the evaluation, determine eligibility, and develop an IEP in accordance with this chapter.

1. During the evaluation period, the child shall receive services in accordance with the existing IEP, excluding the sections of the IEP that are not in accordance with this chapter.

2. The local educational agency shall inform the parent(s) of the sections of the existing IEP that are not in accordance with this chapter.

D. When a child with a disability who was placed in a private residential school under the Comprehensive Services Act transfers to a new local educational agency, the new local educational agency shall review the current placements and adopt or revise and implement the IEP within 30 calendar days of receipt of written notification of the child's transfer. The former Comprehensive Services Act team is responsible for paying for services until 30 calendar days after the new Comprehensive Services Act team receives written notification of the child's residence in the new local educational agency from the former Comprehensive Services Act team. (The CSA Implementation Manual)

***8VAC20-81-130. Least restrictive environment and placements.***

A. General least restrictive environment requirements.

1. Each local educational agency shall ensure: (34 CFR 300.114)

- a. 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; and
- b. That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if 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.

2. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and other nonacademic and extracurricular services and activities provided for children without disabilities, each local educational agency shall ensure that each child with a disability participates with children without disabilities in those services and activities to the maximum extent appropriate to the needs of the child with a disability. The local educational agency shall ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in nonacademic settings. (See also 8VAC20-81-100 H.) (34 CFR 300.117)

3. For children placed by local school divisions in public or private institutions or other care facilities, the local educational agency shall, if necessary, make arrangements with public and private institutions to ensure that requirements for least restrictive environment are met. (See also 8VAC20-81-150.) (34 CFR 300.114 and 34 CFR 300.118)

B. Continuum of alternative placements. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.115)

1. Each local educational agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, aged two to 21, inclusive, for special education and related services.

2. The continuum shall:

a. Include the alternative placements listed in the term "special education" at 8VAC20-81-10, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and

b. Make provision for supplementary services (e.g., resource room or services or itinerant instruction) to be provided in conjunction with regular education class placement. The continuum includes integrated service delivery, which occurs when some or all goals, including benchmarks and objectives if required, of the student's IEP are met in the general education setting with age-appropriate peers.

3. No single model for the delivery of services to any specific population or category of children with disabilities is acceptable for meeting the requirement for a continuum of alternative placements. All placement decisions shall be based on the individual needs of each child.

4. Local educational agencies shall document all alternatives considered and the rationale for choosing the selected placement.

5. Children with disabilities shall be served in a program with age-appropriate peers unless it can be shown that for a particular child with a disability, the alternative placement is appropriate as documented by the IEP.

C. Placements. (Regulations Establishing Standards for Accrediting Public Schools in Virginia (8VAC20-131); 34 CFR 300.116)

1. In determining the educational placement of a child with a disability, including a preschool child with a disability, each local educational agency shall ensure that:

a. The placement decision is made by the IEP team in conformity with the least restrictive environment provisions of this chapter.

b. The child's placement is:

8VAC20-81-140. Placement of children at the Virginia School for the Deaf and the Blind at Staunton.

- (1) Determined at least annually;
- (2) Based on the child's IEP; and
- (3) As close as possible to the child's home.

c. Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that the child would attend if a child without a disability.

d. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which the child needs.

e. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

2. Home-based instruction shall be made available to children whose IEPs require the delivery of services in the home or other agreed-upon setting.

3. Homebound instruction shall be made available to children who are confined for periods that would prevent normal school attendance based upon certification of need by a licensed physician or clinical psychologist. For students eligible for special education and related services, the IEP team shall revise the IEP, as appropriate, and determine the delivery of homebound services, including the number of hours of services.

**8VAC20-81-140. Placement of children at the Virginia School for the Deaf and the Blind at Staunton.**

A. Placements are made by the local school division, in accordance with the administrative policies and procedures of the Virginia School for the Deaf and the Blind at Staunton (Virginia school). The Virginia school shall determine if the student meets the admission criteria of the Virginia school. (§ 22.1-348 of the Code of Virginia)

B. When an eligible child is placed in the Virginia school, the local school division is responsible for ensuring compliance with the requirements of this chapter.

C. For students who are residential students, the Virginia school is responsible for transportation. For students who are day students, the placing local school division is responsible for transportation to and from the school. (§ 22.1-347 C of the Code of Virginia)

**8VAC20-81-150. Private school placement.**

A. Private school placement by a local school division or Comprehensive Services Act team.

1. When a child with a disability is placed by a local school division or is placed for noneducational reasons by a Comprehensive Services Act team that includes the school division in a private special education school or facility that is licensed or has a certificate to operate, the local school division is responsible for ensuring compliance with the requirements of this chapter, including participation in state and divisionwide assessments. The local school division shall ensure that the child's IEP team develops an IEP appropriate for the child's needs while the child is in a private school or facility. (34 CFR 300.325(c))

2. Before a local school division places a child with a disability in a private school or facility that is licensed or has a certificate to operate, the local school division shall initiate and conduct a meeting in accordance with 8VAC20-81-110 to develop an IEP for the child. The local school division shall ensure that a representative of a private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to

ensure participation by a private school or facility, including individual or conference telephone calls. (34 CFR 300.325(a))

3. When a child is presently receiving the services of a private school or facility that is licensed or has a certificate to operate, the local school division shall ensure that a representative of the private school or facility attends the IEP meeting. If the representative cannot attend, the local school division shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls. (34 CFR 300.325(a)(2))

4. After a child with a disability enters a private school or facility that is licensed or has a certificate to operate, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the local school division. (34 CFR 300.325(b)(1))

5. If the private school or facility initiates and conducts these meetings, the local school division shall ensure that the parent(s) and a local school division representative: (34 CFR 300.325(b)(2))

- a. Are involved in any decision affecting the child's IEP;
- b. Agree to any proposed changes in the program before those changes are implemented; and
- c. Are involved in any meetings that are held regarding reevaluation.

6. If the private school or facility implements a child's IEP, responsibility for compliance with the requirements regarding procedural safeguards, IEPs, assessment, reevaluation, and termination of services remains with the local school division. (34 CFR 300.325(c))

7. When a child with a disability is placed by a local school division or a Comprehensive Services Act team in a private school or facility that is licensed or has a certificate to operate, all rights and protections under this chapter are extended to the child. (34 CFR 300.101)

8. If the parent(s) requests a due process hearing to challenge the child's removal from a placement that was made for noneducational reasons by a Comprehensive Services Act team, the child shall remain in the previous IEP placement agreed upon by the parent(s) and the local educational agency prior to placement by the Comprehensive Services Act team. (34 CFR 300.2(c))

9. When a child with a disability is placed in a private school or facility that is out of state, the placement shall be processed through the Interstate Compact on the Placement of Children in accordance with the Code of Virginia. (§ 22.1-218.1 of the Code of Virginia)

**B. Placement of children by parents if a free appropriate public education is at issue.**

1. Local school divisions are not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local school division made a free appropriate public education available to the child and the parent(s) elected to place the child in a private school or facility. (34 CFR 300.148(a))

2. Disagreements between a parent(s) and a local school division regarding the availability of an appropriate program for the child and the question of financial responsibility are subject to the due process procedures of 8VAC20-81-210. (34 CFR 300.148(b))

3. If the parent(s) of a child with a disability, who previously received special education and related services under the authority of a local school division, enrolls the child in a private preschool, elementary, middle, or secondary school without the consent of or referral by the local school division, a court or a special education hearing officer may require the local school division to reimburse the parent(s) for the cost of that enrollment if the court or the special education hearing officer finds that the local school division had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a special education hearing officer or a court even if it does not meet the standards of the Virginia Department of Education that apply to education provided by the Virginia Department of Education and provided by the local school division. (34 CFR 300.148(c))

4. The cost of reimbursement described in this section may be reduced or denied: (34 CFR 300.148(d))

a. If:

(1) At the most recent IEP meeting that the parent(s) attended prior to removal of the child from the public school, the parent(s) did not inform the IEP team that they were rejecting the placement proposed by the local school division to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(2) At least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parent(s) did not give written notice to the local school division of the information described above;

b. If, prior to the parent's(s) removal of the child from the public school, the local school division informed the parent(s), through proper notice of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent(s) did not make the child available for the evaluation; or

c. Upon a judicial finding of unreasonableness with respect to actions taken by the parent(s).

5. Notwithstanding the above notice requirement, the cost of reimbursement may not be reduced or denied for the parent's(s') failure to provide the notice to the local school division if: (34 CFR 300.148(e))

a. The parent is illiterate or cannot write in English;

b. Compliance with this section would likely result in physical or serious emotional harm to the child;

c. The school prevented the parent(s) from providing the notice; or

d. The parent(s) had not received notice of the notice requirement in this section.

C. Parentally placed private school children with disabilities. The provisions of this section apply to children with disabilities who are enrolled by their parent(s) in private schools.

1. The following definitions are applicable for purposes of this subsection.

a. The term "private school" includes:

(1) Private, denominational, or parochial schools in accordance with § 22.1-254 of the Code of Virginia that meet the definition of elementary school or secondary school in subdivision 1 of this subsection;

(2) Preschool facilities that meet the definition of elementary school or secondary school in subdivision 1 of this subsection;

(3) Students who are home-tutored in accordance with § 22.1-254 of the Code of Virginia; or

(4) Students who receive home instruction in accordance with § 22.1-254.1 of the Code of Virginia.

b. The term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under state law. (34 CFR 300.13)

c. The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under state law, except that it does not include any education beyond grade 12. (34 CFR 300.36)

2. Child find. (§ 22.1-254.1 of the Code of Virginia; 34 CFR 300.130, 34 CFR 300.131(a) and (b), 34 CFR 300.132(a) and 34 CFR 300.134(a))

a. Each school division shall locate, identify, and evaluate all children with disabilities who are parentally placed in private schools located in the school division. The activities undertaken to carry out this responsibility for these children shall be comparable to activities undertaken for children with disabilities in public schools.

b. Each local school division shall consult with appropriate representatives of the private schools and representatives of parents of parentally placed private school children with disabilities on how to carry out the child find activities in order to conduct thorough and complete child find activities, including:

(1) How parentally placed private school children suspected of having a disability can participate equitably; and

(2) How parents, teachers, and private school officials will be informed of the process.

c. The child find process shall be designed to ensure:

(1) The equitable participation of parentally placed private school children; and

(2) An accurate count of these children.

3. Services plan. Each local school division shall ensure that a services plan is developed and implemented for each parentally placed private school child with a disability who has been designated to receive special education and related services under this part. (34 CFR 300.132(b))

4. Expenditures. (34 CFR 300.133)

a. To meet the requirement of the Act, each local school division shall spend the following on providing special education and related services to private school children with disabilities:

(1) For children, aged three to 21, inclusive, an amount that is the same proportion of the local school division's total subgrant under § 1411 of the Act as the number of private school children with disabilities, aged three to 21, who are enrolled by their parents in private schools located in the school division served by the school division, is to the total children with disabilities in its jurisdiction, aged three to 21; and

(2) For children, aged three to five, inclusive, an amount that is the same proportion of the local school division total subgrant under § 1419 of the Act as the number of privately placed school children with disabilities, aged three to five, who are enrolled by their parents in a private school located in the school division served by the school division, is to the total number of children with disabilities in its jurisdiction, aged three to five.

(3) If a local school division has not expended for equitable services all of the funds by the end of the fiscal year for which Congress appropriated the funds, the local school division shall obligate the remaining funds for special education and related services, including direct services, to parentally placed private school children with disabilities during a carry-over period of one additional year.

(4) Local educational agencies may supplement, but not supplant, the proportionate share amount of federal funds required to be expended in accordance with this subdivision.

b. In calculating the proportionate amount of federal funds to be provided for parentally placed private school children with disabilities, the local school division, after timely and meaningful consultation with representatives of private schools under this section, shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local school division.

c. After timely and meaningful consultation with representatives of parentally placed private school children with disabilities, the local school division shall determine the number of parentally placed private school children with disabilities attending private schools located in the local school division, and 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. The child count shall be used to determine the amount that the local school division shall spend on providing special education and related services to parentally placed private school children with disabilities in the next subsequent fiscal year.

d. Expenditures for child find activities, including evaluation and eligibility, described in 8VAC20-81-50 through 8VAC20-81-80, may not be considered in determining whether the local school division has met the expenditure requirements of the Act.

e. Local school divisions are not prohibited from providing services to parentally placed private school children with disabilities in excess of those required by this section.

#### 5. Consultation.

a. The local school division shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children. This includes: (34 CFR 300.134(a), (c), and (d))

(1) How the process will operate throughout the school year to ensure that parentally placed children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(2) How, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities;

(3) The types of services, including direct services and alternate service delivery mechanisms;

(4) How special education and related services will be apportioned if funds are insufficient to serve all parentally placed private school children; and

(5) How and when those decisions will be made, including how parents, teachers and private school officials will be informed of the process.

b. If the local school division disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local school division shall provide to the private school officials a written explanation of the reasons why the local school division chose not to provide services directly or through a contract. (34 CFR 300.134(e))

c. Following consultation, the local school division shall obtain a written affirmation signed by the representatives of participating private schools. If the representatives do not provide the affirmation within a reasonable period of time, the local school division shall forward the documentation of the consultation to the Virginia Department of Education. (34 CFR 300.135)

d. A private school official has the right to submit a complaint to the Virginia Department of Education that the local school division: (34 CFR 300.136)

(1) Did not engage in consultation that was meaningful and timely; or

(2) Did not give due consideration to the views of the private school official.

e. The private school official shall provide to the Virginia Department of Education the basis of the noncompliance by the local school division and the appropriate documentation. (34 CFR 300.136)

(1) If the private school official is dissatisfied with the decision of the Virginia Department of Education, the official may submit a complaint to the Secretary of Education, United States Department of Education by providing the information related to the noncompliance.

(2) The Virginia Department of Education shall forward the appropriate documentation to the U.S. Secretary of Education.

6. Equitable services determined. (34 CFR 300.137)

a. No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

b. Decisions about the services that will be provided to the parentally placed private school children with disabilities are made in accordance with the consultation process under subdivision 5 of this subsection and a services plan.

c. The local school division shall make the final decisions with respect to the services to be provided to eligible parentally placed private school children with disabilities.

d. The local school division shall:

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child; and

(2) Ensure that a representative of the private school attends each meeting. If the representative cannot attend, the local school division shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

7. Services provided. (34 CFR 300.138 and 34 CFR 300.132(b))

a. The services provided to parentally placed private school children with disabilities shall be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to these children do not have to meet the requirements for highly qualified special education teachers.

b. Parentally placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

c. No parentally placed private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a public school.

d. Services provided in accordance with a services plan.

(1) Each parentally placed private school child with a disability who has been designated to receive services under this subsection shall have a services plan that describes the specific special education and related services that the local school division will provide to the child in light of the services that the local school division has determined it will make available to private school children with disabilities.

(2) The services plan, to the extent appropriate, shall meet the requirements for the content of the IEP with respect to the services provided, and be developed, reviewed, and revised consistent with the requirements of this chapter for IEPs.

e. The services shall be provided:

(1) By employees of a local school division; or

(2) Through contract by the local school division with an individual, association, agency, organization, or other entity.

f. Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

8. Location of services. Services provided to a private school child with a disability may be provided on site at the child's private school, including a religious school, to the extent consistent with law. (34 CFR 300.139(a))

9. Transportation. (34 CFR 300.139(b))

a. If necessary for the child to benefit from or participate in the services provided under this part, a parentally placed private school child with a disability shall be provided transportation:

(1) From the child's school or the child's home to a site other than the private school; and

(2) From the service site to the private school or to the child's home depending on the timing of the services.

b. Local school divisions are not required to provide transportation from the child's home to the private school.

c. The cost of the transportation described in this subsection may be included in calculating whether the local school division has met the requirement of this section.

10. Procedural safeguards, due process, and complaints. (34 CFR 300.140)

a. Due process inapplicable. The procedures relative to procedural safeguards, consent, mediation, due process hearings, attorneys' fees, and surrogate parents do not apply to complaints that a local school division has failed to meet the requirements of this subsection, including the provision of services indicated on the child's services plan.

b. Due process applicable. The procedures relative to procedural safeguards, consent, mediation, due process hearings, attorneys' fees, and surrogate parents do apply to complaints that a local school division has failed to meet the requirements of child find (including the requirements of referral for evaluation, evaluation, and eligibility) for parentally placed private school children with disabilities.

c. State complaints. Complaints that the Virginia Department of Education or local school division has failed to meet the requirements of this section may be filed under the procedures in 8VAC20-81-200.

d. The dispute resolution options described in subdivisions 10 b and 10 c of this subsection apply to the local educational agency in which the private school is located. (34 CFR 300.140(b)(2))

11. Separate classes prohibited. A local school division may not use funds available under the Act for classes that are organized separately on the basis of school enrollment or religion of the students if (i) the classes are at the same site and (ii) the classes include students enrolled in public schools and students enrolled in private schools. (34 CFR 300.143)

12. Requirement that funds not benefit a private school. A local school division may not use funds provided under the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school. The local school division shall use funds provided under the Act to meet the special education and related services needs of parentally placed private school children with disabilities, but not for the needs of a private school or the general needs of the students enrolled in the private school. (34 CFR 300.141)

13. Use of public school personnel. A local school division may use funds available under the Act to make public school personnel available in nonpublic facilities to the extent necessary to provide services under this section for parentally placed private school children with disabilities and if those services are not normally provided by the private school. (34 CFR 300.142(a))

14. Use of private school personnel. A local school division may use funds available under the Act to pay for the services of an employee of a private school to provide services to a parentally placed private school child, if the employee performs the services outside of the employee's regular hours of duty and the employee performs the services under public supervision and control. (34 CFR 300.142(b))

15. Requirements concerning property, equipment, and supplies for the benefit of private school children with disabilities. (34 CFR 300.144)

a. A local school division shall keep title to and exercise continuing administrative control of all property, equipment, and supplies that the local school division acquires with funds under the Act for the benefit of parentally placed private school children with disabilities.

b. The local school division may place equipment and supplies in a private school for the period of time needed for the program.

c. The local school division shall ensure that the equipment and supplies placed in a private school are used only for purposes of special education and related services for children with disabilities and can be removed from the private school without remodeling the private school facility.

d. The local school division shall remove equipment and supplies from a private school if (i) the equipment and supplies are no longer needed for purposes of special education and related services for children with disabilities or (ii) removal is necessary to avoid unauthorized use of the equipment and supplies for purposes other than special education and related services for children with disabilities.

e. No funds under the Act may be used for repairs, minor remodeling, or construction of private school facilities.

16. Reporting requirements. Each local school division shall maintain in its records, and provide to the Virginia Department of Education, the following information related to parentally placed private school children: (34 CFR 300.132(c))

a. The number of children evaluated;

b. The number of children determined to be children with disabilities; and

c. The number of children served.

**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.

**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.

**8VAC20-81-180. Transfer of rights to students who reach the age of majority.**

A. All rights accorded to the parent(s) under the Act transfer to the student upon the age of majority (age 18), including those students who are incarcerated in an adult or juvenile federal, state, regional, or local correctional institution. (34 CFR 300.520)

B. Notification.

1. The local educational agency shall notify the parent(s) and the student of the following: (34 CFR 300.520)

- a. That educational rights under the Act will transfer from the parent(s) to the student upon the student reaching the age of majority; and
- b. That procedures exist for appointing the parent(s) or, if the parent(s) are not available, another appropriate individual to represent the educational interests of the student throughout the student's eligibility for special education and related services if the student is determined not to have the ability to provide informed consent with respect to the educational program as specified in subsection C of this section.

2. The local educational agency shall include a statement on the IEP (beginning at least one year before the student reaches the age of majority) that the student and parent(s) have been informed of the rights that will transfer to the student on reaching the age of 18. (34 CFR 300.320(c))

3. The local educational agency shall provide any further notices required under the Act to both the student and the parent(s).

4. The local educational agency may continue to invite the parent(s), as appropriate, as bona fide interested parties knowledgeable of the student's abilities, to participate in meetings where decisions are being made regarding their adult student's educational program.

5. The adult student may invite the student's parent(s) to participate in meetings where decisions are being made regarding the student's educational program.

C. A student who has reached the age of 18 years shall be presumed to be a competent adult, and thus all rights under the Act shall transfer to the adult student, unless one of the following actions has been taken:

1. The adult student is declared legally incompetent or legally incapacitated by a court of competent jurisdiction and a representative has been appointed by the court to make decisions for the student;

2. The adult student designates, in writing, by power of attorney or similar legal document, another competent adult to be the student's agent to receive notices and to participate in meetings and all other procedures related to the student's educational program. A local educational agency shall rely on such designation until notified that the authority to act under the designation is revoked, terminated, or superseded by court order or by the adult student;

3. The adult student is certified, according to the following procedures, as unable to provide informed consent. Any adult student who is found eligible for special education pursuant to this chapter and does not have a representative appointed to make decisions on the adult student's behalf by a court of competent jurisdiction may have an educational representative

appointed based on the following certification procedure to act on the student's behalf for all matters described in this chapter and to exercise rights related to the student's scholastic record. An educational representative may be appointed based on the following conditions and procedures: (34 CFR 300.520(b))

a. Two professionals (one from list one and one from list two, as set out in the following subdivisions,) shall, based on a personal examination or interview, certify in writing that the adult student is incapable of providing informed consent and that the student has been informed of this decision:

(1) List one includes (i) a medical doctor licensed in the state where the doctor practices medicine; (ii) a physician's assistant whose certification is countersigned by a supervising physician; or (iii) a certified nurse practitioner.

(2) List two includes (i) a medical doctor licensed in the state where the doctor practices medicine; (ii) a licensed clinical psychologist; (iii) a licensed clinical social worker; (iv) an attorney who is qualified to serve as a guardian ad litem for adults under the rules of the Supreme Court of Virginia; or (v) a court-appointed special advocate for the adult student.

b. The individuals who provide the certification in subdivision 3 a of this subsection may not be employees of the local educational agency currently serving the adult student or be related by blood or marriage to the adult student.

c. Incapable of providing informed consent, as used in this section, means that the individual is unable to:

(1) Understand the nature, extent and probable consequences of a proposed educational program or option on a continuing or consistent basis;

(2) Make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program as compared with the benefits or disadvantages of another proposed educational decision or program on a continuing or consistent basis; or

(3) Communicate such understanding in any meaningful way.

d. The certification that the adult student is incapable of providing informed consent may be made as early as 60 calendar days prior to the adult student's eighteenth birthday or 65 business days prior to an eligibility meeting if the adult student is undergoing initial eligibility for special education services.

e. The certification shall state when and how often a review of the adult student's ability to provide informed consent shall be made and why that time period was chosen.

f. The adult student's ability to provide informed consent shall be recertified at any time that the previous certifications are challenged. Challenges can be made by the student or by anyone with a bona fide interest and knowledge of the adult student, except that challenges cannot be made by employees of local educational agencies. Challenges shall be provided in writing to the local educational agency's administrator of special education who then shall notify the adult student and current appointed representative.

(1) Upon receipt of a written challenge to the certification by the adult student, the local educational agency may not rely on an educational representative, appointed pursuant to subsection D of this section, for any purpose until a designated educational representative is affirmed by a court of competent jurisdiction;

(2) Upon receipt of a written challenge to the certification by anyone with a bona fide interest and knowledge of the adult student, the local educational agency may not rely on an educational representative, appointed pursuant to subsection D of this section for any purpose until a more current written certification is provided by the appointed educational representative. Certifications provided after a challenge are effective for 60 calendar days, unless a proceeding in a court of competent jurisdiction is filed challenging and requesting review of the certifications. The local educational agency shall not rely upon the designated educational representative until the representative is affirmed by the court; or

4. The adult student, based on certification by written order from a judge of competent jurisdiction, is admitted to a facility for the training, treatment and habilitation of persons with intellectual disabilities in accordance with § 37.2-806 of the Code of Virginia. The state-operated program serving the adult student may rely on the judicial certification and appoint an educational representative to act on the student's behalf during the student's stay at the state-operated program.

D. If the local educational agency receives written notification of the action in subdivision C 3 of this section or if the state-operated program receives the judicial certification in subdivision C 4 of this section, the local educational agency shall designate the parent(s) of the adult student to act as an educational representative of the adult student (unless the student is married, in which event the student's adult spouse shall be designated as educational representative).

1. If the parent(s) or adult spouse is not available and competent to give informed consent, the administrator of special education or designee shall designate a competent individual from among the following:

- a. An adult brother or sister;
- b. An adult aunt or uncle; or
- c. A grandparent.

2. If no family member from the previous categories is available and competent to serve as the adult student's educational representative, then a person trained as a surrogate parent shall be appointed to serve as the educational representative by the local educational agency.

**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.

**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)

**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 nonexpedited 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 noneducational 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 nonexpedited 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 nonexpedited 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)

**8VAC20-81-220. Surrogate parent procedures.**

A. Role of surrogate parent. The surrogate parent appointed in accordance with this section represents the child in all matters relating to the identification, evaluation, or educational placement of the child; or the provision of a free appropriate public education to the child. (34 CFR 300.519(g))

B. Appointment of surrogate parents.

1. Children, aged two to 21, inclusive, who are suspected of having or determined to have disabilities do not require a surrogate parent if the parent(s) or guardians are allowing relatives or private individuals to act as a parent.

2. Unless the exception outlined in subdivision 1 of this subsection applies, the local educational agency shall appoint a surrogate parent for a child, aged two to 21, inclusive, who is suspected of having or determined to have a disability when: (34 CFR 300.519(a))

a. No parent, as defined in 8VAC20-81-10, can be identified;

b. The local educational agency, after reasonable efforts, cannot discover the whereabouts of a parent;

c. The child is a ward of the state and either subdivision 2 a or 2 b of this subsection is also met; or

d. The child is an unaccompanied homeless youth as defined in § 725(6) of the McKinney-Vento Homeless Assistance Act (42 USC § 11434 a(6)) and § 22.1-3 of the Code of Virginia and either subdivision 2 a or 2 b of this subsection is met.

3. The local educational agency shall appoint a surrogate parent as the educational representative for a child who reaches the age of majority if the local educational agency has received written notification that the child is not competent to provide informed consent in accordance with 8VAC20-81-180 C 3 or C 4 and no family member is available to serve as the child's educational representative.

4. If the child is a ward of the state, the judge overseeing the child's case may appoint a surrogate parent as the educational representative of the child. The appointed surrogate shall meet the requirements of subdivision E 1 c of this section. (34 CFR 300.519(c))

C. Procedures for surrogate parents.

1. The local educational agency shall establish procedures in accordance with the requirements of this chapter, for determining whether a child needs a surrogate parent. (34 CFR 300.519(b))

2. The local educational agency shall establish procedures for assigning a surrogate parent to an eligible child. The surrogate parent shall be appointed by the local educational agency superintendent or designee within 30 calendar days of the determination that a surrogate parent is necessary. (34 CFR 300.519(b) and (h))

a. The appointment having been effected, the local educational agency shall notify in writing:

(1) The child with a disability, aged two to 21, inclusive, as appropriate to the disability;

(2) The surrogate parent-appointee; and

(3) The person charged with responsibility for the child.

b. The surrogate parent serves for the duration of the school year for which the surrogate parent is appointed unless a shorter time period is appropriate given the content of the child's IEP.

c. If the child requires the services of a surrogate parent during the summer months, the local educational agency shall extend the appointment as needed, consistent with timelines required by law.

d. At the conclusion of each school year, the appointment of surrogate parents shall be renewed or not renewed following a review by the local educational agency.

3. Each local educational agency shall establish procedures that include conditions and methods for changing or terminating the assignment of a surrogate parent before that surrogate parent's appointment has expired. Established procedures shall provide the right to request a hearing to challenge the qualifications or termination if the latter occurs prior to the end of the term of appointment. The assignment of a surrogate parent may be terminated only when one or more of the circumstances occur as follows:

a. The child reaches the age of majority and rights are transferred to the child or to an educational representative who has been appointed for the child in accordance with the procedures in 8VAC20-81-180;

b. The child is found no longer eligible for special education services and the surrogate parent has consented to the termination of services;

c. Legal guardianship for the child is transferred to a person who is able to carry out the role of the parent;

d. The parent(s), whose whereabouts were previously unknown, are now known and available; or

e. The appointed surrogate parent is no longer eligible according to subsection E of this section.

#### D. Identification and recruitment of surrogate parents.

1. The local educational agency shall develop and maintain a list of individuals within its jurisdiction who are qualified to serve as surrogate parents. It may be necessary for the local educational agency to go beyond jurisdictional limits in generating a list of potentially qualified surrogate parents.

2. Individuals who are not on the local educational agency list may be eligible to serve as surrogate parents, subject to the local educational agency's discretion. In such situations, the needs of the individual child and the availability of qualified persons who are familiar with the child and who would otherwise qualify shall be considerations in the local educational agency's determination of surrogate eligibility. Other factors that warrant the local educational agency's attention include:

a. Consideration of the appointment of a relative to serve as surrogate parent; and

b. The appropriateness of the child's participation in the selection of the surrogate parent.

#### E. Qualifications of surrogate parents. (34 CFR 300.519(d), (e), and (f))

1. The local educational agency shall ensure that a person appointed as a surrogate:

a. Has no personal or professional interest that conflicts with the interest of the child;

b. Has knowledge and skills that ensure adequate representation of the child;

c. Is not an employee of the Virginia Department of Education, the local educational agency, or any other agency that is involved in the education or care of the child; and

d. Is of the age of majority.

2. A person who otherwise qualifies to be a surrogate parent is not an employee of the agency solely because the person is paid by the agency to serve as a surrogate parent.

3. If the child is an unaccompanied homeless youth, appropriate staff of an emergency shelter, transition shelter, independent living program, or street outreach program may be appointed as a temporary surrogate even though the staff member is an employee of an agency that is involved in the education or care of the child. The temporary surrogate shall otherwise meet the qualifications of a surrogate, and may serve only until a surrogate parent meeting all of the qualifications outlined in this section can be assigned.

F. Rights of surrogate parents. The surrogate parent, when representing the child's educational interest, has the same rights as those accorded to parents under this chapter. (34 CFR 300.519(g)).

**8VAC20-81-230. Local educational agency administration and governance.**

A. The local educational agency shall ensure that the rights and protections under this chapter are given to children with disabilities for whom it is responsible, including children placed in private schools.

B. Plans, applications, and reports. (§ 22.1-215 of the Code of Virginia; 34 CFR 300.200 and 34 CFR 300.212)

1. The local educational agency shall prepare annually and submit to the Virginia Department of Education an application for funding under Part B of the Act in accordance with the requirements outlined by the Virginia Department of Education. The annual plan shall include:

- a. Assurances that the local educational agency has in effect policies and procedures for the provision of special education and related services in compliance with the requirements of the Act, the policies and procedures established by the Virginia Board of Education, and any other relevant federal and state laws and regulations;
- b. A report indicating the extent to which the annual plan for the preceding period has been implemented;
- c. Budgets outlining the use of the federal funds; and
- d. Any revisions to the local school division's interagency agreement regarding the provision of special education and related services in a regional or local jail, if applicable, in accordance with subdivision G.2. of this section.

2. Prior to submission to the Virginia Department of Education, the annual plan shall be reviewed by the local school division's local advisory committee, and approved by the local school board. State-operated programs and the Virginia School for the Deaf and the Blind at Staunton shall submit their annual plan to the state special education advisory committee for review prior to submission to the Virginia Department of Education.

3. The local educational agency shall ensure that the annual plan, and all required special education policies and procedures, including the revisions to those policies and procedures, which are necessary for ensuring a free appropriate public education to a child, are available for public inspection.

C. Provision of or payment for special education and related services. (34 CFR 300.154(b))

1. If any public noneducational agency is otherwise obligated under federal or state law, regulation, or policy to provide or pay for any services that are also considered special education or related services that are necessary for ensuring a free appropriate public education to children with disabilities, the public noneducational agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement. A public noneducational agency may not disqualify an eligible service for Medicaid reimbursement because that service was provided in a school context.

2. If any public noneducational agency fails to provide or pay for the special education and related services described in subdivision 1 of this subsection, the local educational agency shall provide or pay for the services to the child in a timely manner. The local educational agency may then claim reimbursement for the services from the public noneducational agency that failed to provide or pay for the services and that agency shall reimburse the local educational agency in accordance with the terms of the interagency agreement described in subdivision 21 of 8VAC20-81-20.

D. Local advisory committee. A local advisory committee for special education, appointed by each local school board, shall advise the school board through the division superintendent.

1. Membership.

- a. A majority of the committee shall be parents of children with disabilities or individuals with disabilities.
- b. The committee shall include one teacher.
- c. Additional local school division personnel shall serve only as consultants to the committee.

2. The functions of the local advisory committee shall be as follows:

- a. Advise the local school division of needs in the education of children with disabilities;
- b. Participate in the development of priorities and strategies for meeting the identified needs of children with disabilities;
- c. Submit periodic reports and recommendations regarding the education of children with disabilities to the division superintendent for transmission to the local school board;
- d. Assist the local school division in interpreting plans to the community for meeting the special needs of children with disabilities for educational services;
- e. Review the policies and procedures for the provision of special education and related services prior to submission to the local school board; and
- f. Participate in the review of the local school division's annual plan, as outlined in subdivision B.2. of this section.

3. Public notice shall be published annually listing the names of committee members and including a description of ways in which interested parties may express their views to the committee.

4. Committee meetings shall be held at least four times in a school year and shall be open to the public.

E. Regional special education programs. (§ 22.1-218 of the Code of Virginia; Jointly Owned and Operated Schools and Jointly Operated Programs (8VAC20-280))

1. If it becomes necessary for local school divisions to develop regional programs to serve children with disabilities residing within their jurisdiction, such regional programs shall be

provided in accordance with the least restrictive environment requirements specified in 8VAC20-81-130.

2. If local school divisions elect to participate in an approved regional program for the provision of special education and related services for certain children with disabilities, a joint board shall be established to manage and control the jointly owned or operated program, center, or school. Establishment of the joint board and administration of the jointly owned and operated program shall be conducted in accordance with the Virginia Board of Education regulations governing such programs.

3. Each joint board shall appoint a qualified director who shall be the administrative head of the regional program. The director shall be responsible for the administration of programs and services that are approved by the joint board.

F. Transition from infant and toddler programs to early childhood special education programs. (34 CFR 300.124)

1. Children who are participating in early intervention programs under Part C of the Act and who will participate in preschool programs under Part B shall be afforded a smooth and effective transition to the preschool programs in a manner consistent with the Virginia lead agency's Part C early intervention policies and procedures.

2. The local school division shall 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), in accordance with § 1437(a)(9) of the Act, and its federal implementing regulations.

3. A child with a disability whose second birthday falls on or before September 30 may begin attending Part B preschool programs at the start of the school year if:

- a. The child meets the Part B eligibility criteria; and
- b. An IEP has been developed and signed by the parent(s).

G. Programs for children with disabilities in regional or local jails. (34 CFR 300.101 and 34 CFR 300.102)

1. Each local school division with a regional or local jail in its jurisdiction shall be responsible for the provision of special education and related services to all eligible children with disabilities incarcerated in the jail for more than 10 calendar days.

2. Each local school division with a regional or local jail in its jurisdiction shall establish an interagency agreement with the sheriff or jail administrator responsible for the regional or local jail. The interagency agreement shall address staffing and security issues associated with the provision of special education and related services in the jail. A copy of any revisions to this agreement shall be submitted with the annual plan specified in subsection B of this section.

H. Each local educational agency shall cooperate with the U.S. Department of Education's efforts under § 1308 of the ESEA to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the states, health and educational information regarding those children. (34 CFR 300.213)

I. Early Intervening Services. Each local educational agency shall implement early intervening services in accordance with the provisions of 8VAC20-81-260 H. (34 CFR 300.226)

J. Access to instructional materials.

1. Each local educational agency shall ensure that children with disabilities who need instructional materials in accessible formats are provided those materials in a timely manner. (34 CFR 300.172(b) and (c))

2. To meet the requirements of subdivision 1 of this subsection for blind persons or other persons with print disabilities, the local educational agency may coordinate with the National Instructional Materials Access Center (NIMAC). (34 CFR 300.172(a) and (c))

a. The local educational agency shall provide an assurance to the Virginia Department of Education that the local educational agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. This assurance shall be provided as part of the Annual Plan requirements outlined in subsection B of this section.

b. Each local educational agency shall inform the Virginia Department of Education on an annual basis whether or not it chooses to coordinate with the NIMAC.

c. If the local educational agency coordinates with the NIMAC, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for the purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to do the following:

(1) Require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the NIMAC electronic files containing the contents of the print instructional materials using the NIMAS; or

(2) Purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

d. The requirements of subdivision J.2.c. of this section shall apply to print instructional materials published after July 19, 2006.

3. Nothing in this subsection relieves a local educational agency of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats, but who are not included under the definition of blind or other persons with print disabilities or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner. (34 CFR 300.172(b))

4. Definitions applicable to this subsection.

a. The term "timely manner" has the same meaning as the defined in 8VAC20-81-10.

b. The term, "blind or other person with print disabilities" means children with disabilities who qualify to receive books and other publications produced in specialized formats. A child with a disability qualifies under this provision if the child meets one of the following criteria: (2 USC § 135a; 36 CFR 701.6(b)(1) and 34 CFR 300.172(a) and (e))

(1) Blind person whose visual acuity, as determined by competent authority, is 20/200 or less in the better eye with correcting glasses, or whose widest diameter of visual field subtends an angular distance no greater than 20 degrees;

(2) Person whose visual disability, with correction and regardless of optical measurement, is certified by competent authority as preventing the reading of standard printed material;

(3) Person certified by competent authority as unable to read or unable to use standard printed material as a result of physical limitation; or

(4) Person certified by competent authority as having a reading disability resulting from organic dysfunction and of sufficient severity to prevent their reading printed material in a normal manner.

c. The term "competent authority" is defined as follows: (2 USC § 135a; 36 CFR 701.6(b)(2))

(1) In cases of blindness, visual disability or physical limitations: doctors of medicine, doctors of osteopathy, ophthalmologists, optometrists, registered nurses, therapists, professional staff of hospitals, institutions, and public or welfare agencies (e.g., social workers, case workers, counselors, rehabilitation teachers, and superintendents).

(2) In the case of a reading disability from organic dysfunction: doctors of medicine who may consult with colleagues in associated disciplines.

d. The term "print instructional materials" means printed textbooks and related printed core materials that are written and published primarily for use in elementary school and secondary school instruction and are required by the Virginia Department of Education or the local educational agency for use by students in the classroom. (20 USC § 1474(e)(3)(C))

e. The term "specialized formats" has the meaning given the term in 17 USC § 121(d)(3), and means Braille, audio, or digital text that is exclusively for use by blind or other persons with disabilities, and with respect to print instructional materials, include large print formats when such materials are distributed exclusively for use by blind or other persons with disabilities. (20 USC § 1474(e)(3)(D); 34 CFR 300.172(e))

## **Part IV Funding**

### ***8VAC20-81-240. Eligibility for funding.***

A. Each local school division and state-operated program shall maintain current policies and procedures and supporting documentation to demonstrate compliance with the Act and the Virginia Board of Education regulations governing the provision of special education and related services, licensure and accreditation. Changes to the local policies and procedures shall be made as determined by local need, as a result of changes in state or federal laws or regulations, as a result of required corrective action, or as a result of decisions reached in administrative proceedings, judicial determinations, or other findings of noncompliance. Revisions to policies and procedures must be approved by local school boards for local school divisions, or the Board of Visitors for the Virginia School for the Deaf and the Blind at Staunton. State-operated programs shall submit revisions to policies and procedures to the state special education advisory committee for review. (34 CFR 300.201; 34 CFR 300.220)

B. All disbursement is subject to the availability of funds. In the event of insufficient state funds, disbursement may be prorated pursuant to provisions of the Virginia Appropriation Act.

### ***8VAC20-81-250. State funds for local school divisions.***

A. State funds to assist local school divisions with the cost of providing special education and related services for children with disabilities shall be provided through the Virginia Department of Education's appropriation as provided in this section.

B. Children with disabilities enrolled in programs operated by a local school board:

1. Public school programs. In addition to the funds received for each pupil from state basic aid, local school divisions shall receive payment to support the state share of the number of

special education teachers and paraprofessionals required by the Standards of Quality. (Chapter 13.2 (§ 22.1-253.13:1 et seq.) of Title 22.1 of the Code of Virginia)

2. Homebound instruction. Subject to availability, local school divisions shall receive funds to assist with the cost of educating students who are temporarily confined for medical or psychological reasons. Such students may continue to be counted in the average daily membership (ADM) while receiving homebound instruction. In addition, costs will be reimbursed based on the composite index, the hourly rate paid to homebound teachers by the local educational agency, and the number of instructional hours delivered. Reimbursement is made in the year following delivery of instruction. (Regulations Establishing Standards for Accrediting Public Schools in Virginia (8VAC20-131))

C. Children with disabilities enrolled in regional special education programs: (Virginia Appropriation Act; § 22.1-218 of the Code of Virginia)

1. Subject to availability, reimbursement may be made available for a portion of the costs associated with placement of children with disabilities in public regional special education programs pursuant to policies and procedures established by the Superintendent of Public Instruction or designee.

2. Such reimbursement shall be in lieu of other state education funding available for each child.

D. Applicability of least restrictive environment and FAPE provision in state-funded placements. No state-funding mechanism shall result in placements that deny children with disabilities their right to be educated with children without disabilities to the maximum extent appropriate, or otherwise result in a failure to provide a child with a disability a free appropriate public education. (34 CFR 300.114(b))

E. Children with disabilities receiving special education and related services in regional or local jails. Local school divisions are reimbursed for the instructional costs of providing required special education and related services to children with disabilities in regional or local jails. (Virginia Appropriation Act)

F. Funds under the Comprehensive Services Act for At-Risk Youth and Families. (§§ 2.2-5211 through 2.2-5212 of the Code of Virginia)

1. Funds are available under the Comprehensive Services Act to support the cost of:

- Special education and related services for children with disabilities whose IEPs specify private day or private residential placement;
- Certain nonspecial education services for children with disabilities whose Comprehensive Services Act team identifies that such services are necessary to maintain the child in a less restrictive special education setting, in accordance with Comprehensive Services Act requirements; and
- Special education and related services for children with disabilities who are placed by a Comprehensive Services Act team in a private residential placement for noneducational reasons.

2. Local school divisions shall be responsible for payment of transportation expenses associated with implementing the child's IEP.

3. Comprehensive Services Act reimbursement requirements shall be applicable.

4. When a parent unilaterally places a child with a disability in an approved private nonsectarian school for children with disabilities, the local school division shall not be responsible for the cost of the placement. If a special education hearing officer or court determines that such placement, rather than the IEP proposed by the local school division, is appropriate and no appeal is perfected from that decision, the local school division is responsible for placement and funds are available under the Comprehensive Services Act to support the costs.

G. Reimbursement shall be made for the education of children with disabilities who: (§ 22.1-101.1 B and C of the Code of Virginia)

1. Have been placed in foster care or other custodial care within the geographical boundaries of the school division by a Virginia agency;

2. Have been placed in an orphanage or children's home, which exercises legal rights; or

3. Is a resident of Virginia, and has been placed, not solely for school purposes, in a child-caring institution or group home licensed in accordance with the Code of Virginia.

**8VAC20-81-260. Federal funds.**

A. In accordance with the provisions of the Act, the Virginia Department of Education disburses the federal funds that are available under Part B of the Act to assist local educational agencies with the excess cost of providing special education and related services to eligible children with disabilities. The local educational agency shall submit an annual plan to the Virginia Department of Education describing the use of such funds in accordance with subsection B of 8VAC20-81-230. (34 CFR 300.200; 34 CFR 76.301)

B. Excess costs means those costs that are in excess of the average annual per student expenditure in a local educational agency 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, 34 CFR 300.202 and Appendix A to 34 CFR Part 300)

1. Amounts received under Part B of the Act;

2. Amounts received under Part A of Title I of the ESEA;

3. Amounts received under Parts A and B of Title III of the ESEA; or

4. Any state or local funds expended for programs that would qualify for assistance under any of the parts described in subdivision 1, 2, or 3 of this subsection but excluding any amounts for capital outlay and debt service.

A local educational agency meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities in state and local funds before funds under Part B of the Act are used. (See 34 CFR Part 300, Appendix A for an example of how excess costs shall be calculated.)

C. A local educational agency complies with the maintenance of effort requirement in establishing its eligibility for an award in a fiscal year if the local educational agency budgets the same total or per capita amount in state and local funds as it spent from the same sources to educate children with disabilities in the most recent prior year for which information is available. (34 CFR 300.203)

D. Part B funds may be used to supplement, but shall not be used to supplant state and local expenditures for special education and related services, and shall not be used to reduce the level of expenditures for the education of children with disabilities made by the local school division from the local funds below the level of those expenditures for the preceding year, except under certain conditions specified under the Act. (34 CFR 300.202 through 34 CFR 300.204)

E. The amount of Part B funds determined to be available for each local educational agency is based upon the formulas specified under the Act. (34 CFR 300.705 and 34 CFR 300.816)

F. A local educational agency may use Part B funds to implement a schoolwide program under § 1114 of the ESEA, except that the amount of Part B funds used in any fiscal year shall not exceed the amount of total Part B funds received that year, divided by the number of children with disabilities in the jurisdiction, and multiplied by the number of children with disabilities participating in the schoolwide program. Part B funds used for this purpose are not subject to other Part B funding requirements, but the local educational agency shall ensure that all children with disabilities in schoolwide program schools: (34 CFR 300.206)

1. Receive services in accordance with a properly developed IEP; and
2. Are afforded all of the rights and services guaranteed to children with disabilities under the Act.

G. Children without disabilities may benefit from the expenditure of Part B funds when special education and related services and supplementary aids and services are provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child. (34 CFR 300.208)

H. Early intervening services. (34 CFR 300.226 and 34 CFR 300.646)

1. Children who are not currently identified as needing special education or related services may need additional academic and behavioral supports to succeed in a general education environment. These supports may be in the form of early intervening services. Early intervening services apply to children in kindergarten through grade 12, with a particular emphasis on students in kindergarten through grade three.

2. To develop and implement coordinated, early intervening services, which may include interagency financing structures, a local school division may not use more than 15% of the amount the school division receives under Part B of the Act for any fiscal year. The 15% is less any amount reduced by the local school division pursuant to 34 CFR 300.205, if any, in combination with other amounts (which may include amounts other than education funds).

3. In implementing coordinated, early intervening services under this section, a local educational agency may carry out activities that include:

- a. Professional development (which may be provided by entities other than local educational agencies) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
- b. Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

8VAC20-81-270. Funds to assist with the education of children with disabilities residing in state-operated programs.

4. Nothing in this section shall be construed to either limit or create a right to a free appropriate public education under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability.
5. Each local educational agency that develops and maintains coordinated, early intervening services under this section shall annually report to the Virginia Department of Education on:
  - a. The number of children served under this section who received early intervening services; and
  - b. The number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two-year period.
6. Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.
7. The amount of funds expended by a local educational agency for early intervening services shall count toward the maximum amount of expenditures that the local educational agency may reduce when determining compliance with the requirement for maintenance of effort.
8. If the Virginia Department of Education determines significant disproportionality based on race and ethnicity is occurring in a local educational agency in the identification of children with disabilities, or the placement of identified children in a particular educational setting, the local educational agency shall:
  - a. Use 15% of its Part B funds to provide comprehensive coordinated early intervening services particularly, but not exclusively, to those groups that were significantly overidentified; and
  - b. Publicly report on the revision of policies, practices, and procedures used in the identification and placement of children with disabilities.
- I. If the Virginia Department of Education determines that a local school division is adequately providing a free appropriate public education to all children with disabilities residing in the area served by that school division with state and local funds, the department may reallocate any portion of the funds under Part B of the Act that are not needed by the school division to provide a free appropriate public education to other school divisions in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve. (34 CFR 300.705 and 34 CFR 300.817)

***8VAC20-81-270. Funds to assist with the education of children with disabilities residing in state-operated programs.***

A. State mental health facilities. State funds for education for children in state mental health facilities are appropriated to the Virginia Department of Education. Local funds for such education shall be an amount equal to the required local per pupil expenditure for the period during which a local school division has a child in residence at a state mental health facility. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the mental health facilities. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

B. State training centers for people with intellectual disabilities. State funds for special education and related services for children with disabilities in state training centers for people with intellectual disabilities are appropriated to the Department of Behavioral Health and Developmental Services. Local funds for such education shall be an amount equal to the required local per pupil expenditure for the period during which a local school division has a child in residence at a state mental retardation facility. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the centers. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

C. State specialized children's hospitals. State funds for special education and related services are appropriated to the Virginia Department of Education. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

D. Woodrow Wilson Rehabilitation Center. State funds for education for children are appropriated to the Virginia Department of Education. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

E. Regional and local juvenile detention homes. State funds for education services are appropriated to the Virginia Department of Education. (Virginia Appropriation Act; 34 CFR 300.705)

F. State-operated diagnostic clinics. State funds for the employment of educational consultants assigned to child development and other specialty clinics operated by the state Department of Health are appropriated to the Virginia Department of Education. (Virginia Appropriation Act; 34 CFR 300.705)

G. Virginia Department of Correctional Education. State funds for the education of children, including children with disabilities, are appropriated to the Virginia Department of Correctional Education for the education of all children residing in state adult or juvenile correctional facilities and juveniles committed to the Department of Juvenile Justice and placed in a private facility under contract with the Department of Juvenile Justice. Federal funds are available under the provisions of the Act. (Virginia Appropriation Act; 34 CFR 300.705)

H. The Virginia School for the Deaf and the Blind at Staunton. State funds are appropriated directly to the school to operate day and residential special education programs for children placed by local school divisions. Local funds for the education of children at the Virginia school shall be the amount equal to the local per pupil expenditure for the period in which the child is a resident of the school. Such amount shall be transferred by the Virginia Department of Education from the local school division's basic aid funds to the Virginia school. (Virginia Appropriation Act; 34 CFR 300.705)

***8VAC20-81-280. Funding, withholding, and recovery of funds.***

A. The Virginia Department of Education shall disburse funds to local educational agencies for the education of children with disabilities, aged two to 21, inclusive, when they provide documentation of compliance with state and federal laws and regulations. (34 CFR 300.200)

B. If documentation of compliance is not submitted or is inadequate, the Superintendent of Public Instruction shall provide reasonable notice to the local educational agency that state and

federal funds will not be available for reimbursement for special education programs and services. (34 CFR 300.155 and 34 CFR 300.221)

1. The notification shall include the substance of the alleged violation, and the local educational agency shall be given an opportunity to submit a written response; and

2. The local educational agency shall have the right to appeal to the Virginia Board of Education under 8VAC20-81-290.

C. Whenever the Virginia Board of Education, in its discretion, determines that a local educational agency fails to establish and maintain programs of free and appropriate public education that comply with the regulations established by the board, the board may withhold all state and federal funds for the education of eligible children with disabilities and may use the payments that would have been available to such local educational agency to provide special education, directly or by contract, to eligible children with disabilities in such manner as the board considers appropriate. (§ 22.1-214 E of the Code of Virginia)

D. If the Superintendent of Public Instruction, after reasonable notice and opportunity for a hearing under 8VAC20-81-290, finds that a local educational agency has failed to comply with the state and federal laws and regulations and determines that compliance cannot be secured by voluntary means, the Superintendent shall issue a decision in writing stating that state and federal funds for the education of eligible children with disabilities shall not be made available to that local educational agency until it complies with the state and federal laws and regulations. (34 CFR 300.155 and 34 CFR 300.222)

E. If there is evidence that a child has been erroneously classified and thereby counted as eligible for state and federal special education funds and such evidence is challenged by the local educational agency, the foregoing due process procedures shall apply. (34 CFR 300.155, 34 CFR 300.221 and 34 CFR 300.222)

F. If it is determined that such funds have been erroneously claimed, the Virginia Department of Education shall bill the local educational agency for the amount of funds improperly received and withhold an equal amount of state or federal funds for the following year if not repaid by the local educational agency. (34 CFR 300.155, 34 CFR 300.221 and 34 CFR 300.222)

G. Any local educational agency in receipt of a notice, as described in subsection B of this section, shall provide public notice to the local educational agency's jurisdiction regarding pendency of the action. (34 CFR 300.222)

***8VAC20-81-290. Appeal of administrative decision regarding funding.***

A. The Virginia Department of Education's recommendation to disapprove local eligibility for funding under the Act, or withhold state and federal funds for special education and related services, may be appealed by a local educational agency. (34 CFR 76.401 and 34 CFR 300.155)

B. The procedures for the appeal of administrative decisions are as follows: (34 CFR 76.401 and 34 CFR 300.155)

8VAC20-81-300. Use of public and private insurance.

1. The local educational agency shall request, in writing, a hearing by the Virginia Department of Education within 30 business days from the receipt of notification from the Superintendent of Public Instruction;
2. Within 10 business days from the date of request for a hearing, the Superintendent of Public Instruction shall notify the local educational agency in writing of the date, time, and location of the hearing;
3. The hearing shall be conducted within 15 business days from the date of notification;
4. The hearing shall be conducted by an independent hearing officer in conformance with the provisions of §§ 2.2-4020 and 2.2-4024 of the Code of Virginia;
5. Witnesses and attorneys may be present and testify for the Virginia Department of Education or the local educational agency;
6. A written or electronic verbatim record shall be kept of all proceedings of the hearing;
7. The hearing officer shall review all pertinent evidence presented and shall render a decision based on the preponderance of evidence presented at the hearing and on applicable state and federal law;
8. No later than 10 business days after the hearing, the hearing officer shall issue a written ruling, including findings of fact and reasons for the findings;
9. The decision made by the hearing officer shall be final unless an appeal is requested by a local educational agency;
10. If the Virginia Department of Education does not rescind its final action after a review under this subsection, the applicant may appeal to the U.S. Secretary of Education under the provisions of the Education Department General Administrative Regulations; and
11. Notice of appeal shall be filed within 20 days after the local educational agency has been notified by the Virginia Department of Education of the results of the hearing.

**8VAC20-81-300. Use of public and private insurance.**

A. Children with disabilities who are covered by public benefits or insurance. (34 CFR 300.154(d))

1. A local educational agency may use Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this chapter and as permitted under the public benefits or insurance program except as provided in subdivision 2 of this subsection.
2. With regard to services required to provide a free appropriate public education to an eligible child with a disability, a local educational agency:
  - a. Shall provide notice to the parent(s) that the local educational agency:
    - (1) May not require the parent(s) to sign up for or enroll in public benefits or insurance programs in order for their child to receive a free appropriate public education;

(2) May not require the parent(s) to incur any out-of-pocket expense, such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this section, but in accordance with subsection C of this section may pay the cost that the parent(s) otherwise would be required to pay; and

(3) May not use a child's benefits under a public benefits or insurance program if that use would:

(a) Decrease available lifetime coverage or any other insured benefit;

(b) Result in the family's paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

(c) Increase premiums or lead to the discontinuation of benefits insurance; or

(d) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.

b. Shall obtain informed parental consent each time that access to public benefits or insurance is sought, including parental consent to release educational information to the public benefits or insurance program for billing purposes in accordance with the provisions of the Management of the Student's Scholastic Record in the Public Schools of Virginia (8VAC20-150); and

c. Shall provide notice to the parent(s) that refusal to allow access to their public benefits or insurance does not relieve the local educational agency of its responsibility to ensure that all required services are provided at no cost to the parent(s).

**B. Children with disabilities who are covered by private insurance. (34 CFR 300.154(e))**

1. With regard to services required to provide a free appropriate public education to an eligible child under this chapter, a local educational agency may access a parent's private insurance proceeds only if the parent provides informed consent.

2. Each time the local educational agency proposes to access a parent's private insurance proceeds, it shall:

a. Obtain informed parental consent, including parental consent to release educational information to the private insurance program for billing purposes in accordance with the provisions of the Management of the Student's Scholastic Record in the Public Schools of Virginia (8VAC20-150); and

b. Inform the parent(s) that the refusal to permit the local educational agency to access their private insurance does not relieve the local educational agency of its responsibility to ensure that all required services are provided at no cost to the parent(s).

**C. Use of Part B funds. (34 CFR 300.154(f))**

1. If a local educational agency is unable to obtain parental consent to use the parent's private insurance, or public benefits or insurance when the parent(s) would incur a cost for a specified service required under this chapter to ensure a free appropriate public education, the local educational agency may use its Part B funds under the Act to pay for the service.

2. To avoid financial cost to a parent who otherwise would consent to use private insurance, or public benefits or insurance if the parent would incur a cost, the local educational agency may use its Part B funds to pay the costs the parent otherwise would have to pay to use the parent's benefits or insurance (e.g., deductible or co-pay amounts).

**D. Proceeds from public or private insurance. (34 CFR 80.25 and 34 CFR 300.154(g))**

1. Proceeds from public benefits or insurance or private insurance is not treated as program income for purposes of the Education Department General Administrative Regulations.

2. If a local educational agency spends reimbursements from federal funds (e.g., Medicaid) for services under this chapter, those funds are not considered state or local funds for purposes of the maintenance of effort provisions.

E. Nothing in this chapter should be construed to alter the requirements imposed on a state Medicaid agency or any other agency administering a public benefits or insurance program by federal law, regulations, or policy under Title XIX or Title XXI of the Social Security Act, or any other public benefits or insurance program. (34 CFR 300.154(h))

**8VAC20-81-310. Attorneys' fees.**

A. In any action or proceeding brought under § 1415 of the Act, the court in its discretion may award reasonable attorneys' fees as part of the costs: (34 CFR 300.517(a))

1. To the prevailing party who is the parent(s) of a child with a disability;

2. To a prevailing party who is a local educational agency or the Virginia Department of Education against the attorney of a parent who files a request for due process or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

3. To a prevailing party who is a local educational agency or the Virginia Department of Education against the attorney of a parent, or against the parent, if the parent's request for a due process hearing, or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

B. Funds under Part B may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under § 1415 and Subpart E of the Act. This section does not preclude a local educational agency from using funds under the Act for conducting an action or proceeding under § 1415 of the Act. (34 CFR 300.517(b))

C. A court awards reasonable attorneys' fees under § 1415 of the Act consistent with the following: (34 CFR 300.517(c))

1. Determination of amount of attorneys' fees. Fees awarded under § 1415 (i)(3) of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

2. Prohibition of attorneys' fees and related costs for certain services.

a. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under § 1415 of the Act for services performed subsequent to the time of a written offer of settlement to a parent(s) if:

(1) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 calendar days before the proceeding begins;

(2) The offer is not accepted within 10 calendar days; and

(3) The court or administrative special education hearing officer finds that the relief finally obtained by the parent(s) is not more favorable to the parent(s) than the offer of settlement.

b. Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or for a mediation session.

c. A resolution session convened in accordance with 8VAC20-81-210 will not be considered:

(1) A meeting convened as a result of an administrative hearing or judicial action; or

(2) An administrative hearing or judicial action for purposes of this subsection.

3. Exception to prohibition on attorneys' fees and related costs. Notwithstanding subdivision 2 of this subsection, an award of attorneys' fees and related costs may be made to a parent(s) who is the prevailing party and who was substantially justified in rejecting the settlement offer.

4. Reduction of amount of attorneys' fees. Except as provided in subdivision 5 of this subsection, the court reduces, accordingly, the amount of the attorneys' fees awarded under this chapter if the court finds that:

a. The parent(s), or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

b. The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

c. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

d. The attorney representing the parent(s) did not provide to the local educational agency the appropriate information in the request for a due process hearing in accordance with this chapter.

5. Exception to reduction in amount of attorneys' fees. The provisions of subdivision 4 of this subsection do not apply in any action or proceeding if the court finds that the Virginia Department of Education or the local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of § 1415 of the Act.

## **Part V**

### **Additional Responsibilities of State Boards, Agencies, and Institutions for Education and Training of Children with Disabilities in Residence or Custody**

#### ***8VAC20-81-320. Additional responsibilities of state boards, agencies, and institutions for education and training of children with disabilities in residence or custody.***

A. Provision of education to children with disabilities in residence or custody.

1. Each state board, agency, and institution having children with disabilities in residence or custody shall provide education pursuant to standards, policies and procedures established by the Virginia Board of Education that is comparable to that provided to children with disabilities in the public school system.

a. The Department of Correctional Education shall establish and maintain schools for persons committed to the state, regional or local correctional facilities operated by the Department of Corrections and the Department of Juvenile Justice and for persons committed to the Department of Juvenile Justice and placed in a private facility under contract with the Department of Juvenile Justice. (§§ 22.1-7 and 22.1-340 of the Code of Virginia)

b. The Superintendent of Public Instruction shall approve the education programs at the Virginia School for the Deaf and the Blind at Staunton. (§§ 22.1-7, 22.1-347, and 22.1-348 of the Code of Virginia)

c. The Department of Behavioral Health and Developmental Services has responsibility for providing the education and training to children with mental retardation in residence in its institutions. The Virginia Board of Education shall supervise the education and training provided to school-age residents in state mental retardation facilities. (§ 22.1-7 of the Code of Virginia)

d. The Virginia Board of Education shall provide for and direct the education of school-age residents in state mental health facilities in cooperation with the Department of Behavioral Health and Developmental Services. (§§ 22.1-7 and 22.1-209.2 of the Code of Virginia)

e. The Virginia Board of Education shall prepare and supervise the education and training provided to children in regional and local detention homes. (§§ 22.1-7 and 22.1-209.2 of the Code of Virginia)

f. The Virginia Board of Education shall supervise the evaluation, education, and training provided to school-age children by the Virginia Department of Health and to school-age children in the teaching hospitals associated with the Eastern Virginia Medical Center, the Virginia Commonwealth University Health System Authority, and The University of Virginia Hospitals. (§§ 22.1-7 and 22.1-209.2 of the Code of Virginia)

2. The procedures outlined in 8VAC20-81-230 are applicable to each state board, agency, and institution having children with disabilities in residence and custody. (§ 22.1-7 of the Code of Virginia)

B. Annual program plan. Each state board, agency, and institution having responsibility for providing such education and training shall submit annually to the Virginia Department of Education for approval by the Virginia Board of Education its program plan for the education and training for children with disabilities in residence or custody. This program plan, to be submitted by the date and in the manner specified by the Virginia Board of Education, shall include the provisions and assurances as specified in 8VAC20-81-230.

1. In addition, the program plan shall include the following:

a. The educational objectives of the state board, agency, or institution;

b. Strategies for achieving the educational objectives, including an organized program for staff development;

c. A system of communication between educational and other personnel, including treatment and residential care staff, to ensure coordination of program objectives;

d. A system of communication to ensure service continuity in the transition of the student into and out of the educational program of the facility and, where applicable, the requirements for reenrollment of juveniles committed to the Department of Juvenile Justice, as provided for in the Code of Virginia; (§§ 16.1-293 and 22.1-289 E of the Code of Virginia)

e. An assessment plan for determining the extent to which the objectives have been achieved including, where practicable, follow-up studies of former students to assist in annual program evaluation;

f. A system of communication between the state board, agency, or institution and its employees, whereby the views of all educational employees may be received in an orderly and constructive manner;

g. A cooperatively developed procedure for the evaluation of educational personnel; and

h. The grievance procedures regarding educational personnel as prescribed by the state or the appropriate local agency or board.

2. At least 5-1/2 hours of education/training per school day or 27-1/2 hours per school week available for each student to implement the student's IEP.

a. If a student has a medical or physical condition that requires modification of the school schedule, a waiver statement shall be placed on file.

b. This waiver statement shall document the physical or mental condition of the individual student that requires significant modification of this schedule, and personnel from the following facilities shall file statements of concurrence:

(1) The attending physician -- the Department of Behavioral Health and Developmental Services facilities;

(2) The central review committee, institute review committee or Department of Juvenile Justice physician or psychologist for medical or psychological conditions, with a waiver statement signed by the Department of Juvenile Justice security staff or designee for safety or security conditions -- the Department of Correctional Education;

(3) The physician, staffing committee or principal -- the Virginia School for the Deaf and the Blind at Staunton;

(4) The center counselor upon recommendation of the staffing committee -- Woodrow Wilson Rehabilitation Center;

(5) The attending physician -- state medical facilities;

(6) The detention superintendent or designee -- juvenile detention homes.

3. The Virginia School for the Deaf and the Blind at Staunton shall provide for each age group of children a planned dormitory and a student-life program, including social and daily living skills, recreation, and cultural activities.

#### C. Staff and facility.

1. Each state board, agency or institution shall assign personnel to the educational program who are appropriately and adequately prepared and trained, including having the knowledge and skills to serve children with disabilities, and as follows: (34 CFR 300.156)

a. Administrative, supervisory, instructional, support and ancillary personnel holding valid professional licenses, certificates and endorsements as appropriate in the area of assignment (national standards may apply in the absence of state licensure or certification requirements).

b. Additional education personnel to provide required related services as delineated in the child's IEP. Related services providers must be qualified consistent with the requirements of subdivision 19 a of 8VAC20-81-20.

c. Paraprofessionals who are trained and supervised in accordance with the requirements of the Board of Education.

2. Each state board, agency or institution shall staff the educational program as follows:

a. A principal, supervisor, education director, or lead teacher for the educational program provided at each school or institution, except for juvenile detention homes;

b. Instructional personnel sufficient to maintain pupil-teacher ratios not to exceed the following:

(1) Emotional disability - one teacher for every eight children or one teacher and one paraprofessional for every 10 children;

(2) Hearing impairment/deaf - one teacher for every seven children with one paraprofessional for every three classroom teachers; at the Virginia School for the Deaf and the Blind at Staunton - one teacher for every eight children or one teacher and one paraprofessional for every 10 children;

(3) Intellectual disability - one teacher and one paraprofessional for every 10 children;

- (4) Visual impairment - one teacher for every seven children and one paraprofessional for every three classroom teachers;
- (5) Other health impairment - one teacher for every eight children or one teacher and one paraprofessional for every 10 children;
- (6) Orthopedic impairment - one teacher for every eight children or one teacher and one paraprofessional for every 10 children;
- (7) Specific learning disability - one teacher for every eight children or one teacher and one paraprofessional for every 10 children;
- (8) Multiple disabilities or deaf-blindness - one teacher and one paraprofessional for every six children or one teacher and two paraprofessionals for every 10 children;
- (9) Autism - one teacher for every six children or one teacher and one paraprofessional for every eight children;
- (10) Traumatic brain injury - students may be placed in any program, according to the student's IEP;
- (11) Department of Correctional Education - no greater than an average of one teacher and one paraprofessional for every 10 children;
- (12) Woodrow Wilson Rehabilitation Center - no greater than an average of one teacher for every 10 children; and
- (13) Juvenile detention homes - one teacher for every 12 beds, based on the bed capacity of the facility. If the number of students exceeds the bed capacity, then the ratio shall be one teacher for every 12 students based on the average daily attendance from the previous school year. If unusual or extenuating circumstances exist, the agency may apply to the Superintendent of Public Instruction for an exception to the ratio requirements. Such requests shall be supported by sufficient justification.

3. Each facility shall have available adequate and appropriate classroom space, a library, and instructional materials and supplies to meet the educational needs of the children.

## **Part VI**

### **Compliance with §504 of the Rehabilitation Act of 1973, as Amended**

#### ***8VAC20-81-330. Compliance with §504 of the Rehabilitation Act of 1973, as amended.***

A. Each state-operated program providing educational services to persons of school age and the Virginia School for the Deaf and the Blind at Staunton shall provide a free appropriate public education to each qualified person with a disability of school age and provide procedural safeguards in accordance with the Virginia Department of Education's 504 plan. (34 CFR 104.33)

B. Local educational agencies are required to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints. In meeting the due process portion of this requirement, local educational agencies may utilize the due process hearing system specified in 8VAC20-81-210 to resolve disputes regarding the identification, evaluation, or educational placement of qualified persons who have a disability. If this procedure is selected, the local school system is responsible for 100 percent of the reimbursement costs to the special education hearing officer and any other costs incurred and requested by the special education hearing officer or school division. The Virginia Department of Education trains special education hearing officers on 504 requirements. (34 CFR 104.7 and 34 CFR 104.36)

**8VAC20-81-340. Special education caseload staffing requirements.**

Figure 1: Local school division caseload maximums as funded by the Virginia Appropriation Act.

Disability Category	Level II		Level I
	With Paraprofessional 100% of the time	Without Paraprofessional 100% of the Time	
Autism	8	6	24
Deaf-blindness	8	6	
Developmental Delay: age 5-6	10	8	
Developmental Delay: age 2-5	8 Center-based 10 Combined	12 Home-based and/or Itinerant	
Emotional Disability	10	8	24
Hearing Impairment/Deaf	10	8	24
Intellectual Disability	10	8	24
Learning Disability	10	8	24
Multiple Disabilities	8	6	
Orthopedic Impairment	10	8	24
Other Health Impairment	10	8	24
Speech or Language Impairment	NA	NA	68 (Itinerant)
Traumatic Brain Injury	May be placed in any program, according to the IEP.		
Combined group of students needing Level I services with students needing Level II services	20 Points (see Figure 2)		

Figure 2: Values for students receiving Level I services when combined with students receiving Level II services.

Disability Category	Level II Values		Level I
	With Paraprofessional 100% of the time	Without Paraprofessional 100% of the time	Values
Autism	2.5	3.3	1
Deaf-blindness	2.5	3.3	1
Developmental Delay: age 5-6	2.0	2.5	1
Emotional Disability	2.0	2.5	1
Hearing Impairment/Deaf	2.0	2.5	1
Intellectual Disability	2.0	2.5	1
Learning Disability	2.0	2.5	1
Multiple Disabilities	2.5	3.3	1
Orthopedic Impairment	2.0	2.5	1
Other Health Impairment	2.0	2.5	1
Traumatic Brain Injury	2.0	2.5	1

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