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Fast-Track Regulation Agency Background Document

Agency name	Virginia Board of Education
Virginia Administrative Code (VAC) Chapter citation(s)	8VAC20-81-170
VAC Chapter title(s)	<i>Regulations Governing Special Education Programs for Children with Disabilities in Virginia</i>
Action title	Fast-Track Regulatory Action to Strike "Component" and Align Regulatory Language with Federal Requirements
Date this document prepared	October 29, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 109](#) of the Acts of the Assembly, which directed the Board of Education to amend [8VAC20-81-170](#) B 2 a and e to remove the word "component" following the word "evaluation." At its meeting on September 23, 2021, the Board approved an exempt action ("Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia," effective November 24, 2021) to amend the regulation as required by the legislation.

However, the legislation did not strike similar language from 8VAC20-81-170 B 4, and so amending B 4 would have been inappropriate for the exempt action. The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](#). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 in order to align the current regulation with applicable federal regulations.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

None

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The Board approved "Fast-Track Regulatory Action to Strike 'Component' and Align Regulatory Language with Federal Requirements" on November 18, 2021.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

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Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The Board's overall regulatory authority is found in § [22.1-16](#) of the Code of Virginia, which states that "[t]he Board of Education may adopt bylaws for its own government and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title."

The Board’s regulatory authority over special education programs for children with disabilities is found in § [22.1-214.A](#) of the *Code of Virginia*, which states in part that “[t]he Board of Education shall prepare and supervise the implementation by each school division of a program of special education designed to education and train children with disabilities” Section [22.1-214.B](#) further states that “[t]he Board of Education shall prescribe procedures to afford due process to children with disabilities and their parents or guardians and to school divisions in resolving disputes as to program placements, individualized education programs, tuition eligibility and other matters as defined in state or federal statutes or regulations.”

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it’s intended to solve.

The rationale and goal of the regulatory change is to maintain the internal consistency the Board’s regulations and also to ensure that the Board’s regulations align with federal regulations.

The regulatory change is essential to protect the health, safety, and welfare of citizens by ensuring adequate and proper due process protections to children with disabilities and those seeking educational services.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](#). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 a in order to align the current regulation with applicable federal regulations.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantage of the regulatory action to the public and the agency/Commonwealth is that the change will ensure adequate and proper due process protections to children with disabilities and those seeking educational services. There are no disadvantages to the regulatory change nor are there other pertinent matters of interest to the regulated community, government officials, or the public.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no requirements in the current regulatory action that are more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

This change will not affect other state agencies.

This regulatory change will affect school divisions. However, school divisions are already required to follow the Board's regulations.

This regulatory change will not affect other entities.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>It is not anticipated that this regulatory change will affect agency operations or resources.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>It is not anticipated that this regulatory change will affect other state agencies.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The benefit of the regulatory change is to maintain the internal consistency the Board's regulations and also to ensure that the Board's regulations align with federal regulations.</p>

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	It is anticipated that any costs associated with implementation would be absorbed within existing operational resources.
Benefits the regulatory change is designed to produce.	The benefit of the regulatory change is to maintain the internal consistency the Board's regulations and also to ensure that the Board's regulations align with federal regulations.

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	It is not anticipated that this regulatory change will affect other entities.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	It is not anticipated that this regulatory change will affect other entities.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	It is not anticipated that this regulatory change will affect other entities.
Benefits the regulatory change is designed to produce.	It is not anticipated that this regulatory change will affect other entities.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

There are no alternatives to the regulatory change.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

There are no alternatives to the regulatory change.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

As required by § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted Jim Chapman by email to jim.chapman@doe.virginia.gov or by mail to the following address:

Jim Chapman
James Monroe Bldg.
101 N. 14th St, 25th Floor
Richmond, VA 23219

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
8VAC20-81-170 B 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))"	The proposed change will strike the words "for an evaluation component," which is consistent with the change required by the General Assembly to 8VAC20-81-170 B 2 a and e.
8VAC20-81-170 D 3 e		"Opportunity to present and resolve complaints through the due process procedures"	<p>The proposed change will amend the current language to read as follows:</p> <p>"Opportunity to present and resolve complaints through the due process <u>complaint and state complaint</u> procedures, <u>including</u>;</p> <p>(1) <u>The time period in which to file a complaint;</u></p> <p>(2) <u>The opportunity for the local educational agency to resolve the complaint; and</u></p> <p>(3) <u>The difference between the due process and the state complaint procedures, including the applicable jurisdiction of each procedure, potential issues, filing and decisional timelines for each process, and relevant procedures.</u>"</p> <p>The proposed change brings the current regulatory language into alignment with 34 CFR § 300.504(c)(5).</p>

8VAC20-81-170 D 3 m			The proposed change will strike this subsection since the requirement is being rolled into D 3 e.
8VAC20-81-170 G 10 a		<p>“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).”</p>	<p>The proposed change will amend the current language to read as follows:</p> <p>“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 <u>without parental consent</u> under the Family Education Rights and Privacy Act. (20 USC § 1232g).”</p> <p>The proposed change brings the current regulatory language into alignment with 34 CFR § 300.622(a).</p>