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Exempt Action: Final Regulation Agency Background Document

Agency name	State Board of Education
Virginia Administrative Code (VAC) Chapter citation(s)	8 VAC20-81
VAC Chapter title(s)	Regulations Governing Special Education Programs for Children with Disabilities in Virginia
Action title	Regulatory Changes to Align with the 2024 Differentiated Monitoring and Support Report
Final agency action date	March 28, 2024
Date this document prepared	March 18, 2024

This information is required for executive branch review pursuant to Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19. In addition, this information is required by the Virginia Registrar of Regulations pursuant to the Virginia Register Act (§ 2.2-4100 et seq. of the Code of Virginia). Regulations must conform to the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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.

On March 13, 2024, the U.S. Department of Education's Office of Special Education Programs ("OSEP") issued a [Differentiated Monitoring and Support Report](#) ("DMS Report"), which identified areas where the Board's regulations were noncompliant with the federal Individuals with Disabilities Education Act ("IDEA"), P.L. 108-406, December 3, 2004, § 1400 et seq (34 C.F.R. § 300.4).

In the [DMS Report](#), OSEP made the following findings:

- The state definitions of "complaint" and "due process hearing" in 8VAC20-81-10 are restricted to a violation by a local educational agency ("LEA") rather than a "public agency," which is inconsistent with 34 C.F.R. §§ 300.33, 300.153(b), and 300.507(b);

- The state definitions of “calendar day” and “business day” in 8VAC20-81-10 are inconsistent with 34 C.F.R. § 300.11(a) and (b);
- The procedure of requiring parties to sign a confidentiality pledge prior to the commencement of mediation, as permitted in 8VAC20-81-190(E)(3) is inconsistent with 34 C.F.R. § 300.506(b)(8) and OSEP guidance;
- 8VAC20-81-200(B)(3) requires that a state complaint “contain a statement that a local educational agency has violated the Act or these special education regulations,” which is inconsistent with 34 C.F.R. §§ 300.33 and 300.153(b);
- 8VAC20-81-200(B)(7) requires that a complaint “contain all relevant information and supporting documentation,” which is inconsistent with 34 C.F.R. § 300.153(b);
- 8VAC20-81-200(D)(1)(c) does not allow for a case-by-case determination as to whether non-personally identifiable information can be shared with a non-parent complainant, which is inconsistent with 34 C.F.R. § 300.152(a)(5);
- 8VAC20-81-210(A) applies only to LEAs or “school divisions” rather than all of the entities listed under the IDEA’s “public agency” definition as required by 34 C.F.R. §§ 300.33 and 300.507;
- 8VAC20-81-210(P)(9)(b) permits the state educational agency (“SEA”) to provide approval for an extension of the due process hearing timeline when neither party requests an extension of time, which is inconsistent with the requirements in 34 C.F.R. § 300.515(a) and (c).

In response to the findings in the [DMS Report](#), the Board is making the following regulatory changes:

- Amending the definitions of “business day,” “calendar day,” and “complaint” in 8VAC20-81-10 to align with federal regulations and OSEP guidance;
- Adding a definition of “public agency” to 8VAC20-81-10 to address OSEP concerns about 8VAC20-81-200 and 8VAC20-81-210;
- Amending 8VAC20-81-190(A) to clarify that mediation is available “to parties to any dispute arising under the Act”;
- Striking the last sentence from 8VAC20-81-190(E)(3) to align with federal regulations and OSEP guidance;
- Amending 8VAC20-81-200(B)(3) so that complaints require a statement that a “public agency,” rather than only a LEA, has violated the Act or 8VAC20-81;
- Striking 8VAC20-81-200(B)(7) to align with federal regulations and OSEP guidance;
- Amending 8VAC20-81-200(D)(1)(c) to require VDOE to determine on a case-by-case basis what information must be withheld when resolving a complaint filed by someone other than the child’s parent and the parent has not consented to the release of the child’s personally identifiable information;
- Replacing the uses of “local educational agency” with “public agency” 8VAC20-81-200(C), (D), (F), and (G) to ensure consistency with federal regulations and OSEP guidance;
- Amending 8VAC20-81-210(A) so that the due process system is available to resolve disputes between parents and public agencies, rather than just LEAs;
- Striking 8VAC20-81-210(P)(9)(b) to align with federal regulations and OSEP guidance;
- Replacing the uses of “local educational agency” with “public agency” 8VAC20-81-210(E)(1), (E)(2), (N), and (O)(17)(c) to ensure consistency with federal regulations and OSEP guidance; and
- Replacing the use of “school division” with “local educational agency” in 8VAC20-81-210(N)(16)(a) for consistency.

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, internal staff review, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “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.”

The changes are necessary to meet the requirements of federal law or regulation and so are exempt under § 2.2-4006(A)(4)(c). The [DMS Report](#) cited specific areas where the Board's regulations are noncompliant with the federal IDEA, as stated above.

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 these regulatory changes on March 28, 2024.