



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	20
VAC Chapter Number:	80
Regulation Title:	Regulations Governing Special Education Programs for Children with Disabilities in Virginia
Action Title:	Final regulations
Date:	November 3, 2000

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

The regulations reflect the requirements of federal law (the *Individuals with Disabilities Education Act (IDEA)*, effective June 4, 1997) and regulations (34 CFR Part 300, effective May 11, 1999). Changes to the proposal published in the Virginia Register of Regulations were made in response to public comment, further directions from the United States Department of Education, and actions of the 2000 Virginia General Assembly.

The regulations contain provisions governing:

- Responsibilities of the Virginia Department of Education;
- Responsibilities of local school divisions and state operated programs;
- Requirements associated with child find, evaluation, eligibility and provision of services to children with disabilities.
- Procedural safeguards, including notice requirements, complaints, mediation and due process;
- Funding.

These regulations were subjected to public comment on two occasions: a 60 day public comment period (January 17 – March 17, 2000) and an additional 30 day comment period (August 27 – September 27, 2000).

The proposed regulations were carefully reviewed and revised in response to the comments expressed by the public. The revisions to the proposed regulations reflect public comments; directions from the

United States Department of Education that were received after the proposed regulations were approved for comment by the Board of Education in July 1999 and in actions of the 2000 Virginia General Assembly. Many of the changes were made in response to public comment that suggested different interpretations of the regulatory language. Other changes include:

- Insertion of a child study committee during the referral process;
- Creation of a “departmentalized” staffing plan;
- Creation of a mechanism to appeal a decision on a complaint;
- Availability of evaluation reports to parents 2 business days before the eligibility meeting;
- Permits parents to audio record IEP meetings.

These regulations incorporate the requirements of the *Special Education Program Standards* (8 VAC 20-570-10 et seq.) that have not previously been incorporated into other Board of Education regulations. The *Special Education Program Standards* will be rescinded upon final approval of these regulations.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The Board of Education adopted the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* on October 19, 2000.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

Basis: The *Individuals with Disabilities Education Act* (IDE 20 USC §§1400 et seq.), effective June 4, 1997) and regulations (34 CFR Part 300, effective May 11, 1999).
Title 22.1, *Code of Virginia*, §22.1-16, §22.1-214

Virginia is required to conform its regulations with the IDEA statute and regulations in order to receive federal funding. In 2000-01, the total estimated IDEA funding Virginia will be receiving is \$122 million, with \$114 million flowing directly to localities. (The remainder funds Virginia Department of Education training and technical assistance to local school divisions and compliance and monitoring requirements.)

The Virginia regulations minimally exceed federal regulations. In the few instances where Virginia regulations do not mirror federal regulations, the difference can be attributed to the following:

- Those aspects of special education that are given to the states to establish (e.g., caseload standards, timelines, use of a child study committee)

- Those aspects of special education that are set forth in the Code of Virginia (e.g., services begin at age 2)
- Long-standing aspects of Virginia special education that reflect parental rights (e.g., consent to termination of services, Local Advisory Committees), many of which were created in response to public comment in previous revisions to the regulations.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of these regulations is to align Virginia's special education regulations with the federal *IDEA* regulations that were issued on March 12, 1999 to ensure Virginia's continued eligibility for federal special education funding (\$122 million in 2000-01).

The revision incorporates provisions of the *Code of Virginia* as well as other regulations that apply to the provision of special education programs and strives to clarify areas of ambiguity in the previous regulations.

The regulations are essential to protect the health, safety or welfare of students with disabilities in Virginia. By ensuring that Virginia's regulations comport with federal law and regulations, we ensure that students with disabilities in the Commonwealth have available a free appropriate public education and are afforded the procedural safeguards and protections guaranteed by federal law.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The following identifies substantive changes made to the proposed regulations:

- Insertion of a child study committee during the referral process. Public comment requested that this process be reinserted.
- Creation of a "departmentalized" staffing plan. School divisions requested this model be incorporated to enable students to be taught by more than one teacher.
- Creation of a mechanism to appeal a decision on a complaint.. Both educators and parents requested an appeal.
- Modify the definition of developmental delay to enable local educational agencies the choice to use the term for children aged 5 – 8, in response to comment and maintaining conformity with federal regulations.
- Establish a single mediation system in Virginia, rather than both state and local systems, in response to direction from the U.S. Dept. of Education.
- Modified the due process hearing process, in response to comments.

- Require local educational agencies to make evaluation reports available to parents 2 business days before the eligibility meeting, in response to comments.
- Permit parents to audio record IEP meetings.
- Establishes residence for children with disabilities placed in nursing homes or group homes, under specific conditions.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term “issues” means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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, please include a sentence to that effect.

Regulatory changes are being proposed in order to ensure that Virginia's special education regulations conform with federal special education regulations that were issued on March 12, 1999. Additionally, changes have been proposed to incorporate provisions of the *Code of Virginia* and the *Special Education Program Standards*, as well as other regulations that apply to the provision of special education programs and to clarify areas of ambiguity in the previous regulations.

Advantages to the Public: These regulations will ensure that Virginia's special education regulations comport with federal law thus ensuring that students with disabilities have available a free appropriate public education and are afforded the procedural safeguards and protections guaranteed by federal law. Local school divisions will receive \$114 million in funds to support special education programs.

Disadvantages to the Public: There are no identifiable disadvantages to the general public.

Advantages to the Agency: The Virginia Department of Education is required to revise these regulations in order to comport with the 1997 amendments to the Individuals with Disabilities Education Act and its implementing regulations in order to receive federal funding to support special education programs and services in Virginia. If these regulations are revised to comport with the federal special education regulations, the Virginia Department of Education will receive \$122 million in federal funding of which approximately 90% is passed on to local school divisions and state operated programs to help offset the excess cost of special education.

Disadvantages to the Agency: There are no identifiable disadvantages to revising these regulations in this manner because if these regulations are not revised to comport with federal special education regulations, the Virginia Department of Education will lose the \$122 million in federal funding.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

The revisions to the proposed regulations reflect public comments; directions from the United States Department of Education that were received after the proposed regulations were approved for comment

by the Board of Education in July 1999 and in actions of the 2000 Virginia General Assembly. Many of the changes were made in response to public comment that suggested different interpretations of the regulatory language.

Examples of changes made in response to the USDOE include:

- Statement that children do not have to be classified by a disability.
- Statement that children may be eligible for special education even if they are advancing from grade to grade.

Examples of changes made in response to public comment include:

- Insertion of a child study committee during the referral process.
- Creation of a “departmentalized” staffing plan.
- Creation of a mechanism to appeal a decision on a complaint.

Examples of changes made in response to the 2000 Virginia General Assembly include:

- Change in name of the Virginia School for the Deaf, the Blind, and the Multi-Disabled.
- Change in class size in detention homes.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

The Virginia Department of Education received 1768 communications in the form of letters (1490), E-mail (168), and comments made during six public hearings (110). The majority of the letters and E-mails were either modeled after a school board attorney’s review of the proposed regulations that was provided to the Virginia School Boards Association and local school divisions or a review conducted by the State Special Education Advisory Committee or the Virginia Coalition for Students with Disabilities. Of the 1658 letters and E-mails, only 315 were independent letters, expressing ideas differently than those in the “form” letters.

Comments were received from local school division personnel (1210); and parents (200), advocates (46), and attorneys (8) representing students with disabilities; and other sources, including citizens (216), professional organizations (13), private schools (10), interpreters (10), state personnel, and others. The overarching concern of the local educational agencies appeared to be that the Board of Education’s special education regulations exceed federal regulations, thus imposing additional requirements on school divisions that are not mandated by the Individuals with Disabilities Education Act (IDEA). Parents, on the other hand, appeared most concerned about preserving the rights they have been accorded under Virginia’s regulations for many years and strengthening their rights in accordance with IDEA..

The following list represents the areas of most concern to local educational agencies:

- Age of eligibility – stated that the age in the proposed regulations exceeds federal requirements and that the change from September 30 to August 1 would require the provision of services for an additional year.
- Child Study Committee – requested that the proposed school based committee be replaced by the child study committee that is currently in use.

- Comprehensive Services Act (CSA) – requested the removal of references to CSA because of concerns that local educational agencies will be required to fund placements that have been made by other agencies or are non-educational in nature..
- Consent – requested that the requirements regarding parental consent in the proposed regulations that exceed federal regulations be removed. Local educational agencies are most concerned about parental consent for termination of special education and related services.
- Departmentalized programs – requested that this model of services be restored to the regulations.
- Discipline – believe this section of the proposed regulations exceeds federal regulations and requested that the proposed regulations mirror the federal regulations.
- Documentation – stated that too many requirements regarding the documentation of decisions and deliberations have been included in the proposed regulations and requested that they be removed.
- Due process hearings – believe the requirement in the proposed regulations that local educational agencies must implement the order of a local hearing officer regarding a change in a student's placement during the pendency of an appeal exceeds federal requirements and requested that it be removed.
- Insurance – requested removal of the section on insurance from the regulations.
- Jails – believe that the education of students in jails should be the state's responsibility.
- Tape recording of IEP meetings – supported the proposed regulatory provision giving local educational agencies the authority to determine whether to permit tape recording.
- Timelines – believe that some of the timelines in the proposed regulations are too short to permit time to complete required tasks effectively.
- Transfer of rights – believe these provisions are too complicated and confusing.

The following list represents the areas of most concern to parents, advocates and attorneys for students with disabilities:

- Complaints – believe that the complaint system should be changed to a process that more closely resembles the due process hearing process.
- Consent – believe that the Board of Education has removed some parental consent rights in the proposed regulations and wish parental rights to be strengthened.
- Due process hearings – believe that the due process system needs to be changed, that there are too many special education hearing officers who are not well versed in special education law and who make incorrect decisions. Advocated for fewer hearing officers, increased training, testing to determine knowledge of special education law.
- Evaluation reports – requested inclusion of a requirement that school divisions provide parents with copies of evaluation reports from 2-5 days prior to any meetings that will be held to discuss the reports.
- Length of school day – requested that the language regarding the provision of a 5.5 hour school day to preschoolers be strengthened.
- Placement – requested that the IEP team be restored as the team that determines placement.
- Timelines – requested that the Board of Education shorten the timeline for determination of eligibility and preparation of the student's IEP to 60 calendar days.

- Tape recording of IEP meetings – requested that the proposed regulations be changed to require school divisions to permit the tape recording of meetings.

Second Public Comment Period

The Board of Education invited an additional 30-day public comment period on the proposed revisions to the Virginia Special Education Regulations. Notice was published in the August 28, 2000 edition of the *Virginia Register of Regulations*, posted on the Virginia Department of Education web page, and sent to the 3640 persons on the Office of Special Education and Student Services' mailing list.

A total of 87 comments were received, with the following breakdown:

34 responses from public educators	53 responses from parents and citizens
20 special education directors, 5 psychologists, 8 from local school board chair, assistant superintendents, special education teacher, attorney, others (8 were from one school division)	20 parents, 19 citizens, 6 advocacy organizations, 8 others (attorney, state agency, higher education faculty, physician, professional organization)

Over 900 issues were presented by the 87 comments, with over 11% of the issues raised by the Coalition for Students with Disabilities. Twenty-two persons indicated their support for the Coalition's comments.

Agency Response: The Department made changes to the regulations in response to most of the comments provided. However, in some circumstances the changes requested could not be made, as the changes would result in a violation of federal or state law or other regulation.

A balance was sought between adhering to federal regulations and providing as much flexibility as possible for local educational agencies and maintaining parental rights. In many cases, no change was made as to implement a change requested by one party would be contrary to the wishes of another party.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

The following list reflects the changes made in response to public comment, direction from the U.S. Department of Education, or the 2000 General Assembly.

8 VAC 20-80-10 Definitions.

- Date for upper age of eligibility changed back to September 30 from August 1.
- Deleted definitions no longer needed.
- Added definitions for chapter, behavioral intervention plan, functional behavioral assessment, and manifestation determination review.
- Modified the definitions for audiologist, extended school year, home instruction, home tutoring, homebound instruction, independent educational evaluation, interpreting, parents.
- Deleted public agency as this federal term is captured by the term "local educational agency" in Virginia.

8 VAC 20-80-30 Functions of the Virginia Department of Education.

- Clarified that if the Virginia Department of Education provides direct services it will comply with state statutes and regulations.
- Identified that the members of the State Special Education Advisory Committee are to be appointed by the Board of Education.

8 VAC 20-80-40 Responsibility of local school divisions and state operated programs.

- Clarified local school divisions' obligation with respect to children receiving foster care, in regional or local jails and in nursing facilities.

8 VAC 20-80-45 Special education staffing requirements.

- Added special education staffing model that enables special education teachers to teach specific content areas
- Revised language regarding alternative staffing plans.
- Clarified early childhood special education caseloads.
- Clarified educational interpreting waiver qualifications and requirements.

8 VAC 20-80-50 Child find.

- Clarified local school divisions' child find obligation for children ages 0 – 2, in private schools, who are home schooled or home tutored.
- Modified the screening process regarding notification of parents, timelines for referrals, completion of new student speech-language-voice screening .

8 VAC 20-80-52 Referral for evaluation.

- Reinserted child study committee. The role of child study in the referral process was modified from the 1994 regulations to reflect IDEA 1997.

8 VAC 20-80-54 Evaluation.

- Clarified the procedures for ensuring parental participation in any meetings;
- Clarified that the process of determining needed evaluation data can serve as the evaluation if the decision is made that no additional evaluation data is needed; that the review of existing evaluation data can be used to amend the IEP; the re-evaluation process and notice and parental consent requirements.
- Clarified language regarding students' participation in state assessment.
- Added language to require local educational agencies to make copies of the evaluation reports available to parents no later than 24 hours before the meeting to determine eligibility.

8 VAC 20-80-56 Eligibility.

- Clarified that a child may have more than one disability and that children do not have to be classified by a disability.
- Revised language regarding consensus to make clear that parental consent provisions are not diluted.
- Clarified that related services may be added by the IEP team.
- Clarified local responsibility when a student transfers from another state.
- Revised the definition of developmental delay.

8 VAC 20-80-58 Termination of special education and related services.

- Clarified local educational agencies' responsibilities when a parent revokes consent.

8 VAC 20-80-60 Free appropriate public education.

- Added language to ensure that children advancing from grade to grade, placed by any state or local agency, or in any state-operated program have a right to a free appropriate public education.
- Removed language regarding exemptions from compulsory attendance that could imply that eligibility under IDEA could be limited.
- Clarified school divisions' obligations regarding transportation.

8 VAC 20-80-62 Individualized education program

- Added language to ensure that each local educational agency shall have an IEP in effect for each child with a disability at the beginning of each school year and clarified timelines.
- Eliminated use of an Individualized Family Service Plan for children aged 2 through 5 served by Part B of IDEA in a local educational agency.
- Added language to specify that if the meeting is recorded, the recording shall become a part of the student's scholastic record.
- Added language requiring local educational agencies to permit the tape recording of IEP meetings unless the local educational agency has developed a written policy prohibiting, limiting, or otherwise regulating the use of audio recording devices at IEP meetings.
- Deleted language that required documentation of certain considerations of the IEP team. Added language to require that parents receive an explanatory list of the special factors that must be considered.
- Revised language regarding consensus to state that IEP teams must work toward consensus and that if the IEP team cannot reach consensus, it must provide the parents with written prior notice..

8 VAC 20-80-64 Least restrictive environment and placements.

- Removed language requiring local educational agencies to ensure least restrictive environment provisions are met when children in public or private institutions. (Least restrictive environment protections for children placed by the local school division in a private institution are maintained.)

8 VAC 20-80-65 Placement of children at the Virginia School for the Deaf and the Blind at Staunton or the Virginia School for the Deaf, Blind, and Multi-Disabled at Hampton.

- **Added section clarifying the roles and responsibilities of local school divisions and the Virginia School for the Deaf and the Blind and the Virginia School for the Deaf, the Blind and the Multi-Disabled and reflected changes made by the 2000 General Assembly.**

8 VAC 20-80-66 Private school placements.

- Clarified obligation regarding students who are home tutored in accordance with the Code of Virginia.

8 VAC 20-80-68 Discipline procedures.

- Reorganized to clarify obligations with respect to short-term removals.
- Clarified obligations regarding possession of weapon or controlled substance; local educational agency's ability to repeat 45-day alternative placement; the persons who participate in the manifestation determination decision and the review of existing data at an IEP meeting serving as a functional behavioral assessment; and the removal of a child if the behavior is not a manifestation of the disability.

8 VAC 20-80-70 Procedural safeguards.

- Removed language regarding parent involvement in placement decisions as parental involvement in the IEP process, which makes placements, is ensured elsewhere in the regulations.

8 VAC 20-80-72 Transfer of rights to students who reach the age of majority.

- Reorganized section on transfer of rights at age of majority to clarify obligations of the local educational agency and of parents.
- Clarified use of a power of attorney.
- Included surrogate parent as a potential educational representative for an adult student with a disability who has been certified not being competent to make educational decisions under IDEA.

8 VAC 20-80-74 Mediation.

- Identified that the state will have only one mediation system.

8 VAC 20-80-76 Due process hearing.

- Clarified language in the sections concerning the basis for a due process hearing, procedure for requesting a due process hearing and the model form to be used when requesting a hearing.
- Added language prohibiting anyone who represents schools or parents in any matter involving education or disability rights, or is an employee of any parent or disability rights agency or organization, from serving as a hearing officer in special education cases.
- Clarified language to distinguish between expedited and non-expedited hearings.
- Revised the requirements regarding implementation plans to include the procedures to be followed when an appeal is filed.
- Changed the timeline for appointment of a hearing officer in an expedited due process hearing from one day to two days.
- Deleted the provision that required the hearing officer to determine during the prehearing conference whether individuals who are advising the parties, other than counsel, have special knowledge or training with respect to the problems of children with disabilities.
- Added a separate section describing the timelines for expedited due process hearings.
- Clarified language regarding attorneys' fees.
- Added language establishing a one year statute of limitations for appeals.
- Added language stating that the Department of Education has the authority to establish the number of hearing officers who may hear special education cases.
- Added language stating that if a hearing officer is suspended from the Virginia Supreme Court's hearing officers' list for cause, that hearing officer may not longer hear special education due process cases even if reinstated by the Virginia Supreme Court to hear other cases.

8 VAC 20-80-78 Complaint procedures.

- Clarified the section describing the notification sent by the Virginia Department of Education to a local school division when a complaint has been received.
- Added a provision requiring school divisions to send a copy of their response to the complaint to the complainant.
- Added a provision that permits the Virginia Department of Education to establish a timeline in the notification letter for the submission of any additional information.
- Added a provision permitting an appeal of the final decision by either party within 30 calendar days of the issuance of the decision.

8 VAC 20-80-80 Surrogate parent procedures.

- Revised language such that training of surrogate parents is required annually only when new information must be provided.

8 VAC 20-80-90 *Local educational agency administration and governance.*

- Revised interagency dispute section to clarify obligations of agencies and subsequent actions if there is a dispute regarding obligations.

8 VAC 20-80-110 *State funds for local school divisions.*

- Added language to clarify that local school divisions are not responsible for the non-educational needs (or costs thereof) of children receiving special education who are placed by a CSA team.

8 VAC 20-80-120 *Federal funds.*

- Added federal language regarding use of federal funds for developing or implementing coordinated services.

8 VAC 20-80-130 *Funds to assist with the education of children with disabilities residing in state operated programs.*

- Added language to clarify the funding of the Virginia School for the Deaf and the Blind at Staunton and the Virginia School for the Deaf, Blind, and Multi-Disabled at Hampton.

8 VAC 20-80-140 *Funding, withholding, and recovery of funds.*

- Added language regarding withholding of funds for following years if local educational agencies have not repaid funds erroneously claimed.

8 VAC 20-80-152 *Use of public and private insurance.*

- Added all federal language regarding use of private and public insurance

8 VAC 20-80-160 *Additional responsibilities of state boards, agencies, and institutions for education and training of children with disabilities in residence or custody.*

- Revised to reflect changes in the caseloads at detention homes, per the 2000 General Assembly.

8 VAC 20-80-190 *Compliance with § 504 of the Rehabilitation Act of 1973, as amended.*

- Clarified that the provisions apply to students.

Appendix A.

- Modified the speech-language impairment caseload, in accordance with the actions of the 2000 General Assembly.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for

oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

Parental involvement in special education is a fundamental component of the special education regulations. The federal regulations strengthened the parents' role in special education. Long-standing Virginia requirements regarding parental consent that were maintained further strengthen the parents' role. The regulations promote the role of the permanent foster parent under certain circumstances.

The intended outcome of special education is the economic self-sufficiency of young adults with disabilities. These regulations set forth the policies, processes and protections for children with disabilities to attain this self-sufficiency upon graduating or aging out of special education.

These regulations have no relationship to marital status or commitment,

These regulations have no relationship to disposable family income. Virginia has required that children with disabilities receive special education at no cost to the parent. These regulations do not alter that fundamental provision.