

**Special Education Handbook:
A Summary
of Virginia's Special Education
Procedural Safeguards**

**Prepared by
The Virginia Bar Association
Young Lawyers Division**

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The Virginia Bar Association

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Introduction

In response to the ever-increasing number of families seeking to access services for children with special educational needs, the Young Lawyers Division of The Virginia Bar Association decided to create a handbook of Virginia's Special Education Procedural Safeguard Requirements to assist those parents in both accessing and understanding the services available.

In creating this handbook, we recognized that many publications currently exist on this subject matter, but we also recognize that many parents can become overwhelmed with the volume and density of the materials. Accordingly, this handbook has been created in the hope that parents will not be intimidated by the complexity of the procedures involved in special education services.

This handbook is the product of the volunteer efforts of young lawyers across the Commonwealth, many of whom have had some degree of personal involvement with the special education services described herein. Our thanks to each of them for his or her contribution.

The Virginia Bar Association
Young Lawyers Division
2002

This handbook was created in consultation with the Virginia Department of Education and the Virginia Office of the Attorney General.

The Virginia Bar Association is a voluntary, statewide professional organization of more than 5,500 lawyer and judicial members.

The VBA was established in 1888 for the purpose of cultivating and advancing jurisprudence, facilitating the administration of justice, and upholding and elevating the standard of honor, integrity and courtesy in the legal profession.

I. DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

As a parent, guardian, or foster or surrogate parent of a child with special needs, you are afforded certain procedural rights, such as written notice of a change in the delivery of your child's education, the right to participate in meetings, the right to inspect records, and the ability to file complaints when you disagree with something that has been done.

Opportunity to Examine Records and Participate in Meetings

As a parent, you have the right to inspect and review all educational records of your child as they relate to his or her identification, evaluation, and educational placement or the provision of a Fair and Appropriate Education to your child. You also have the right to participate in any meetings regarding these same issues. You must be given notice of any scheduled meeting, early enough so that you have an opportunity to participate. The notice of the meeting will indicate the date, time, location, and reason for the meeting and will let you know who will be attending. The participants in the meeting should all agree on the time and place of the meeting. You may also tape-record the meeting (with the use of your own equipment) but you must let the school know in advance (in writing, if you can write in English) that you plan to do so. If the meeting concerns your child's eligibility for services, you should receive a copy of the evaluation report at least two (2) business days prior to the meeting. If the meeting is an IEP meeting, you should receive a written description of the factors to be considered at the meeting.

Informal or unscheduled conversations, conversations about issues not contained in the child's IEP (such as lesson plans or coordinating the provision of related services) and activities to prepare for a later scheduled meeting are not considered "meetings" and do not require that you get prior written notice.

Independent Evaluation

As a parent, you have the right to obtain an independent educational evaluation of your child by a qualified examiner who is not employed by the school system. The school system must provide you information on how to contact such an examiner. The school system

must also pay for this independent evaluation unless a due process hearing is held and the hearing officer determines that the evaluation conducted by the school system is appropriate. The evaluation criteria used by the independent examiner must be the same as those used by school system examiners but the school system may not impose any additional conditions or timeliness requirements on the independent evaluation. The school system may ask why you have chosen to have an independent evaluation, but may not require you to provide an explanation and may not deny or delay providing you the independent evaluation or initiating a due process hearing to defend the public evaluation. Any evaluation conducted independently, whether at public or private expense, must be considered by the school system and may be used as evidence in a due process hearing.

Notice

You also have the right to receive prior written notice (in your native language, or translated orally if your native language is not written) within a reasonable time before any change or refusal to change the identification, evaluation, or educational placement of your child or the provision of a Fair and Appropriate Education to your child. The notice must contain:

- A description of what the school proposes to do;
- An explanation of why the school plans to take the action (or why it refuses to take some action);
- A description of other options that the school considered and the reasons why those options were rejected;
- A description of anything the school relied upon in making the decision, whether it was an evaluation, procedure, test, record, or report;
- A description of any other factors that are relevant to the school's proposed action or refusal to act;
- A statement that you have protection under the procedural safeguards and if you are not given a copy of those procedural safeguards, how you can obtain a copy of them; and
- Sources and persons for the parents to contact to get assistance in understanding the notice and your procedural protections.

Consent

The school system must obtain your voluntary consent in writing, before it proposes to:

- Conduct an initial evaluation, reevaluation, or functional behavioral assessment;
- Change the identification or eligibility of your child;
- Initiate the provision of special education or related services;
- Revise your child's IEP;
- Terminate special education or related services (except for graduation with a standard or advance studies diploma); and
- Access your private insurance.

The school system should ensure that you understand what you are giving your consent for and you may revoke your consent at any time, although your revocation is not retroactive to negate activities that were taken before you revoked your consent. If you refuse to give consent for an initial evaluation or reevaluation, the school system may seek mediation or a due process hearing to try to obtain those evaluations.

If the school system takes reasonable measures, such as phone calls, written requests or home or work visits, to request consent to conduct a reevaluation, and you fail to respond, the school system may conduct the reevaluation without your consent. Also, consent is not required if the school system is simply reviewing existing evaluations, is administering a test to all children and consent is not required of any other parent, is administering a test to measure progress toward IEP goals, or is observing (through a teacher or related service provider) ongoing classroom evaluations.

Mediation

If you have a dispute with the school system concerning a proposal to initiate or change the identification, evaluation, or educational placement of your child or the provision of a free and appropriate education to your child, you may seek

mediation to try to resolve the dispute. Mediation is a voluntary process that involves a trained impartial mediator who is not employed by the school system)or the Virginia Department of Education, chosen from a list of mediators maintained by the Virginia Department of Education. The mediator will hear from both sides and attempt to reach a resolution satisfactory to both sides. If an agreement is reached, a written mediation agreement will be drafted. The costs of mediation will be paid for by the Virginia Department of Education. Finally, all discussions during mediation are confidential and cannot be used as evidence in a due process or civil court proceeding. If you choose not to use mediation, the school system may require you to meet with representatives of the school system to explain the benefits of mediation, but the school system may not deny or delay your right to a due process hearing if you choose not to participate in this meeting.

Due Process Hearing

Either you or the school system may request an impartial due process hearing any time there is a dispute over the identification, evaluation, or educational placement of your child or the provision of a free and appropriate education to your child (including disputes over refusal to provide consent). You make a request for a due process hearing by sending a written request to your school system, with a copy to the Virginia Department of Education. The request must be kept confidential by both the school system and by the Virginia Department of Education. The request must provide the school system with notice of the problem, which will include the name, home address, and school of your child, a description of the problem and, to the extent possible, a proposed solution to the problem. A model request is maintained by the Virginia Department of Education. You should note that a due process hearing may not be delayed or denied if you fail to provide the school system with this notice.

When a request for a due process hearing is received, the school system must provide you with information about mediation, free or reduced legal help in the area, and your procedural safeguards. Within five (5) business days of receiving a request (or within three (3) business days if the hearing is expedited), the school system shall appoint a hearing officer by

securing a name of the hearing officer from a list maintained by the Supreme Court of Virginia and confirming appointment in writing. Both parties have two (2) days to object to a hearing officer based on a conflict of interest.

A due process hearing will be held at a time and place that is reasonably convenient to you and your child. At the due process hearing you and the school system have the right to be represented by an attorney or others with special training or knowledge of children with disabilities, present evidence, confront, cross-examine, and compel the attendance of witnesses, and request that any evidence not disclosed at least five (5) business days (two (2) business days in expedited hearings) before the hearing not be introduced into evidence. At least five (5) business days before the hearing both parties also must disclose to the other party any evaluations completed by that time and any recommendations based on those evaluations or they may be barred from being admitted into evidence. You also have the right to have your child present at the hearing and have the hearings open to the public, if you so choose. You may also obtain, at no cost, a written or electronic record of the hearing and any findings of fact and decisions. Findings of fact and decisions will be made public but only after any information that could personally identify the child has been deleted.

A decision must be reached and sent to the parties within 45 calendar days of filing a request for a hearing. Extensions may be granted only in the best interests of the child. A decision by the hearing officer is final and binding on all the parties, unless it is appealed to a civil court (see below) within a year of the date of the decision. Pending an appeal, a due process hearing officer's decision will be stayed, unless the hearing officer agrees with the parents, in which case, the decision must be implemented pending appeal.

Civil Action

Any party that disputes the decision of a due process hearing may file a civil action in either state circuit court or federal district court. The court shall review the record from the due process hearing, hear additional evidence if the parties request it, and, based on a preponderance or weight of the evidence, issue

a decision. If you seek relief from the court that is also available under Section 615 of IDEA, procedures provided in regulations to that Act must also be exhausted.

In a lawsuit brought under Section 615 of IDEA, the court may award attorneys' fees to you if you prevail. Any attorneys' fee award will be based on prevailing rates in the community and no bonus or multiplier will be used. Fees and costs are prohibited for certain services, such as IEP meetings unless the meeting is convened for purposes of mediation or a hearing. Any award of fees may be reduced if the court determines you unreasonably delayed the proceedings or if the time spent and amount charged are excessive. Also, you will not be entitled to fees for services performed after the school system makes a timely settlement offer, you reject that offer, and the court determines that the relief you finally obtain is not more favorable than the settlement offered. However, if the court determines you were substantially justified in rejecting the settlement offer, you may still be entitled to attorneys' fees.

Child Placement During Proceedings

Unless the parties agree otherwise, a child shall stay in his or her current educational placement during any administrative or judicial proceeding. If the dispute concerns the child's initial placement, the child must be placed in the public school until the completion of the proceedings, unless you choose not to so place your child. Any disciplinary placements shall be made subject to the rules governing disciplinary procedures.

Notice of these Safeguards

Finally, you have the right to receive a copy of the document specifying your rights and responsibilities any time any of the following take place:

- Initial referral for evaluation;
- Each notification of an IEP meeting;
- Reevaluation of the child;
- Your request for due process hearing; and
- Notification of a decision to take disciplinary

action.

II. IDEA DISCIPLINE PROCEDURES

A student with a disability has the same due process rights in disciplinary matters as students without disabilities. Additionally, the student has rights under the IDEA which are described in the following discussion.

Short-Term Suspensions. A student with a disability may be suspended, on the same basis as a child without disabilities, for not more than 10 cumulative school days in a school year. No special procedures are required under the IDEA.

Additional short-term suspensions of 10 days or less at a time, which do not result in a change in placement, may be imposed during the school year. A change in placement will occur if the series of removals constitutes a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. If a change in placement occurs, the procedures that apply to long-term suspensions must be followed.

After the first 10 days of suspension have been imposed, at the time of the next recommendation for a short-term suspension the IEP team must convene within 10 business days. The IEP team must develop a functional behavioral assessment plan and, as soon as practical, develop a behavioral intervention plan with positive behavioral supports. If the student already has a behavioral intervention plan the IEP team shall convene to review the plan and its implementation and make modifications, if necessary, to address the behavior.

For any additional short-term suspensions during the school year that do not constitute a change in placement, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary. If one or more of the team members believe that modifications are needed the IEP team shall meet to modify the plan and its implementation.

No educational services are required during the first ten days of suspension in a school year. For any additional short-term suspensions educational

services are required to the extent necessary to allow the student to progress with his/her studies.

Certain Short-Term Suspensions, Long-Term Suspensions, and Expulsions. Multiple short-term suspensions which constitute a change in placement, long-term suspensions, and expulsions require special procedures because they constitute a change in placement. A change in placement as a result of discipline requires a Manifestation Determination Review (“MDR”) (to be held within 10 school days of the recommendation for discipline), a Functional Behavioral Assessment (“FBA”) (to be initiated within 10 business days of the recommendation for discipline), a Behavioral Intervention Plan (“BIP”) (to be developed as soon as practicable following the completion of the FBA and any required assessments), and an IEP which specifies the services that will be provided in an alternative education setting if the student is disciplined. The alternative education setting and services specified in the IEP must allow the student to continue to progress towards his/her IEP goals and continue to progress in the general curriculum. The local educational agency shall notify the parent(s) of the recommendation for discipline and provide the parent(s) with the procedural safeguards notice not later than the date on which the decision to take the action is made.

The functional behavioral assessment may consist of a review of existing data and can be completed at the IEP meeting where the FBA and MDR are made. Parental consent is not necessary to review existing data. If the student had a behavioral intervention plan already, the IEP team shall convene to review the plan and its implementation and make needed modifications to address the behavior.

Educational services must be provided to enable the student to progress in the general curriculum and to continue to receive IEP services and modifications which will allow the child to meet the IEP goals. The services will be provided in an alternative setting, which may include homebound, as specified by the IEP Committee.

The special education and disciplinary records must be provided for consideration by the person making the final determination regarding the disciplinary action.

Weapons and Drugs. Students may be assigned to an alternative education program for up to 45 calendar days if the child possesses or carries a weapon to school or to a school function, or the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function. The terms school or school function include any site under the jurisdiction of a school division or the State. This removal may be imposed by the administration even if the misconduct is a manifestation of the disability. Additional discipline may be imposed if there is no manifestation and if the procedures which apply to disciplinary changes in placement are followed.

Authority of Hearing Officer. A school division may request an expedited due process hearing to seek approval to change the student’s placement for up to 45 calendar days if the school division believes that the student’s behavior is likely to result in injury to self or others. This procedure may be repeated in order to impose additional 45-day removals. The hearing officer must consider whether the school division has shown by substantial evidence that the current placement is substantially likely to result in injury to the child or others, whether the current placement is appropriate, whether efforts have been made by the school division to minimize the risk of harm in the current setting, and whether the proposed setting will enable the child to continue to progress in the general curriculum, although in another setting, and in meeting the IEP goals. The MP must also include services and modifications to address the behavior so that it does not recur.

Manifestation Determination Review. The IEP team and other qualified personnel make the MDR decision. The team determines whether the behavior of the child was a manifestation of the child’s disability in order to decide whether the student can be disciplined. The team meets immediately, if possible, but not later than 10 school days after the date on which the decision to recommend the discipline is made. The MDR team must consider, in terms of the behavior, all relevant information, including evaluation and diagnostic results, testing and information supplied by the parents, observations of the child, and the child’s IEP and placement.

The MDR team then makes three determinations: first, whether, in relationship to the behavior subject to disciplinary action, the child’s IEP and placement

were appropriate, and whether the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; second, whether the child's disability impaired the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and third, whether the child's disability impaired the ability of the child to control the behavior subject to disciplinary action. If the MDR team determines that the behavior was not a manifestation of the child's disability, the student may be disciplined, except that the student must continue to receive an appropriate education. The parents may request an expedited hearing if they disagree with the manifestation determination or with the appropriateness of the educational services offered the student while being disciplined.

In reviewing a challenge to the manifestation determination, the hearing officer shall determine whether the local educational agency has demonstrated that the child's behavior was not a manifestation of the child's disability. The hearing officer also must apply the specific criteria used for a 45-day hearing officer removal to determine whether the interim alternative education setting is appropriate.

Placement During Appeals. If the parents request a hearing to challenge the interim alternative educational setting or the manifestation determination, the student may remain in a 45-day alternative setting during the appeal in cases to which the 45-day rule applies, such as weapons, drugs or a hearing officer's removal. The student may also be placed in a setting agreed upon by the parents and the school division at any time. School divisions may also seek an injunction from the state or federal courts to prevent a student's return to the current educational placement. Other than in cases where one of these provisions applies, the student must return to the current educational placement during the appeal.

Protections for Children not yet Eligible for Special Education and Related Services. A student may be covered by the discipline provisions of the IDEA if the school division had knowledge that the child was a child with a disability before the misconduct occurred. A school division has knowledge that a child is a child with a disability if:

- the parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the educational agency that the child is in need of special education and related services;
- the behavior or performance of the child demonstrates that the child qualifies as disabled; the parent of the child has requested an evaluation of the child to see if the child qualifies as disabled; or
- the teacher of the child, or other personnel of the school division, have expressed concern about the behavior or performance of the child to the director of special education or to other personnel through the child find or special education referral system.

Exception. A school division does not have knowledge of a disability and does not use special education discipline procedures if, as a result of receiving the information specified above, the school division either: (1) determined that an evaluation was not necessary or (2) conducted an evaluation and determined that the child was not a child with a disability and provided prior written notice to the child's parents of its determination.

Conditions that apply if no basis of knowledge. If the school division has no reason to have knowledge that a child is a child with a disability prior to taking disciplinary measures, the child may be subjected to the same disciplinary measures as students without disabilities. If the student is later referred for an evaluation, the school division must conduct an expedited evaluation. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is later determined to be a child with a disability, the school division shall provide special education and related services in an alternative setting.

Expedited Due Process Hearings. Expedited due process hearings must be conducted and a decision reached within 20 business days. Evidence must be disclosed not less than two business days in advance of the hearing.

Referral to and Action by Law Enforcement and Judicial Authorities. A local educational

agency may report a crime committed by a child with a disability to appropriate authorities and must share disciplinary and special education records with appropriate persons to whom the crime is reported. State law enforcement and judicial authorities may exercise their responsibilities to crimes committed by a child with a disability to the extent such action applies to students without a disability.

Transfer of Parental Rights at Age of Majority.

All IDEA rights transfer from the parent(s) to the child when the child reaches the age of majority (age 18). The transfer of rights also applies to those students who are incarcerated in an adult or juvenile federal, state, regional, or local correctional institution. A student who has reached the age of 18 years is presumed to be a competent adult.

The rights will not transfer to the adult student if the student is determined to be legally incompetent or legally incapacitated or is determined to be unable to provide informed consent through the certification process established in State Regulations (8 V.A.C. 20-80-72 C). The school division shall notify the parent(s) and the student that procedures exist to appoint another individual to look out for the educational interests of a disabled student who has reached the age of 18 but is not able to provide informed consent. In these cases, the parent(s) may be appointed to look out for the student's educational interests or, if the parent(s) are not available, another appropriate individual may be appointed.

Notification. The school division must notify the parent(s) and the student that educational rights under IDEA will transfer at the age of 18 and must provide the student with a statement of the rights that transfer. This notice must be provided at least a year in advance of the student's 18th birthday. A statement about notification of the transfer of rights and a statement that a copy of the rights was provided to the student must be included in the Individualized Education Program (IEP) at least one year prior to the student's 18th birthday. The school division must provide any further notices required under the IDEA to both the student and the parent(s) when the student reaches age 18.

The school division may continue to invite the parent(s) of the adult student, as appropriate, to participate in meetings on the basis that they are persons knowledgeable about the student's abilities.

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

Placing Your Child in a Private School

The school district is not required to pay the cost of special education and related services for a child with a disability at a private school or facility if the school district made a Free Appropriate Public Education (FAPE) available to the child and you still elected to place the child at the private school or facility.

Disagreements between you and the school district regarding (1) the availability of a program appropriate for your child, and (2) the question of financial responsibility for private school placement are subject to the due process procedures discussed elsewhere in this document.

If you enroll your child, who previously received special education and related services through the school district, in a private preschool, elementary, or secondary school without the consent of or referral by the school district, a court or hearing officer may require the school district to reimburse you for the cost of that enrollment. This potential reimbursement would be provided to you if the court or hearing officer finds that the school district had not made FAPE available to your 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 hearing officer or a court even if it does not meet the State standards that apply to education provided by the Virginia Department of Education and local school divisions.

The cost of reimbursement described in the above paragraph may be reduced or denied if:

- Prior to the removal of your child from the public school, you did not inform the IEP team that you were rejecting the placement proposed by the school district to provide FAPE to your child by stating your concerns and intent to enroll your child in a private school at public expense; or
- At least 10 business days (including holidays but excluding Saturdays and Sundays) prior to the removal of your child from the public school, you failed to give written notice to the school district of your rejection of the placement proposed and failed

to state your concerns and intent to enroll your child in a private school at public expense; or

- Prior to your removal of your child from the public school, the school district informed you of its intent to evaluate your child for a reasonable and appropriate purpose, but you did not make your child available for the evaluation; or

- There is a judicial finding that your rejection of the placement was unreasonable.

The amount of reimbursement to you may not be reduced for failure to provide notice if:

- You cannot read or write in English; or
- Providing notice would likely result in physical or serious emotional harm to your child; or
- The school prevented you from providing the notice; or
- You did not receive the notice of the requirement to provide written notice to the school district.

III. CONFIDENTIALITY AND ACCESS TO EDUCATIONAL RECORDS

You have a right to:

- Be fully informed about the confidentiality requirements of personally identifiable information, including:

- a.** Availability of information in the native language of various population groups within the state;
- b.** Descriptions of the children evaluated, types of information maintained, methods of gathering the information, and uses made of the information;
- c.** Policies and procedures that the school district must follow regarding storage, disclosure to others, retention, and destruction of personally identifiable information in the education record; and
- d.** Your rights under the Family Educational Rights and Privacy Act (FERPA).

- Inspect and review any education records that are collected, maintained, or used by the school district regarding your child (unless such rights have been restricted by court order).

- Receive and review education records without unnecessary delay and prior to any meeting regarding an IEP or hearing relating to the identification, evaluation, or placement of your child. Compliance shall occur no more than 45 days after your request has been made.

- Make reasonable requests for explanations and interpretations of the information in your child's records.

- Request that the school district provide you with copies of the records if failure to obtain copies would keep you from reviewing or inspecting the records. The school district may charge a fee for the copies if the fee does not prevent you from exercising your right to inspect and review the records.

- Choose a representative to inspect and review your child's records.

- Be informed that the school district may presume that a parent has the authority to look at records relating to his or her child unless the school district has been advised to the contrary.

- Be informed that the school district must keep records of persons obtaining access (except access by parents and authorized school district employees) to your child's records, including the name of the person, the date access was given, and the purpose for which the person used the records.

- Request that the school district correct the information in the record if you believe that the information is inaccurate or misleading or violates the privacy or other rights of your child. If the school district agrees to correct the education record, the record must be corrected within a reasonable period of time.

- Request a hearing if the school district refuses to change the record. If, as a result of the hearing, the hearing officer decides that the information is:

- a.** Inaccurate, misleading or a violation of privacy. The school district must change the information in the record and inform you in writing of the changes; or
- b.** Accurate. You still have the right to place in the record a statement explaining your reasons for disagreeing with the decision.

- Be notified and consent to disclosure of your child's record to anyone other than employees of the school district for educational purposes, except for referrals to or actions by law enforcement and judicial authorities.
- Request the destruction of information in your child's education record, and be informed of the school district's obligation to destroy information in your child's special education record when no longer necessary to provide educational services to your child. Please note a permanent record of your child's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

IV. FILING OF COMPLAINTS

A complaint is a written statement signed by any individual or organization that contains a statement that the school district has violated the IDEA or State Regulations Governing Special Education Programs for Children with Disabilities in Virginia (8 V.A.C. 20-80-10 through 8 V.A.C. 20-80-190). A complaint must include the facts upon which the complaint is based; address action that occurred no more than one (1) year prior to the date the complaint is received (unless the Virginia Department of Education determines that the violation is continuing or you are requesting compensatory services for a violation no more than three (3) years prior to the date the complaint is received); and contain all relevant documents.

Complaints may be filed with the Virginia Department of Education (101 North 14th Street, Richmond, Virginia 23219).