Regulations Governing Special Education Programs for Children with Disabilities in Virginia
Frequently Asked Questions

001-10. Education Records

Q: The definition of "education record" specifies that "in addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child's educational program (e.g., scheduling of meetings or notices)."

- **Since the definition also references education record in accordance with the Family Educational Rights and Privacy Act (FERPA), does this mean that all correspondence, including e-mails, would be considered an education record?**
- **How does this affect record retention requirements?**

A: Federal regulations implementing IDEA, at 34 CFR §300.611(b), reference the definition of education included in FERPA. The Virginia Regulations reiterate language from the federal regulations and are also consistent with the regulations implementing FERPA (34 CFR §99). Pertinent sections in the Virginia Regulations related to the term, "education record" are as follows:

8VAC20-81-10. Definitions

"**Education record**" means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term also has the same meaning as "scholastic record." In addition to written records, this also includes electronic exchanges between school personnel and parent(s) regarding matters associated with the child's educational program (e.g., scheduling of meetings or notices). This term also includes the type of records covered under the definition of "education record" in the regulations implementing the Family Education Rights and Privacy Act. (20 USC §1232g(a)(3); §22.1-289 of the Code of Virginia; 34 CFR §300.611(b)).

8VAC20-81-170. Procedural safeguards.

A. Opportunity to examine records; parent participation. (34 CFR §§300.322(e), 300.500 and 300.501; 8 VAC 20-81-150)

1. Procedural safeguards. Each local educational agency shall establish, maintain, and implement procedural safeguards as follows:
   a. The parent(s) of a child with a disability shall be afforded an opportunity to:
   (1) Inspect and review all education records with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of a free appropriate public education to the child.

8VAC20-81-170. Procedural safeguards.

G. Confidentiality of information.

1. Access rights. (34 CFR §300.613)

a. The local educational agency shall permit the parent(s) to inspect and review any education records relating to their children that are collected, maintained, or used by the local educational agency under this chapter. The local educational agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing in accordance with 8 VAC 20-81-160 and 8 VAC 20-81-210, or resolution session in accordance with 8 VAC 20-81-210, and in no case more than 45 calendar days after the request has been made.

8VAC20-81-170. Procedural safeguards.

G. Confidentiality of information.

4. List of types and locations of information. Each local educational agency shall provide a parent(s) on request a list of the types and locations of education records collected, maintained, or used by the local educational agency. (34 CFR §300.616)

Except for specific exceptions listed in FERPA, education records are those records that are directly related to the student and maintained by an education agency or institution or a party acting for the agency or institution (34 CFR §99.3). Education records may be in any mode that includes (but is not limited to) handwriting, print, computer media, videotape, audiotape, film, microfilm, or microfiche. Further, the designation of a document as an education record depends on who maintains it, not who originates it. Thus, documents that are maintained, but not necessarily created, by the school division or a division employee or agent qualify as education records.

It is up to each locality to determine which electronic data and communication (including communication between and among school personnel), if any, constitute an education record and how the school division will maintain electronic education records in ways that will allow parent(s) access to those records if they request a copy or want to inspect or review the student's entire record. In addition, a division must be mindful that certain electronic data and communication must be retained to enable it to demonstrate compliance with various state and federal special education regulations regarding whether in the context of a state complaint, due process proceeding, or federal monitoring and data collection. Recall that the definition of electronic record includes matters associated with the child's educational program; e.g., scheduling of meetings or notices.

Local retention schedules must comply with the requirements of the Library of Virginia. This would include electronic records as well as other education records.

Practice Tip: Since electronic data and communication systems are developed and overseen by Information Technology (IT) specialists, it is recommended that they be included in the decision on how such information will be maintained. As many localities move toward electronic data bases with the eligibility process and IEPs maintained on-line, localities may need to specify in the child's main education file that a separate file is available electronically and is available to review on request. If notice of meetings and other official communication occur between school personnel and parent(s) electronically, the locality may need to be able to search files related to a specific student or they may wish to print all e-mails to maintain in the child's record. This

would include determining whether communication between and among school personnel are education records.

It is important to note that requests based on the Freedom of Information Act (FOIA) may be used at any time to request e-mails with a child's name. Even though there may be local directives that would prohibit such electronic communications, such directions would not negate the school division's response to a FOIA request which may include a search of e-mails. These communications may also be subject to subpoena in legal actions, including due process hearings. It is recommended that each locality bring together those who have knowledge of its IT system and those who can identify which information may be requested to develop a system that efficiently and effectively can be used to produce the information requested within the time period allowed by FOIA. There may be a number of alternative solutions to this requirement based on each locality's system.

002-10. Post-secondary Evaluations

Q: Are local educational agencies obligated to conduct evaluations required for students attending colleges or universities, enlisting in the armed forces, or other post-secondary service if the parent/student requests?

A: No. The U.S. Department of Education's Office of Special Education Programs states in its Commentary on the federal regulations, Federal Register, 2006, p. 46644:

> "We do not believe that the regulations should require public agencies to conduct evaluations for children to meet the entrance or eligibility requirements of another institution or agency because to do so would impose a significant cost on public agencies that is not required by the Act [IDEA]. While the requirements for secondary transition are intended to help parents and schools assist children with disabilities transition beyond high school, section 614(c)(5) in the Act does not require a public agency to assess a child with a disability to determine the child's eligibility to be considered a child with a disability in another agency, such as a vocational rehabilitation program, or a college or other postsecondary setting. The Act also does not require LEAs to provide the postsecondary services that may be included in the summary of the child's academic achievement and functional performance. We believe it would impose costs on public agencies not contemplated by the Act to include such requirements in the regulations. It would be inconsistent with the Act to require public agencies to conduct evaluations for children who are exiting the school system because they exceed the age for eligibility under State law. Section 300.305(e)(2), consistent with section 614(c)(5)(B)(i) of the Act, is clear that an evaluation in accordance with §§ 300.304 through 300.311 is not required before the termination of a child's eligibility under the Act due to graduation from secondary school with a regular diploma or due to exceeding the age eligibility for FAPE [free appropriate public education] under State law."

003-10. Revocation of Parent Consent

Q: Both parents have the legal authority to make educational decisions for their child with a disability. One of the parents asks the LEA to cease special education and related services for the child. The other parent disagrees. The LEA contends that the child remains eligible for special education and related services.

a. Which parent's consent right prevails?
b. Can the parent who consents to the child's continuing eligibility request mediation or due process to contest the other parent's consent revocation?

A: The U.S. Department of Education's Office of Special Education Programs (OSEP) has responded to the Virginia Department of Education's inquiry in this regard:

- As long as the parent has the legal authority to make educational decisions for the child, the LEA must accept either parent's revocation of consent for the purposes of 34 CFR §300.300(b)(4). The federal regulation governs the requirements relative to parent consent revocation. The LEA must provide the parent with prior written notice in accordance with 34 CFR §300.503 before ceasing the provision of special education and related services. 34 CFR §300.300(b)(4)(i).

- If a parent, including a parent other than the parent who revoked consent, later requests that his or her child receive special education and related services, the LEA must treat this request as a request for an initial evaluation under 34 CFR §300.301, rather than a reevaluation under 34 CFR §300.303.

- Under 34 CFR §300.300(b)(4)(ii), the school division may not use mediation or due process to overcome a parent's written revocation of consent for the continued provision of special education and related services. OSEP further states that a parent who opposes the cessation of the child's eligibility in this instance cannot request mediation or due process to resolve the dispute. This is because a decision by one parent to revoke consent is not an action by a "public agency", and the parent may only file a due process request with respect to actions which are the responsibility of the local school division, and not by another parent. In effect, the hearing officer has no role to play as the matter is not one over which s/he has jurisdiction.

- Similarly, mediation is not an option as mediation is designed to resolve disputes between a public agency and a parent. OSEP states that if the parents disagree with each other, the LEA may recommend to the parents alternative dispute resolution options to resolve their disagreement, such as through local family mediation services.
  [*Letter to Cox*, OSEP, 2009; 110 LRP 10357]

Summary point: Although in the past, we understood that the school division needed the consent of one parent to move forward with an action, this is an exception that allows a parent to essentially "trump" the consent of the other parent. Specifically, if both parents have the legal authority to make educational decisions for the child, and if one parent revokes, in writing,

consent for the child to receive special education and related services, the LEA must terminate services, even if the other parent has consented or is willing to consent for the child to receive special education and related services.

Reminder: For further assistance in understanding the requirements relative to parental consent revocation, please review VDOE's "Guidance Document on the Implementation of the IDEA Federal Regulations – Part B, Additional Requirements 2008" and VDOE's "Model Written Prior Notice" when parents revoke consent in accordance with requirements at 34 CFR §300.300. Both documents are available on VDOE's web site at: www.doe.virginia.gov/special_ed

Note: This FAQ addresses only those instances when parents who have equal standing disagree with the issue of a child's continued eligibility for special education and related services. Please know that an additional FAQ will be issued in the near future that addresses those instances when parents who have equal standing in special education matters disagree with each other on those issues requiring parental consent other than continued eligibility.

004-10. Discipline

Q. The LEA initiates a long-term removal of a student for disciplinary reasons, places the student in an alternative setting, and proposes changes to the student's IEP. If the parent does not consent to a revision of a student's IEP services, must the LEA implement the services in the last-agreed upon IEP until the consent issue is otherwise resolved?

A.: Yes, because of Virginia's specific parental consent requirements.

The federal regulations anticipate that it may not be possible for a student removed for disciplinary reasons to an alternative placement to receive exactly the same services as those called for in the student's IEP and in so doing, not have FAPE adversely impacted. 34 CFR §300.530 requires that a student must continue to receive educational services so as to enable the student to continue to participate in the general educational curriculum, "although in another setting", and to progress toward meeting his or her IEP goals. The U.S. Department of Education's Office of Special Education Programs (OSEP) notes in its Commentary to the IDEA federal regulations:

> We caution that we do not interpret "participate" to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.
>
> ….while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act [IDEA] modifies the concept of FAPE in these circumstances to

> encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of the discipline.

[Federal Register, 2006, pp. 46716-7]

A Virginia federal district court ruled consistently with this commentary, holding that the IDEA did not require the school division to "duplicate at the alternative setting every single special club, athletics, arts, Japanese emersion" that was provided to the student prior to his disciplinary removal in order for the student to receive FAPE. *Reiser v. Fairfax County School Board*, 44 IDELR 187, 2005.

While OSEP and the court have interpreted IDEA and the federal regulations to not require provision in the alternative setting of all services in a student's IEP for the purposes of FAPE, Virginia's parent consent provisions require the school division to implement the child's current IEP services, as consented to by the parent, even during a disciplinary removal. While the federal regulations and OSEP's commentary provide the LEAs with flexibility in providing FAPE to a student in an alternate setting for disciplinary purposes, Virginia-specific parental consent provisions require parental consent before a school division may implement revised IEP services. (8 VAC 20-81-170 E.1).

The parental consent requirement is specific to Virginia and is permitted under the IDEA (34 CFR §300.300 (d)(2)). It does not make an exception in the event of a revision to the IEP proposed due to a disciplinary removal to an alternative placement. If the parent refuses consent to the proposed IEP, the dispute resolution options of mediation and/or due process are available to resolve the matter. Until the dispute is resolved, the LEA is obligated to provide the services in accordance with the student's last agreed on IEP.

005-10. IEP Progress Reports

Q: When must progress reports be provided to children with disabilities?

A: The Virginia Regulations, at 8 VAC 20-81-110 G. 8., require that each child's IEP must include a "statement of…when periodic reports on the progress the child is making toward meeting the annual goals will be provided; for example, through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, and at least as often as parents are informed of the progress of their children without disabilities."

A key phrase in this regulation is "at least as often as parents are informed of the progress of their children without disabilities." This means that the child's IEP must indicate when periodic reports will be provided to parents. These progress reports must be provided to the parents of children with disabilities whenever the school division provides progress reports generally for its students in the general education settings. For many, this means quarterly and interim, and for

others it may mean six week reports. IEPs, however, must specify when these reports will be provided, and LEAs must provide progress reports as outlined in the child's IEP.

Some school divisions state the frequency of progress reports in general terms. Others indicate specific reporting dates. Either practice is acceptable. Undated "blocks" on the IEP for providing progress reports are not sufficient, unless there is a statement that indicates the reporting time frames (such as a statement indicating that reports will be provided at the same time as interim and quarterly report cards are provided to all parents).

Practice Tip
IEP team members, including parents, may wish to review VDOE's model IEP forms for recommended language that documents the frequency of progress reports. See "Transition Individualized Education Program", p. 11; "Elementary Individualized Education Program", p. 7. Both documents are available at VDOE's web site at: http://www.doe.virginia.gov/special_ed. Then click on the site for "Instructional Services and IEPs".

006-10. Teacher as Member of the Local Advisory Committee

Q: The Virginia Regulations, at 8 VAC 20-81-230 D.1, now require that local advisory committees include one teacher.

a. Does this have to be someone who is currently teaching?
b. If so, does this have to be a teacher employed by the school division or can it be someone from another school division or a private school?

A: The regulation is purposely broad to give local school divisions sufficient flexibility for implementation. Each LEA must have their own local policies and procedures regarding the selection of the teacher and the teacher's qualifications. The only requirement is that a "teacher" must serve on the local advisory committee. Thus, each LEA must determine whether the "teacher" on the local advisory committee must be, for example, a teacher who is actively teaching (versus someone who is credentialed as a teacher with a teaching license). Similarly, each LEA must determine whether the teacher must be a teacher in the school division versus a teacher in a neighboring school division or a private school.

Practice Tip

It is recommended that when developing its procedures and/or criteria to determine who is eligible to serve in the capacity of "teacher" on the local advisory committee, the school division use procedures similar to those used to select members for the local school board's other advisory committees, including other members of the local advisory committee.

007-10. Students Who Transfer

Q. The *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, at 8 VAC 20-81-120 A.2, indicate that for transfer students, the new LEA shall provide a free appropriate public education (FAPE) "…in consultation with the parent(s)…" until the LEA either adopts the IEP from the previous LEA or conducts an evaluation and develops and implements a new IEP.

- **What does "in consultation with the parent(s)" mean?**
- **How must the "consultation" be documented?**
- **Who is responsible for this consultation process?**

This regulation also directs the new LEA to provide FAPE "including services comparable to those described in the child's IEP from the previous" school division.

- **What does "comparable services" mean?**
- **Who determines "comparable services"?**

A: The provisions of 8 VAC 20-81-120 A.2 ensure that children with disabilities who transfer from school divisions located in Virginia or elsewhere are provided FAPE while the new school division works to secure information from the previous school division. These requirements protect the child's FAPE entitlement by ensuring that the right to services is not interrupted. The requirements also take into consideration the fact that school divisions may organize and implement their approaches to services in ways that meet children's needs differently, although as effectively, and that other states may have requirements that differ in some respects from those in Virginia.

Virginia's regulation noted above mirrors the federal regulation at 34 CFR § 300.323 (e) and (f). The LEA must consult with the parent(s) and determine comparable services. The language in this provision does not specifically direct who is responsible for the "consultation" with the parent(s) and the determination of "comparable services". In the context of addressing the meaning of "comparable services", however, the U.S. Department of Education's Office of Special Education Programs (OSEP) places this responsibility squarely with the IEP team. OSEP states in its commentary on the IDEA regulations:

> We do not believe it is necessary to define "comparable services" in these regulations because the Department [U.S. DOE] interprets "comparable" to have the plain meaning of the word, which is "similar" or "equivalent." Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State), "comparable" means services that are "similar" or "equivalent" to those that were described in the child's IEP from the previous public agency, **as determined by the child's newly designated IEP Team in the new public agency**. [emphasis added]

[Federal Register, 2006, p. 46681]

The language in the regulation joins the responsibility for the consultation with the responsibility of determining comparable services. These responsibilities are not separate and distinct. For this reason and since OSEP clearly directs the IEP team to determine comparable services, the IEP team is responsible also for the consultation process.

"In consultation with the parent(s)" means ensuring that the parent is provided the opportunity to provide input on the child's educational needs, as well as for the school division to provide information to the parent about the division.

The regulations do not require specific documentation of the consultation process or determination of comparable services; thus, giving school divisions some flexibility to develop their own mechanisms for ensuring compliance with the requirement. For example, a school division might document the process on a form that specifies basic data information, summary of the discussions and determinations, including what services will be provided, and the signature of persons present, including the parent. The requirements for Prior Written Notice will also document the IEP team's determinations. It is important to note, however, that the regulations do not require parental consent for the school division to initiate services comparable to those in the child's current IEP. Parental consent follows the IEP team's determination to adopt the child's IEP from the previous LEA, or pursuant to the team's development of an interim or new IEP.

Important:
Remember that both federal and state regulations governing special education provide flexibility to school divisions to amend a child's IEP without a meeting. (8 VAC 20-81-110 B.9). Recognizing that it may take some time to convene an IEP meeting at a mutually agreed upon time and place, the school division and parent may agree not to convene an IEP meeting for this purpose. Recall that in this instance the school division must ensure that the child's IEP team is informed about the comparable services to be provided the child until the LEA either adopts the IEP from the previous school division or conducts an evaluation and develops and implements a new IEP.

Practice Tip
Please note that the IEP team's decision may be challenged by a parent in a state complaint or a due process hearing. As a result, it is advisable for the IEP team to carefully document its reasoning with regard to the comparability of services, especially in cases where the services in the previous IEP are not being identically replicated.

008-10. Age of Eligibility

Q:
- **Are local educational agencies (LEAs) required to serve children below the age of 2?**
- **Conversely, are LEAs required to serve children after they reach the age of 22?**

A: The Virginia Regulations define "Age of eligibility" as:

…all eligible children with disabilities who have not graduated with a standard or advanced studies high school diploma who, because of such disabilities, are in need of special education and related services, and whose second birthday falls on or before September 30, and who have not reached their 22nd birthday on or before September 30 (two to 21, inclusive) in accordance with the Code of Virginia. A child with a disability whose 22nd birthday is after September 30 remains eligible for the remainder of the school year.
(8 VAC 20-81-10)

Children below the age of 2

An LEA is obligated to provide FAPE to a child who is not yet two if:

- the child has been referred and found eligible for special education and related services,
- an IEP has been developed, and
- the child will be age 2 by September 30 of the current school year.

In other words, even though on the first day of school the child is not yet 2, the child is entitled to receive services in accordance with the IEP beginning on the first day of the school year. This requirement is in keeping with the Virginia Regulations that direct each LEA to have an IEP in effect for each child with a disability within its jurisdiction at the beginning of each school year. (8 VAC 20-81-110 B.1).

Practice Tip: It is critical that for children who are being served by the Part C program and whose second birthdays fall before September 30, school personnel work with the Part C program to ensure that referrals are made in a manner that gives the school division sufficient time to determine eligibility and, if needed, to develop an IEP before the start of school. For those LEAs whose school year begins during the first week of September, the process for evaluation and eligibility (65 business days) and IEP development (30 days) would require a referral from the Part C program during the first part of April. Of course, compressing these timelines is permissible and preferred in ensuring completion of the process in advance of the opening of school.

Children who turn 22 years of age

As indicated in the definition, a student who turns 22 after September 30, is entitled to services for the remainder of the school year. In other words, if a student is 21 on September 30, turning 22 on November 1, the student has the right to continue to receive services in accordance with the IEP for the remainder of the school year. In addition, students who turn 22 after September 30 are eligible for Extended School Year (ESY) services during the current school year and/or during the summer following the school year in which the child turned 22, if determined appropriate by the student's IEP team.

Practice Tip: For students who are in their last year of school, it is expected that the student's IEP include services in accordance with the regulations governing secondary transition. It is essential that school personnel finalize steps to help the student transition into the next setting.

Although students with disabilities who do not graduate with a standard or advanced studies diploma, and have not turned 22, remain entitled to special education and related services, this does not mean that the services must be provided at a high school. Instead, the IEP team certainly can identify and consider whether other settings are more appropriate for providing special education services to the student.

009-10. Consent when Parents Disagree

Q: Are the requirements related to revocation of consent applicable to matters other than the child remaining eligible for special education and related services? If both parents have equal standing and disagree when parental consent is required - thus one provides consent and the other disagrees, either orally or in writing - what is an LEA required to do? For example, if the IEP team develops an IEP with parental involvement and one parent provides consent for implementation and the other refuses consent, what is the school division required to do? Must school personnel implement the IEP with the consent of one parent, or work to achieve the consent of the other parent before implementation?

A: It is important to review the regulations that detail the definition of consent, as well as those circumstances that require consent before answering this question. The Virginia Regulations define consent in 8 VAC 20-81-10 as:

> **"Consent"** means: (34 CFR 300.9)
> 1. The parent(s) or eligible student has been fully informed of all information relevant to the activity for which consent is sought in the parent's(s') or eligible student's native language, or other mode of communication;
> 2. The parent(s) or eligible student understands and agrees, in writing, to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
> 3. The parent(s) or eligible student understands that the granting of consent is voluntary on the part of the parent(s) or eligible student and may be revoked any time.
> a. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked. Revocation ceases to be relevant after the activity for which consent was obtained was completed.).
> b. If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the local educational agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.
> The meaning of the term "consent" is not the same as the meaning of the term "agree" or "agreement." "Agree" or "agreement" refers to an understanding between the parent and the local educational agency about a particular matter and as required in this chapter. There is no requirement that an agreement be in writing, unless stated in this chapter. The local educational agency and parent(s) should document their agreement.

In addition, the Virginia Regulations list those circumstances that require consent at 8 VAC 20-81-170 D.1. as:

1. Required parental consent. Informed parental consent is required before:
a. Conducting an initial evaluation or reevaluation, including a functional behavioral assessment if such assessment is not a review of existing data conducted at an IEP meeting; (34 CFR 300.300(a)(1)(i))
b. An initial eligibility determination or any change in categorical identification;
c. Initial provision of special education and related services to a child with a disability; (34 CFR 300.300(b)(1))
d. Any revision to the child's IEP services;
e. Any partial or complete termination of special education and related services, except for graduation with a standard or advance studies diploma;
f. The provision of a free appropriate public education to children with disabilities who transfer between public agencies in Virginia or transfer to Virginia from another state in accordance with 8VAC20-81-120;
g. Accessing a child's public benefits or insurance or private insurance proceeds in accordance with subsection F of this section; and (34 CFR 300.154)
h. Inviting to an IEP meeting a representative of any participating agency that is likely to be responsible for providing or paying for secondary transition services. (34 CFR 300.321(b)(3))

The key to this answer is that the regulations use the term "parent(s)" indicating that only one parent is required to provide consent. Thus, even if only one parent provides consent, under these regulations, the school division must move forward with the action for which consent has been provided. Consequently, using the example provided in the question, if one parent provides consent to implement the IEP, the school division is required to implement the IEP. The parent who disagrees may use the dispute resolution options of mediation and/or due process to address concerns; however, in the interim, the school division is obligated to rely upon the consent that has already been provided.

Note: This is different than the circumstance when a parent revokes consent for a student to continue to be eligible for special education and related services. For information in that case, please refer to FAQ 003-10, which addresses Revocation of Consent.

Practice Tip: When both parents are involved and do not live together or are not married, school personnel need to be sure to determine that the parents have equal rights with regard to educational decisions. Additionally, the Prior Written Notice (PWN) provides an excellent mechanism to document the parents dueling positions. Under the PWN section of proposed or refused action (using our example of the developed IEP), the IEP team can document that while one parent provided consent, which gives the school division the obligation to implement the decision, one parent disagreed. The IEP team should consider documenting on the PWN the contentious issue(s), as well as the issue(s) which reflects consensus. The Procedural Safeguards document will apprise parents with information related to the dispute resolution options of mediation, complaints, and due process.

010-10. IEEs for Students who Transfer

Q: If a student is evaluated and found ineligible for special education and related services, moves to another locality, and the child's parent requests an independent educational evaluation (IEE), which school division is required to pay for the IEE: the former school division or the receiving school division?

A: Federal and state regulations governing special education are clear that the IDEA requirements shift from the former school division to the receiving school division when the child transfers. (34 CFR § 300.323; 8 VAC 20-81-120). This includes responding to a parent disagreeing with the former school division's evaluation-eligibility process and requesting an IEE.

In this instance, the previous school division determined the child ineligible for special education and related services. The parent's request for an IEE means that the evaluation-eligibility process is not fully concluded. When a parent requests an IEE, school personnel have two choices: grant the request, or initiate a due process hearing to show that its evaluation is appropriate. (8 VAC 20-81-170 B.2.b(2)). However, the child's transfer triggers a critical, preliminary step to the LEA fulfilling its obligations regarding the IEE. The referenced regulations on student transfers direct the receiving school division to either adopt the previous LEA's evaluation and eligibility determination or conduct its own evaluations. (8 VAC 20-81-120 A). Once the receiving school division has completed this preliminary step, and the parent disagrees with the receiving school division's evaluation or adoption of those evaluations completed by the previous LEA, the parent would then be disagreeing with the receiving school division's evaluation(s). The school division then would respond to the parent's request for an IEE, in accordance with 8 VAC 20-81-170 B.2.b(2), noted above.

Q: Would the same reasoning apply if the former LEA determined the child eligible for special education and related services, the child moves to another locality, and the parent requests an IEE?

A: Yes.

Q: Would the same reasoning apply if the parent requests the IEE prior to the transfer?

A: No. This is a matter of timing. If the parent requests the IEE of the former school division and the student transfers while the school division is processing the request, the former school division is responsible for completing the process. In this instance, the former LEA must either grant the IEE request or initiate a due process hearing to show that its evaluation(s) is appropriate. Following the disposition of the IEE and completion of the eligibility process by the former school division, the receiving LEA is responsible for either adopting the previous LEA's evaluation and eligibility determination or conducting its own evaluations. [Note: If the disposition of the IEE involves a due process hearing, the receiving LEA will be guided by the hearing officer's decision.]

Practice Tip:

- Even if the parent does not request an IEE upon the student's transfer, the receiving LEA should review the former LEA's evaluation(s) and decision that the student is ineligible for special education and related services, and determine whether or not to conduct its own evaluations or adopt those evaluations completed by the previous LEA. This places the receiving LEA in a clear position if the child's eligibility ever becomes an issue.

- With an out-of-state transfer student, the school division should review carefully the evaluations and eligibility determination, since each state may have different eligibility criteria.

011-10. Participation in Testing

Q: Do IEP teams have the authority to exempt students with disabilities from participation in state assessment programs?

No. IEP teams may not exempt students from state assessment programs. Instead, they are required to determine how each student will participate in state assessments.

The Virginia Regulations, consistent with the federal regulations, require the Virginia Department of Education (VDOE) to:

> Ensure that each local educational agency includes **all children with disabilities** (emphasis added) in all general Virginia Department of Education and divisionwide assessment programs, including assessments described in § 1111 of ESEA, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective IEPs and in accordance with the provisions of the Act [IDEA] at § 1412.
> (8 VAC 20-81-20 (4); 34 CFR §300.160). (emphasis added)

In addition, the state regulations, at 8 VAC 20-81-110 G.6, require IEP teams to include certain information regarding students' participation in state assessments in their IEPs:

> a. A statement of any individual appropriate accommodations or modifications that are necessary to measure the child's academic achievement and functional performance, in accordance with the guidelines approved by the Board of Education, in the administration of state assessments of student achievement that are needed in order for the child to participate in the assessment;
>
> b. If the IEP team determines that the child must take an alternate assessment instead of a particular state assessment of student achievement (or part of an assessment), a statement of:
> (1) Why the child cannot participate in the regular assessment;
> (2) Why the particular assessment selected is appropriate for the child, including that the child meets the criteria for the alternate assessment; and

(3) How the child's nonparticipation in the assessment will impact the child's promotion; graduation with a modified standard, standard, or advanced studies diploma; or other matters.

c. A statement that the child shall participate in either a state assessment for all children that is part of the state assessment program or the state's alternate assessment;
…..

In this regulation, "alternate assessment" means any assessment other than the standard SOL test. For any student participating in the Virginia Alternate Assessment Program (VAAP), Virginia Grade Level Alternative (VGLA), Virginia Substitute Evaluation Program (VSEP), or any Board-approved substitute test (ie. WorkKeys), therefore, such a statement, as noted in the regulation must be included.

ADDITIONAL KEY INFORMATION

- ☐ VDOE issued a SUPTS E-MAIL, September 18, 2009, regarding "Participation of Students with Disabilities in State Assessments" that provides specific guidance relative to the above Virginia Regulations and school year 2009-2010:

  The *Regulations Governing Special Education Programs for Children with Disabilities in Virginia,* revised 2009, require students with disabilities to participate in all state assessments. Beginning on the effective date of these regulations (July 7, 2009), Individualized Education Program (IEP) teams and 504 committees will no longer be allowed to exempt students with disabilities, including those students participating in the Virginia Grade Level Alternative (VGLA) and the Virginia Alternate Assessment Program (VAAP) from available state assessments in the content areas of reading, mathematics, science, history/social science, and writing. Although a writing assessment is not presently available for students participating in the VAAP, the development of a VAAP writing assessment will begin this year with implementation currently scheduled for 2010-2011. The Division of Student Assessment and School Improvement will recruit field test participants for the VAAP writing assessment under separate cover.

  IEPs and 504 plans developed for the 2009-2010 school year do not need to be revised; however, all IEPs and 504 plans for students with disabilities developed for the 2010-2011 school year and thereafter, must comply with these regulations and reflect the student's participation in all content area assessments applicable to the grade of the student's enrollment.

- ☐ **Valuable Resources:** We encourage everyone to consult VDOE's document, *Procedures for the Participation of Students with Disabilities in Virginia's Accountability System*, and current manuals for the VAAP, VGLA, and VSEP. See Web site at: http://www.doe.virginia.gov/testing/participation/index.shtml and http://www.doe.virginia.gov/testing/alternative_assessments/index.shtml.

- ☐ It may be useful to include on the IEP form all required information related to participation on state assessments. This will prompt IEP teams to address each requirement, as well as document the IEP team's decisions. IEP team members, including

parents, may wish to review VDOE's model IEP forms for recommended language that documents this information.
Web site: http://www.doe.virginia.gov/special_ed. Then click on the site for "Instructional Services and IEPs".

012-10. IEP Team Composition for Students Placed in Private Schools

Q: The Virginia Regulations require that the IEP team include not less than one special education teacher of the child. If a child attends a private day school or residential facility, placed by the school division, is the school division obligated to ensure the child's teacher(s) from the private special education school attends the IEP meeting?

A: The Virginia Regulations, at 8 VAC 20-81-150 A 3 related to private school placements by a local school division or Comprehensive Services Act team, require:

> When a child is presently receiving the services of a private school or facility…., the local school division shall ensure that a representative of the private school or facility attends the IEP meeting. If the representative cannot attend, the local school division shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.
> [corresponding federal regulation at 34 CFR §300.325(a)(2)]

This is the extent of the school division's obligation; i.e., to include someone from the private school or facility at the IEP meeting. The school division is not required to compel anyone from the private school or facility to attend the IEP meeting, but simply, to invite a representative and ensure alternative means of participation, including individual or conference phone calls, are available.

Virginia Regulations direct the IEP team to include:

> Not less than one special education teacher of the child or, if appropriate, not less than one special education provider of the child. For a child whose only disability is speech-language impairment, the special education provider shall be the speech-language pathologist.
> [8 VAC 20-81-110 C.1.b and c; 34 CFR §300.321 (a)(2) and (3)]

Given the presenting question, the language "teacher of the child" may appear confusing; i.e., some may think that the mandated teacher must be one of the child's current teachers in the private school. Meeting the mandates for IEP team composition, however, requires the school division to ensure their own school personnel attend the meeting. These regulations do not contemplate requiring a school division to ensure that persons other than those individuals employed by the school division serve in this role. Requirements for inviting persons from the private school are confined to "…a representative of the private school or facility…", as cited above.
(see also U.S. Department of Education's Office of Special Education Programs' Commentary on the federal regulations related to this issue, Federal Register, 2006, pp. 46669-46670).

013-10. Private Pre-schools

Q: Parents unilaterally place their child with a disability in a private pre-school and request that the local school division provide speech therapy under the regulations governing "equitable services". Although the school division's equitable services include speech therapy, the school division determines that the private pre-school does not meet the definition of "elementary school." School personnel notify the parents that the school division will not provide equitable services for their child.

- **Are there uniform standards for local school divisions to use in determining whether or not a pre-school facility meets the definition of "elementary school?"**
- **Does the Virginia Department of Education (VDOE) have a legal basis to override a school division's determination that a private pre-school does not meet the definition of "elementary school?"**
- **Do the parents have dispute resolution options, other than the complaint system, for resolving the dispute?**

A:
Preliminary Note: The U.S. Department of Education reminds us that the IDEA requirements extend to pre-schoolers with disabilities. Specifically, U.S. DOE's Office of Special Education Programs (OSEP) states that the IDEA requirements are equally applicable to pre-schoolers with disabilities. (OSEP Q&A, "On Serving Children with Disabilities Placed by Their Parents in Private Schools", Question H-3, January 2007).

When parents unilaterally place their children with disabilities in private schools, federal and state regulations governing special education allow parents to request equitable services from the school division in which the private school is located. (34 CFR §300.137; corresponding Virginia Regulations at 8 VAC 20-81-150 C.6). When the school division receives these requests, the LEA must make two initial decisions:

- Is the facility a "non-profit" institutional day or residential school?
- Does the school meet the definition of "elementary school"; or "secondary school?"

[8 VAC 20-81-150 C.2.b]

With this foundation in mind, let us review each of the above questions:

☐ **Are there uniform standards for local school divisions to use in determining whether or not a pre-school facility meets the definition of "elementary school?"**

The federal and state regulations governing special education define "elementary school" as a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law. (8 VAC 20-81-150 C.1.b; 34 CFR §300.13). (emphasis added). Virginia state law, the *Code of Virginia*, does not include or exclude pre-schools in its definition of "elementary school." (§22.1-1). We are guided, however, by the emphasis in the IDEA definition that the elementary school "…provides elementary education." Therefore, in order for an LEA to determine if the non-profit pre-school facility meets this definition, it is critical that the LEA review whether or not the private pre-school has

an age appropriate curriculum. This does not mean that the private pre-school facility be attached to or be physically located in an elementary school. A private pre-school program's attachment to an elementary school does not demonstrate whether the program provides elementary education, since a private elementary school may include a pre-school program that is simply a day care center. What more properly guides us in this matter is a review of the private pre-school's curriculum as to whether that curriculum:

- aligns with the Virginia Foundation Blocks for Early Learning: Comprehensive Standards for Four-Year-Olds;

- includes developmental activities and opportunities (pre-literacy, early numeracy, problem solving opportunities, and exploration of the child's environment) interfaced with age appropriate social interactions.

☐ **Does the Virginia Department of Education (VDOE) have a legal basis to override a school division's determination that a private pre-school does not meet the definition of "elementary school?"**

The determination of whether or not the private pre-school meets the definition of "elementary school" rests with the local school division where the private pre-school is located. The Virginia Department of Education has no legal basis to override a school division's determination in this regard.

☐ **Do the parents have dispute resolution options, other than the complaint system, for resolving the dispute?**

The parent's dispute resolution options in this instance are limited to the complaint system. If the parent disagrees with the school division's determination, the parent may file a complaint with VDOE, under 8 VAC 20-81-200, that the LEA failed to follow regulatory requirements for parentally placed private school children with disabilities.

The federal and state regulations governing special education preclude parents from using mediation or requesting due process to resolve this type of dispute. Those dispute resolution options apply only if the school division failed to meet the requirements of child find. (8 VAC 20-81-150 C.10.b; 34 CFR §300.140).

Practice Tip:
Documentation of determinations of whether a private pre-school meets the definition of "elementary school" may include: an examination of the private pre-school program and any curriculum manuals; identification of factors used in the examination of the private pre-school's program and manuals; and/or summary of an on-site visit of the private pre-school and interviews with staff. Such documentation will ensure that the school division's determination was not arbitrarily made.

014-11. Parental Placement of a Student with a Disability in a Residential Facility

Q. When a parent unilaterally places a student with a disability in a residential facility, what is the school division's responsibility?

A.

The school division's responsibilities differ depending on the reason for the placement. If the parent places for educational reasons, then the student is treated as any other parentally placed private school student, and the parent is deemed to have waived the student's right to a free appropriate public education (FAPE). In such cases, the school division where the residential facility is located would be responsible for child find activities and for the provision of any available appropriate equitable services under an Individualized Services Plan. (8 VAC 20-81-150 C)

If the parent places for non-educational reasons, then the school division of the parent's residence continues to have FAPE responsibility. This conclusion is based on several rulings involving Virginia school divisions and the VDOE, including a due process decision and an Office for Civil Rights decision. The decision makers in these cases reasoned that in contrast to the parental educational placement, when students are placed in a residential facility due to non-educational and often emergency factors, such as extreme behavioral, mental health, medical or substance abuse crises, the parents have not made a decision to waive FAPE, as they do when they place for educational reasons. Therefore, when placed for non-educational reasons, the student maintains his or her FAPE entitlement. This mandate was memorialized in Virginia's 2002 special education regulations and incorporated in the current regulations at 8 VAC 20-81-30 E.3. (see also 8 VAC 20-81-30 B.9)

While it is important for a school division to understand that it maintains responsibility in these cases, it is equally important that it understand the scope of this responsibility. In short, the school division's responsibility is limited to providing the child's educational services, and because it retains this responsibility, the IEP team, not the residential facility, determines what is necessary to provide FAPE.

Practice Tip: To ensure that school divisions consider all relevant factors and appropriately document the situation, we recommend that a school division take the following steps:

1. When the school division learns that a student has been placed in a residential facility by a parent for non-educational reasons, it should promptly convene an IEP team meeting. The team's first inquiry should be whether the student's needs have changed such that he or she now requires a residential placement for *educational* reasons.
    a. If the IEP team determines that a change in placement is appropriate for educational reasons, then the IEP team amends the child's IEP to reflect that change. In cases where private placement is determined appropriate, school divisions should secure funding through CSA (Comprehensive Services Act) for the private educational services in the IEP.
    b. If the IEP team determines that its placement remains educationally appropriate, the IEP should be amended to state that the placement remains appropriate; however, it is functionally unavailable because the child is currently at a residential facility for non-

educational reasons. The IEP team then proceeds to determine how it will deliver the student's FAPE (special education and related services).[1]

c. While some facilities provide "scholarships" to students who have been placed for non-educational reasons, the facility's provision of a "scholarship" does not diminish or eliminate the school division's FAPE-responsibility for the child.

d. The school division may elect to provide the services through an itinerant teacher, by contracting with the school division where the facility is located, by purchasing the appropriate educational services from the facility, or by some other means.

2. The IEP should also be amended to reflect:
   a. The school division is providing educational services in the new setting as a result of the functional unavailability of the previous placement, and that, when the child returns to the LEA, he or she will return to the previous placement unless the IEP team determines otherwise.
   b. The school division is sharing the student's present levels of performance information, goals and other pertinent IEP information to assist the private facility in understanding the child's educational needs.[2]
   c. The IEP team's decision about the level and nature of services, as well as the determination of how these services are to be provided through an itinerant teacher, by contracting with the locality where the facility is located, or by purchasing the appropriate educational services from the facility, or by some other means.
3. Finally, school divisions may wish to talk to parents about options that may be available for addressing the student's medical and/or behavioral issues through the CSA process, since parents may be unaware of the availability of these resources. If local CPMT policies do not allow parent referrals to the FAPT, the school division needs to consider referring the child/family to the FAPT.

[1] Free appropriate public education means special education and related services. 34 CFR 300.17; 8 VAC 20-81-10.

[2] Of course, this assumes that the school division has been authorized by the parent to share this information with the private facility.

016-11. Partial Parental Consent to IEP

Q: Must a school division implement any and all parts of a child's IEP that have been clearly consented to by the parent, even if the parent has refused consent for the implementation of some parts of the IEP? How does a school division determine what constitutes "clear" consent in these situations?

A: At times, IEP teams disagree on certain parts of a proposed IEP and agree on others. In such instances, it is not uncommon for parents to initial or write their names next to the provisions to which they agree with the other members of the IEP team. It is also common for parents during or after an IEP meeting, prior to consenting, to make hand-written notations on the proposed document in an attempt to consent to some, but not all, parts of the proposed IEP. Following an IEP meeting but prior to consent, parents may even, by handwritten notation, attempt to add services, or conditions to the provision of services, that were not reviewed by the other members

of the IEP team.

Virginia Regulations clearly mandate school divisions to ensure that an IEP is implemented as soon as possible following parental consent to the IEP. (8 VAC 20-81-110 B.2). This regulation does not explicitly require the LEA to implement portions of the child's IEP in the instance where the parent has not consented to the entire document; however, when read in conjunction with two other regulatory provisions, the law does not prohibit the LEA from implementing those parts of the IEP that are consented to by the parent, as it is critical that the student's receipt of a free appropriate public education (FAPE) not be interrupted. (8 VAC 20-81-170 E.1.d, and 34 CFR § 300.300 (d)(2)). Thus, it is important that the denial of consent to one provision for a service not deny another which may be essential to the student's receipt of FAPE.

For these reasons, VDOE has held historically and consistently that in such instances, the school division must implement those provisions on which the parties clearly agree and document what actions will be taken to resolve the items in dispute. If the parent's notations are illegible, consent boxes are unclearly identified, and/or the parent provides commentary that make it impossible to ascertain the parent's intentions to any degree of certainty, the IEP team may conclude that the parent has not "clearly" conveyed consent and provide the parent with prior written notice. If following an IEP team meeting but prior to consent, the parent provides notations attempting to add services or establishing conditions to the provision of services, another IEP team meeting needs to take place so that the other IEP team members review the additional requests and determine their appropriateness.

Additionally, there may be some situations in which the IEP team believes that the parent's partial consent would actually impede the provision of FAPE. For instance, the parent and other team members agree on behavioral goals for the student, but the parent refuses consent for a more restrictive environment that the team contends will provide critical support for the achievement of the goals. In such cases, the team should provide prior written notice to the parent and consider available dispute resolution options.

Practice Tip

- One practical way of processing this information is to present the parent with a "clean" copy of the proposed IEP, containing only those provisions that the LEA determines the parent has conveyed consent and requesting the parent to sign or initial consent on the "clean" IEP document. This suggestion does not eliminate the LEA's responsibility for pursuing additional steps to resolve items in dispute in order to work towards a complete program of services for the child, and it does not eliminate the LEA's responsibility for issuing a prior written notice in response to additional services or conditions that may have been requested by the parent.
- Where the parent's notations or comments on the proposed IEP document are readily comprehensible to the LEA, and where the parent has signed or initialed the proposed IEP document, subject to the limitations imposed by their notations or comments, it may not be necessary to present the parent with a "clean" copy of the IEP document.

017-11. IEP Content: Frequency and Duration

Q: How precise must the IEP language be in stating the frequency and duration of each service?

A: Federal and Virginia special education regulations require that IEPs include the anticipated frequency and duration of those services and modifications in the student's IEP. 8 VAC 20-81-110 G.7; 34 CFR §300.320 (a)(9). The U.S. Department of Education's Office of Special Education Programs (OSEP) addresses this issue in its analysis of the IDEA's implementing regulations. OSEP notes that an IEP must include sufficient information about the amount of services that will be provided so that the level of the school division's commitment of resources is clear. Specifically, OSEP states:

What is required is that the IEP include information about the amount of services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and other IEP Team members. The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP. (71 Fed. Reg., 2006, p. 4667)

OSEP issued a 2010 opinion consistent with its previous positions on this matter and reiterated its 2006 statement noted above. (*Letter to Matthews*, OSEP 55 IDELR 142, 2010). OSEP, however, also cautions that there may be special circumstances where the amount of time for each service, especially related services, may vary in order to meet the needs of an individual student. The example given is an IEP that calls for 16 weekly sessions of counseling, totaling 600 minutes, per semester. OSEP notes that while most IEPs need to state minutes per session in order to meet the regulatory requirement, the referenced provision contains sufficient information so that everyone understands the number of minutes to be provided over the course of the semester, while also providing sufficient flexibility for managing the length of each session depending on the student's needs. (*Id.*) Documentation of the provision of the service is critical in this regard.

Practice Tip: IEP teams generally follow the common meanings of "frequency" and "duration":

Frequency: the amount of services to be delivered per time period.
Duration: the date that services will begin and end (see VDOE sample IEP forms).

Many variables come into play, however, when IEP teams develop specific language to describe these two terms for each child. For example, IEP teams must consider whether the classes will be self-contained and/or collaborative; changes in school schedules; the child's needs, some of which may be fluctuating; and integrating services in the classroom or across other instructional environments. In addition, daily special education services provided in the classroom and related services provided on a periodic basis may lend themselves to differing frequency descriptions. For this reason, we refer you to the following VDOE documents, which address varying situations, to provide guidance. In addition, school personnel may wish to review individual situations with their VDOE special education technical assistance specialist.

- VDOE sample IEP forms

- *Guidance Document Standards-based Individualized Education Program (IEP)* and associated training modules (PPTs)
- Speech-Language Pathology Services in Schools: Guidelines for Best Practice

018-11. Hearing Officer Determination of Services During Disciplinary Removal

Q: FAQ 004-10 states that if a student is removed for disciplinary reasons to an interim alternative education setting, and the parent refuses to agree to a change in services, the school division is obligated to provide services set forth in the last agreed upon IEP until the dispute is resolved. What happens if the school division pursues a due process hearing on the matter? Is the school division's proffered IEP in the alternative setting considered FAPE for the student even though the parent refuses consent to any change in services?

A: FAQ 004-10 references Virginia-specific requirements for written parental consent to any change in a student's IEP services. The specific challenge arises when the parent refuses to consent to a revision of the student's IEP services in the alternative educational setting. If the parent does not consent to the IEP team's proffered addendum of services, the school division obviously cannot implement those proffered services. If the school division chooses to file due process to resolve this dispute, the Virginia Regulations provide that the student stays in the interim alternative educational setting pending the hearing officer's decision. See 8 VAC 20-81-160.G. Ultimately in such a dispute, determination of the appropriateness of the services and placement properly belongs to the hearing officer.

In short, a hearing officer may decide that in a particular disciplinary dispute, a school division has offered FAPE, and that the full range of services in the last agreed upon IEP was, accordingly, not required. A school division, having clearly determined that the proffered IEP addendum is reasonably calculated to provide a FAPE in this instance, may elect to stand by that offer and allow applicable dispute resolution options to resolve the matter. If the matter proceeds to a due process hearing, the hearing officer has the opportunity to determine whether the offer of FAPE is sufficient. To the extent that the parent has not consented to the offer, the hearing officer could override the lack of parental consent. Once the hearing officer rules that the school division's offer provides FAPE, then the school division may implement the IEP where the lack of parental consent is overridden.

A Note to Keep in Mind: Because timely resolution of issues involving disciplinary actions is critical, the federal and state regulations governing special education apply a shorter time period for the due process hearing. The expedited due process hearing must occur within 20 school days of the date the due process request is received; the hearing officer's decision must be made within 10 school days after the hearing. (8 VAC 20-81-210 R.1; 34 CFR § 300.532(c)). While the parties may agree to a nonexpedited hearing and follow the rules governing the 45-day timeline period, the expedited process supports a more timely resolution of the student's placement and services, including the school division's offer of FAPE in the alternative educational setting.

019-11. Parental Placement of a Student with a Disability in a Private Day School

When a parent unilaterally places a student with a disability in a private day school, what is the school division's responsibility?

FAQ 014-11 addresses the school division's FAPE-responsibility for parentally-placed students for non-educational reasons in residential facilities. The same premise does not apply when a parent places a student with a disability in a private day school, as there are no circumstances under which a day placement is considered a placement for non-educational reasons. This determination is based on the following factors:

- The primary function of any program licensed as a private day school is to provide solely educational services.
- The primary function of any private school, for example a private parochial school, is to provide educational services.
- According to the Virginia Department of Behavioral Health and Developmental Services, there are no licensed "free-standing" Day Treatment Programs which require a student's withdrawal from public school. Licensed Day Treatment Programs that operate within a private school setting function for the purpose of supporting the educational program.

Therefore, there is no instance wherein a parent places a child with a disability in a private day school for reasons other than education. At that point, the provisions of 8 VAC 20-81-150 C apply and the student with a disability is not entitled to the services or any amount of a service the student would receive if enrolled in a public school. (8 VAC 20-81-150 C.6.a).

Reminder: The regulations mandate the school division of location (i.e. where the private school is located) with responsibility for child find and equitable services under an Individual Service Plan. 8 VAC 20-81-150 C.

020-11. IEP Amendment without a Meeting – Providing Meeting Notice

Q: If a parent and school division agree to amend an IEP without an IEP team meeting, is the school division required to provide notice of this meeting?

A: When making changes to a child's IEP after the annual IEP meeting for the school year, the parent(s) and the local educational agency representatives may agree to develop a written document to amend or modify the child's current IEP without convening an IEP meeting. 34 CFR §300.324(a)(4) and (a)(6); 8 VAC 20-81-110 B.9. The regulations also require the following:

a. If changes are made to the child's IEP, the local educational agency shall ensure that the child's IEP team is informed of those changes.
b. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.
c. This meeting is not a substitute for the required annual IEP meeting.

In responding to an informal inquiry from Virginia Department of Education staff on this issue, staff in the U.S. Department of Education's Office of Special Education Programs (OSEP) advised that an IEP meeting notice, as outlined in 8 VAC 20-81-110 E.2 and 34 CFR §300.322 (a) and (b), is not required in this instance. OSEP stated, however, that in such cases, the prior written notice requirements of 34 CFR 300.503 still apply. (corresponding Virginia Regulations at 8 VAC 20-81-170 C) (see OSEP's "Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations," Revised June 2010; Question C-10).

Practice Tips:

- The changes to the child's IEP and parent consent when there is no full IEP team meeting need to be documented. The regulations use the phrase "written document" when amending or modifying the child's IEP in this context. (8 VAC 20-81-110 B.9). A school division could develop a form, or modify an existing addendum form, in which the parent's agreement to change an IEP provision without a meeting and changes made to the IEP are documented. This form could also include a space for the parent to provide written consent along with a statement indicating that the prior written notice is attached. This form could also be used to advise other IEP team members of the change.
- If a significant change is contemplated, it may be more beneficial for the full IEP team to be convened to discuss the relevant issues.
- We recommend that the prior written notice indicate that an amendment was made without a meeting of the IEP team, what the amendment included, as well as all of the other required components of the prior written notice.

021-12. IEP: Annual Review Date

Q: Is there a "common meaning" for the word "annual" when used in the context of when IEPs must be reviewed? For example, two school divisions hold annual review IEP meetings on January 17, 2012.

- **One team writes the IEP annual review date as January 17, 2013.**
- **The other team writes the IEP annual review date as January 18, 2013.**

Which LEA is correct?

A: Virginia Regulations, at 8 VAC 20-81-110 B.5, mandate that the school division must ensure that the IEP team reviews the student's IEP "…periodically, but not less than annually." This provision is consistent with the federal regulations governing special education that expect IEPs to not be static documents, but rather, be responsive to each child's current educational needs. (34 CFR § 300.324(b)). The U.S. Department of Education's Office of Special Education Programs (OSEP) does not address the meaning of the term "annual" in its analysis to the federal regulations and to date, has not provided guidance on this issue. Therefore, VDOE applies the "plain meaning" to the word; i.e. "annual" means 365 days from the date of the last annual IEP meeting (or initial IEP meeting if the IEP is the first for the child with a disability.) In the example given above, both teams convened on January 17, 2012. The IEP team would then meet on or before January 17, 2013 for its annual review.

Keep in mind that the annual review date for the IEP meeting may differ from the actual "service dates." For instance, if a student's annual IEP meeting takes place on August 15, 2011, and the

school year begins on September 6, 2011 and ends on June 10, 2012, the service dates may be from 9-6-11 through 6-10-12; the annual review date is no later than 8-15-12.

If the IEP team meets to develop an addendum to the child's IEP, does the team's meeting date to develop the addendum become the new "annual review date?"

During an annual review, all IEP components are reviewed, discussed, and determinations made accordingly. Thereafter during the school year, changes may be required in the child's IEP. Addenda are for the purposes of changing some provision(s) in the child's IEP. Meetings for any purpose other than the annual review (e.g., developing an addenda or conducting MDR) do not extend the annual review date. Meeting for the purpose of annual review, prior to the expiration of the annual review date, creates a new annual review date.

022-12. Enrollment as a Pre-Requisite to an IEP Meeting

Q: The parents of a child with a disability, who placed their child for educational reasons in a private school, contemplate returning their child to the public schools. The parents request the school division of their home residence to develop an IEP for the child. May the LEA make enrollment a pre-requisite to developing an IEP for this child?

A: No. Because an LEA has an ongoing, affirmative obligation to locate children with disabilities residing within the school division and to provide them with a free appropriate public education (FAPE), a child's school enrollment status is not a condition precedent to developing an IEP for the child at the parent's request.

School divisions implement enrollment procedures for all students residing within their jurisdiction in accordance with the *Code of Virginia* requirements on such matters as immunization records. (§ 22.1-271.2). At the same time, school divisions are obligated to provide FAPE to every FAPE-eligible child residing within the division. (§ 22.1-214; 8 VAC 20-81-30 B).

School divisions may question the use of administrative time and resources to develop a prospective IEP if the parents are not enrolling, or have not yet enrolled, their child in the division. A review of case law, however, supports that the school division's FAPE responsibility for a child with a disability not enrolled extends to when the parent who privately placed the child requests the LEA to develop an IEP for the child. While the LEA cannot implement a proposed IEP while the child remains in the private school, several courts reason that when the parents request an IEP, "…refusing to do an IEP pre-enrollment constitutes a violation" of IDEA and emphasize that "…residency, not enrollment, triggers an educational agency's obligation to provide FAPE." (*James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 2000; *District of Columbia v. West*, US District Court, 54 IDELR 117, March 30, 2010).

Certain facts, however, may modify the obligation. For instance, a federal district court in our 4th Circuit applied the same reasoning in *James* but distinguished that if the parent does not request an IEP, the school division is not obligated to develop one. (*C.M. v. Henderson County Schools*, 184 F.Supp.2d 466, W.D.N.C. 2002). As further application, in a recent decision, one of Virginia's hearing officers ruled that the school division was not obligated to revise a current IEP at the request of the parent of a parentally placed student because the division had previously developed IEPs for the student that did not call for private placement and the parents systematically refused consent. (see VDOE's Web site, Hearing Officer Decisions, #11-048

under the category of IEP.) If the parent presents new information, however, or if the proposed IEP implementation dates have expired, the IEP team should meet.

Reminder:

1. As we have seen, enrollment may not be a pre-requisite for or a barrier to the provision of FAPE for a child with a disability. For this same reason, Virginia's regulations governing special education also include the provision that if a child with a disability is living with the parent in the residence of the local school division, the division is responsible for ensuring the child receive FAPE even if enrollment requirements for the child are not completed within a reasonable period of the parent's request to enroll the child. (8 VAC 20-81-30 D).

2. Recall that Virginia regulations governing special education include homeschoolers and pre-schoolers in the definition of "private school" populations addressed in parentally placed provisions.

Practice Tip: Provide prior written notice to document the LEA's response and the justification for the response. For example, if the LEA refuses to develop a revised IEP to an IEP which is current, the PWN should state that the division stands by its current proposed IEP and that if the parent provides new information which may affect the decisions of the IEP team, the LEA will consider convening a meeting to review the new information.

023-12. Discipline – Summer School

Q: Do the disciplinary protections under the *Individuals with Disabilities Act* (IDEA) apply to students with disabilities who attend summer school?

A: IDEA disciplinary protections are only required for students with disabilities who are attending the school division's summer school program if such services are included in the student's IEP. Otherwise, the school division is not required to implement the student's IEP in the summer school program, or conduct a manifestation determination before dismissing the student from the summer program for inappropriate behavior and following its disciplinary policies and procedures for non-disabled students. (see *Savannah, MO, Sch. Dis*, 50 IDELR 262, Office for Civil Rights (OCR), 2007[1]).

Generally, the decision of whether a student's IEP must continue during the summer months is made in the context of Extended School Year (ESY) services. (see Virginia Department of Education's Technical Assistance Resource document regarding Extended School Year Services.) An IEP may also be extended into the summer months, either as ESY or not, if the IEP team determines to provide the student compensatory services to address a complaint or due process finding, or to offset interrupted services. If the IEP team determines the child ineligible for ESY services but includes one or more of the school division's summer school programs for whatever reason in the student's IEP, then the IDEA disciplinary protections apply to the student. If the IEP team determines the student is not eligible for ESY services and does not include summer services in the IEP but the parent decides to enroll the child in a summer school program, no IDEA disciplinary protections apply.

Practice Tip: As a cautionary note, school administrators should be mindful that even though a student with a disability may not require summer school in order to receive FAPE, that student

has the same right to attend summer school as a non-disabled student. As a result, accommodations may be needed to allow access to the child. For instance, a child with an orthopedic impairment may still need additional time to move from class to class within the building. The obligation to make this accommodation available arises not under IDEA, but under the more general umbrella of Section 504. OCR reminds us that Section 504 places a duty on school divisions to provide the necessary services in summer school programs to ensure that the student with a disability receives equal opportunity to participate in the program to the same extent as the student's non-disabled peers. Failure to provide that access may constitute disability discrimination.[2]

Just as a student with a physical disability may require accommodations to attend summer school, a student whose disability involves behavioral challenges may need accommodations to be able to participate in the program. From the perspective of discipline and students with disabilities in summer school, this may require a special education staff member who is most familiar with the student's behavioral issues to confer with the summer school teacher(s) about the student's needs and to document their review of any accommodations or modifications that might permit the student to meet the school division's behavioral standards and remain in summer school. (see *Savannah*). Such situations need to be reviewed on a case-by-case basis and as necessary, with the division's school board attorney.

KEY: When a student with a disability is provided an accommodation for the above reasons noted in this Practice Tip and s/he nonetheless does not comply, the student may be removed on the same basis as a student without a disability. This is because in this instance, the student's right to accommodations is for access only (under the 504 standard) and not for FAPE purposes (under the IDEA standard: providing the student with services for the student to benefit educationally). Therefore, the disciplinary protections under IDEA do not apply and a manifestation determination review need not be conducted. (see *Savannah*).

- When students with disabilities are enrolled in summer school programs, administrators should note if the student is attending because of an IEP team decision or enrolled by the parent.
- If the IEP includes summer school services, whether for ESY or other purpose, the LEA should have a plan to ensure that staff are aware and clarify that:
  - Any discipline actions must follow the special education regulations.
  - All IEP accommodations and modifications are required, as documented in the IEP.
  - Requirements for progress are to be reported, as documented in the IEP.
  - Documentation of delivery of services must be maintained.

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[1] A 2000 New York Federal District Court issued a decision in 2000 that takes the opposite position from OCR. Virginia's Office of the Attorney General has advised VDOE that the New York case is distinguishable from the OCR case in that New York schools maintained that summer school was an integral part of the New York Board Promotion Policy that required summer school for all students where there was a question of promotion. Virginia does not have such a policy.

[2] OCR has focused on this issue in a number of cases, including *Savannah* referenced above. See also *Fayette County (KY) Sch. Dis.,* 353 IDELR 279, OCR, 1989; *Clayton (MO) Sch. Dis.,* 16 IDELR 786, OCR 1990; *West Lafayette (IN) Community Sch. Corp.,* 352 IDELR 498, OCR 1987.

024-12. Orientation and Mobility (O&M) Services

Q: Is there a common definition of O&M services that IEP teams can follow in determining what services a student with a disability may need to benefit educationally?

A: Virginia Regulations mirror the federal IDEA definition of O&M services as meaning:

Services provided to blind or visually impaired children by qualified personnel to enable those children to attain systematic orientation to and safe movement within their environments in school, home, and community; and includes travel training instruction and teaching children the following, as appropriate:

- Spatial and environmental concepts and use of information received by the senses (e.g., sound, temperature, and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);
- To use the long cane or service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;
- To understand and use remaining vision and distance low vision aids; and
- Other concepts, techniques, and tools.

[8 VAC 20-81-10; federal regulation at 34 CFR § 300.34(c)(7)]

Q: How can an IEP team determine if O&M services are needed by a student with a disability in order to benefit educationally?

A: The definition referenced above includes that O&M services are for students who are blind or visually impaired. Therefore, documentation of the student's visual impairment or blindness must be included in the IEP to be considered for O&M instruction as a related service. An evaluation by an O&M specialist to assess needs in orientation and/or mobility will assist the IEP team in determining what services would be appropriate for the child. The IEP team must consider any resulting recommendations for direct instruction or consultation in O&M. Key times when further O&M assessment may be indicated include whenever visual function or travel needs change or at transition periods (i.e., kindergarten, middle school, and high school).

Q: The definition states that O&M services are provided by "qualified personnel." Who is "qualified" to provide O&M services?

A: In Virginia, there is no licensure requirement for O&M specialists, or definition of "qualified." Best practice suggests that such specialists have a degree in O&M from a recognized program. To further guide school divisions, there are currently two organizations that certify O&M specialists:

- The Academy for Certification of Vision Rehabilitation and Education Professionals
- The National Blindness Professional Certification Board

While the O&M specialist manages the O&M program for a student and teaches O&M skills to a student, other school personnel may be involved in reinforcing certain O&M skills under the direction of the specialist. General and special education teachers, teachers of the blind and vision impaired (TBVI), paraprofessionals, and even student peers may help to reinforce the skills the student has acquired through O&M instruction.

Q: What are the school division's obligations for providing O&M services in settings outside of school?

A: As we see in the above cited regulatory definition of Orientation and Mobility services, Virginia Regulations and federal IDEA regulations clearly anticipate the need for O&M services to be considered in environments outside of the immediate school building:

- systematic orientation to and safe movement within their [students'] environments in school, home, and community.
- to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street).

Therefore, IEP teams must consider environments exterior to the school building as potential sites for instruction if the student needs such assistance to benefit educationally. While the regulations contemplate these exterior environments, each situation must be reviewed on an individual basis in accordance with the description of the child's present level of performance that defines the student's educational needs.

Q: Is there are a list of duties that would help IEP team members understand the role of the O&M specialist?

A: Questions are often raised as to the specific role of the O&M specialist. The following provides a summary of the many roles O&M specialists maintain:

Assessment and evaluation

- Assisting in conducting the Functional Vision Assessment (FVA) when appropriate;
- Conducting the O&M assessment; and
- Evaluating student progress and providing progress notes as per LEA policy.

Direct instruction

- Encouraging purposeful movement, exploration of immediate surroundings, and motor development for young children with visual impairments;
- Teaching spatial and environmental concepts and use of information received by the sense (e.g. sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using traffic sounds at an intersection to cross the street).
- Providing support to the student to facilitate development of self-esteem, self-determination, and social acceptance.
- Teaching students to orient themselves to unfamiliar environments.
- Instructing in efficient use of low vision for movement.
- Teaching efficient use of low vision devices.
- Teaching use of mobility tools, including the long cane and adaptive mobility devices, for safely negotiating the environment.

- Providing travel experiences in the community, including residential and business environments and public transportation systems.

Supporting educational teams

- Supporting families of young children in encouraging gross and fine motor skills, sensory skills, basic concepts, and other developmental milestones.
- Ensuring continuity from early childhood intervention services to school-age programs.
- Ensuring that appropriate vision-specific supports are in place and the necessary skills are attained for transitioning from school to adult life.
- Modifying the environment to accommodate specific mobility needs.
- Modeling appropriate O&M techniques for other team members.
- Providing, creating, and acquiring adapted materials, such as tactile maps and mobility devices.
- Providing in-service training and consultation to other team members in home, school, and community settings.
- Recommending O&M strategies for access to the general curriculum, such as physical education class and participation in school and community extra-curricular activities.

Administrative

- Maintaining records on all evaluations, IEPs, and progress reports.
- Attending IEP meetings.

025-12. School Division Closures & Obligation for Services

Q: If a school division is closed for inclement weather, emergency situations, holidays, or teacher workdays, is the school division obligated to provide the IEP services that would have been provided had school been in session?

A: A school division's obligation to provide specific, quantifiable services in accordance with an IEP is an enforceable obligation. In the events noted above, a holiday is the only event that has been addressed by the courts. A Virginia federal district court has ruled that no services are required during Thanksgiving or Christmas Break. *(Smith v. James C. Hormel School of the Virginia Institute of Autism and Greene County School Board*, 2009, U.S. District Court, LEXIS 114892, aff'd in relevant part 2010 U.S. District court, LEXIS 29026). It is reasonable to apply this same standard to Spring break and designated holidays, such as Columbus Day, when those holidays are so noted on the school division's school year calendar as a planned closure.

The same reasoning may be applied to other non-holiday closures, whether planned or unplanned. As one hearing officer ruled in a due process decision, "there is no expectation that a school will provide any services when the school is closed." (*Student with a Disability Department of Defense-Defense Legal Services Agency*, 109 LRP 47582, 2008). Additional authority may be found in the federal and state regulations governing special education in the definition of "school day". (34 CFR § 300.106(b); corresponding Virginia Regulations at 8 VAC 20-81-10). "School day" means "any day, including a partial day, that children are in attendance at school for instructional purposes. The term has the same meaning for all children in school, including children with and without disabilities." Put most simply, services cannot be provided when the school division is closed, for either general education or special education students.

We then turn to the question of whether or not school divisions are responsible for making-up special education services following events involving school division closures. To answer this question, we look to the following due process case decision and additional principles, based on a "rule of reason".

- A hearing officer noted that "With regard to school closures for holidays, parent-teacher conferences, and other school-wide activities, no services would have been anticipated by the IEP team during these regularly scheduled events. Therefore no make-up time is called for." (*In re: Student with a Disability*, 109 LRP 13190, Montana State Educational Agency, January 16, 2009). This holding is consistent with the above referenced decisions that are equally applicable. This principle also would apply to unplanned closures due to emergency situations or inclement weather.
- As part of general practice, school divisions may "bank" instructional hours in calculating what constitutes a regular school year to ensure that the division meets the number of instructional hours/days. If the unscheduled closures exceed this "banked" time, the school division is required to make up the missed time for students in general education, as well as special education. Therefore, IEP services that were not provided on a day of closure must be provided on the school division's make-up days (whether banked or additional).

Practice Tip

- Regardless of these principles, an IEP meeting may be convened, either at the request of school personnel and/or parent, to review the impact that a planned or unplanned closure had on the student's right to receive FAPE.
- School divisions may wish to develop specific language in their IEPs that provides a clear understanding of the application of the above referenced points. As part of an electronic series of Tips for implementing the special education requirements, one school board attorney suggests the following language:

Tip No. 3702011 (9/16/11) IEP Implementation

It is a good idea to have a provision on the service page of the IEP that provides notice to parents that scheduled IEP services, despite any statement in the IEP to the contrary, are not provided on or made up for days the school division is closed for any reason, such as holiday or weather and may not be provided during a partial day. This clarifying statement is necessary so that students may not be entitled to compensatory education services in the event of a school closing. For example, if speech services are specified in the IEP with a frequency of three thirty minute sessions per week and are actually provided on Monday, Wednesday and Friday, if the school division is closed on Wednesday through Friday, the speech services are provided only on Monday and the other two days are not made up per the terms of the IEP. This clarification assists in avoiding parent complaints that the three sessions had to be rescheduled for Monday and Tuesday or made up at later date.

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[1] While not endorsing a specific law firm or school board attorney, we use the quoted section to illustrate the type of language IEP teams could consider in addressing this issue so that both parent and school personnel are clear on the school division's responsibility for FAPE.

026-12. Private Pre-Schools – Child Find

Q: Parents unilaterally place their child in a private pre-school located in a school division different from where they live. The school division where the private pre-school is located determines that the private school is "non-profit" but does not meet the definition of "elementary school." Although the child is then not entitled to "equitable services", which school division is responsible for child find?[1]

A: FAQ 013-10 addresses private pre-schools and equitable services, and specific issues related to determining whether or not a private pre-school meets the definition of "elementary school." In that case, it is correct to say that when the school division (LEA) determines that the private pre-school does not meet the definition of "elementary school," the child is not eligible for equitable services under the school division's "set aside monies" (proportionate share calculation). FAQ 013-10 also notes that when dealing with issues involving parentally-placed private school children with disabilities, the school division of location[2] must determine whether the private school is "for profit" or "non-profit." Therefore, consistent with FAQ 013-10, the private pre-school school must be "non-profit" and meet the definition of "elementary school" in order to meet the threshold consideration for accessing equitable services.

The child find obligation exists independently from the requirements related to equitable participation. The U.S. Department of Education's Office of Special Education Programs (OSEP) has stated that a LEA is still responsible for child find activities even if the private school is "for profit". (*Letter to Chapman*, 49 IDELR 163, August 22, 2007). OSEP emphasizes that even if the private school does not meet the definition of elementary school and the child, thus, is not eligible for equitable services, the State must ensure that all children residing in the State, including children with disabilities attending private schools, and who are in need of special education and related services, are identified, located, and evaluated, including those attending for-profit private schools. (IDEA §1412(a)(3)(A); corresponding federal regulations at 34 CFR §300.111).

OSEP left it to the States to determine whether the LEA of location or the LEA of residence is responsible for child find activities in this instance. VDOE determined that the LEA of location is responsible for ensuring child find activities for students in "for profit" and "non-profit" schools.[3] However, if the LEA of location identifies that the private pre-school does not meet the definition of "elementary school" whether or not it is operating as a "non-profit", the placement is considered for purposes other than education, such as day care, and therefore, the child is not privately placed in a pre-school. In that instance, the child find responsibilities are with the LEA of residence.

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[1] While this inquiry focuses on private pre-school facilities, the response relates to all private schools.

[2] LEA of location is the school division where the private school is located. LEA of residence is the school division in which the parent resides. While the LEA of location and LEA of residence may be one and the same, the question noted above is in the context of the parent living in one school division and placing the child in a private school in another school division.

[3] Superintendent's Memo, Interpretive, No.1, February 9, 2007. Informational Memos to Special Education Administrators from H. Douglas Cox, dated November 15, 2007 and December 14, 2007.

027-12. IEP Team Composition: Manifestation Determination Review Meetings & Resolution Sessions

Q: Does a parent have an "equal right" in the determination of the IEP team composition when the purpose of the meeting is for manifestation determination review (MDR) or Resolution Session in a due process proceeding?

A: No. Both the federal and state regulations governing special education mandate the composition of the IEP team when the team meets for the purpose of MDR or Resolution Session. The team must be comprised of the "…local educational agency, the parent(s), and relevant members of the child's IEP team, as determined by the parent and the local educational agency…". (emphasis added) (MDR: 34 CFR §300.530(e)(1); corresponding Virginia Regulations at 8 VAC 20-81-160D.2; Resolution Meetings: 34 CFR §300.510(a)(4); corresponding Virginia Regulations at 8 VAC 20-81-210Q.1.d).

During the public comment period on the revision of the IDEA federal regulations, this question was raised to the U.S. Department of Education's Office of Special Education Programs (OSEP). OSEP only advised LEAs and parents to "…act cooperatively in determining who will attend the resolution meeting." (Analysis, Federal Register 46701, regarding resolution sessions in due process proceedings).

We are guided, however, by a Virginia Federal District Court decision on this subject. (*Fitzgerald v. Fairfax County School Board*, U.S. District Court, 50 IDELR 165, 2008). In this case, the parents asserted that they had an "equal right" (their words) to determine the individuals who attend MDR meetings. As the Virginia Hearing Officer determined and the federal court upheld, the parents misread the law and regulation in this regard. The court especially noted that the law does not mean that the parents and LEA must agree on identity in all team members, or that parents have a veto on members. The court emphasized that like any IEP team meeting, "…the LEA determines the school system's MDR members and the parents may determine whom they wish to invite in addition to those designated by the school and the LEA."

Additionally and significantly emphasized by the hearing officer and court, neither the IDEA nor its implementing regulations give parents veto power over which specific LEA or school personnel serve on the IEP team. This application of the law is consistent for IEP teams no matter whether the purpose of the meeting is MDR, Resolution Session in due process proceedings, or any other IEP team meeting. Thus, the parents' participation in determining the composition of the IEP team is limited to inviting individuals who, in their opinion, "have knowledge or special expertise regarding the child." (34 CFR § 300.321(c); corresponding Virginia Regulations at 8 VAC 20-81-110 C.1.f.) (see *Fitzgerald*).

028-12. Eligibility – Visual Impairment

Q: What consideration should eligibility groups give to visual acuity "in the better eye with best possible correction" when determining a child eligible for special education and related services as a child with a Visual Impairment?

A: Virginia Regulations governing special education mandate eligibility criteria for determining a child with blindness if, in part, the child demonstrates "Visual acuity **in the better eye with best possible correction** of 20/200 or less at distance or near…" (emphasis added) (8 VAC 20-81-80 W.2.a). This same standard element, **in the better eye with best possible correction**, is omitted in the mandated eligibility criteria for determining a child with a visual impairment. The specific language mandates that eligibility groups determine the child to have a visual impairment if the child demonstrates having a "visual acuity better than 20/200 but worse than 20/70 at distance or near…". (8 VAC 20-81-80 W.3.a).

Until the cited regulation is revised, we encourage eligibility groups to understand the following section of the Virginia Regulations to mean:

A child with a visual impairment demonstrates the following:

a. Visual acuity better than 20/200 but worse than 20/70 **[in the better eye with best possible correction]** at distance and/or near; or
b. Visual field restriction in the better eye of remaining visual field of 70 degrees or less but better than 20 degrees.

NOTE: Please see 8 VAC 20-81-80 W for the complete criteria for eligibility as a child with a visual impairment.

029-12. Age of Eligibility

Q: The Virginia Regulations governing special education mandate that a student with a disability turning age 22 after September 30 remains eligible for a free appropriate public education (FAPE) for the remainder of the school year (8 VAC 20-81-10). Does the same mandate apply if the student turns 22 prior to September 30 and a new school year has started?

A: FAQ 008-10 reinforces the above referenced regulation that students with disabilities turning 22 years of age after September 30 have the right to continue to receive services in accordance with the IEP for the remainder of the school year. This is consistent with the definition of "age of eligibility" in the Virginia Regulations, and assumes that the student has not graduated with a standard of advanced studies diploma.

Also consistent with this same definition is the fact that FAPE-eligibility ends when the student turns 22 prior to September 30 even after the beginning of a new school year. If the regulation had intended that any student who turned 22 during the school year remained eligible for the remainder of the year, the regulation would have simply stated this point. Instead, it refers to the September 30 date and the right of the student who turns 22 after that date to finish the school year. The converse is true for students who turn 22 prior to that date. In this instance, the IEP team may determine, with consent, that the student's FAPE ends on:

- the last day of the previous school year (assuming the student's IEP does not provide for extended school year (ESY) services; or
- if the IEP provides for ESY, the last day of those services; or
- the exact birth date.

As noted in the Practice Tip for FAQ 008-10, it is essential that good planning, including secondary transition, be provided the student in his/her last year of school, so that the student transitions successfully from public school.

030-12. Incarcerated Students with Disabilities in Federal Prisons: Lea Responsibilities for FAPE

Q: Are local school divisions responsible for providing a free appropriate public education (FAPE) for students with disabilities convicted as adults and incarcerated in federal prisons?

A: No. Federal and state regulations governing special education require that FAPE be available to eligible students with disabilities in adult correctional facilities. (34 CFR §300.102(a); corresponding Virginia Regulations at 8 VAC 20-81-100A.2.b). No other provision in the IDEA or Virginia Regulations directs FAPE for students with disabilities convicted as adults and serving time in federal prison.

The U.S. Department of Education's Office of Special Education Programs (OSEP) emphasized this position in responding to an inquiry on this topic. OSEP noted that the IDEA does not specifically require the provision of educational services to students with disabilities incarcerated in federal prisons. These students fall under the authority of the Federal Bureau of Prisons. (*Letter to Mahaley*, 111 LRP 68366, OSEP 2011; see also *Letter to Yudien*, 103 LRP 37913, OSEP 2003).

031-12. Child Find Responsibilities for Incarcerated Students

Do school divisions have Child Find responsibilities for students:

1. **incarcerated in regional or local jails;**
2. **convicted as adults and serving time in federal prison?**

1. **Incarcerated students in regional or local jails**

   Virginia Regulations governing special education mandate that school divisions must implement a child find program to identify, locate and evaluate students under 18 years old who are suspected of having a disability needing special education and related services, and who are incarcerated in a regional or local jail in the jurisdiction of the school division. (8 VAC 20-81-50A.1.e)

2. **Students convicted as adults and in federal prisons**

   As noted in FAQ 030-12, students convicted as adults and serving time in federal prison are under the authority of the Federal Bureau of Prisons. The provisions of IDEA do not apply to these students, including the requirements for child find. (see *Letter to Yudien*, 103 LRP 37913, OSEP 2003).

032-12. IEP: Transfer Student and Extended School Year Services

Q: A student transfers during the summer to a new school division with an IEP that includes Extended School Year Services (ESY). What is the new school division's obligation related to the provision of ESY?

A: There are two Virginia Regulations that apply in this situation. (1) 8 VAC 20-81-120 A details the receiving school division's responsibilities when a student with a disability transfers to the new division. (2) 8 VAC 20-81-110 B requires that at the beginning of each school year, the school division must have an IEP in effect for each child with a disability within its jurisdiction.[1]

- If the student transfers during the summer before the start of the school year, the receiving school division must implement the student's current IEP, as written, until the IEP team, with parental consent: 1) adopts the IEP from the student's previous school division; 2) develops an interim IEP; or 3) develops a new IEP.[2] These actions, thus, ensure the school division's compliance with the requirements of 8 VAC 20-81-110 B.

- If, however, the student transfers during the summer before the start of the school year and the student's previous IEP includes ESY, the receiving school division must treat the student as if the student had transferred to the school division "within the same school year" and comply with 8 VAC 20-81-120, since ESY services are considered an extension of the previous school year. Thus, the receiving school division must provide comparable ESY services in consultation with the parent until the student's IEP team, with parental

consent, does one of the following: 1) adopts the student's previous IEP; 2) develops an interim IEP; or 3) develops a new IEP.[3]

Practice Tip: A good practice would be to train school personnel responsible for registering students with IEPs to determine if ESY services are required and to alert the local director of special education services (or designee) so that the above referenced requirements may be initiated in sufficient time to address the student's need for ESY and/or any delays in providing these services.

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[1] For purposes of these requirements, "school year" is defined as the period of time approved or modified by the local school board as a school year or academic year.

[2] These are the same requirements for when a student transfers during the school year. See 8 VAC 20-81-120, as detailed in FAQ 007-10.

[3] See FAQ 007-10 for guidance in determining "comparable" services.

033-12. Secondary Transition: Consent for Inviting Participating Agency Representatives

Q: Are school personnel required to obtain written consent from the parent to invite a participating agency representative to an IEP meeting before they invite the agency representative?

A: Yes, the local school division must acquire written consent from the parent (or a student who has reached the age of majority) for each agency that is invited to attend an IEP meeting to discuss the provision or payment of transition services. (34 CFR § 300.321(b)(3); corresponding Virginia Regulations at 8 VAC 20-81-170 E.1.h). The U.S. Department of Education's Office of Special Education Programs (OSEP) provides the rationale and context for this mandate:

[Parent consent] was included in the regulations specifically to address issues related to the confidentiality of information. Under section 617(c) of [IDEA] the Department must ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs pursuant to Part B of the Act, irrespective of the requirements under FERPA. We continue to believe that a public agency should be required to obtain parental consent (or the consent of a child who has reached the age of majority) before inviting representatives from other participating agencies to attend an IEP Team meeting, consistent with § 300.321(b)(3). We do not believe that the requirements in § 300.321(b)(3) are inconsistent with § 300.321(a)(6). Section 300.321(a)(6) permits other individuals who have knowledge or special expertise regarding the child to attend the child's IEP Team meeting at the discretion of the parent or the public agency. It is clear that in § 300.321(b)(3), the individuals invited to the IEP Team meeting are representatives from other agencies who do not necessarily have special knowledge or expertise regarding the child. In these situations, we believe that consent should be required because representatives of these agencies are invited to participate in a child's IEP Team meeting only because they may be

providing or paying for transition services. We do not believe that representatives of these agencies should have access to all the child's records unless the parent (or the child who has reached the age of majority) gives consent for such a disclosure. Therefore, we believe it is important to include the requirement for consent in § 300.321(b)(3)."

[*Analysis*, Federal Register, 2006, p. 46672]

Further, OSEP responded to an inquiry regarding how often a school division is required to obtain consent for participating agency representatives to attend an IEP meeting:

". . . a separate consent must be obtained from the parents or a child who has reached the age of majority for each IEP Team meeting . . . before a public agency can invite a representative of any participating agency that is likely to be responsible for providing or paying for transition service to attend the meeting. "

[*Letter to Gray*, 50 IDELR 198, OSEP 2008]

Consequently, for each meeting in which the LEA wishes to invite an outside agency, it must obtain a new consent prior to issuing an invitation to an agency.

Practice Tip: Since it is difficult to schedule outside agencies' participation at meetings, it may be helpful to designate certain dates on which the LEA will attempt to hold meetings that require their participation. An LEA may arrange for the participation of an agency for an unidentified student as long as written consent is received prior to revealing to the agency the student's name or other identifying information. This will give the LEA some flexibility in obtaining written consent prior to the meeting without delaying the scheduling of outside agencies' participation.

034-12. IEP – Services to Parents

Q: Are IEP teams required to include services to parents in a student's IEP? As an example, if a hearing impaired student requires instruction in American Sign Language (ASL), would the school division be required to provide instruction in ASL to the student's parents?

A: Providing services to parents as a part of a student's IEP depends on whether or not the student's educational needs require the parent to have certain knowledge and skills in order to implement the IEP and to work toward meeting the child's goal(s). Services provided to parents that link to the child's IEP generally fall under "related services," but may also be considered "assistive technology services" if the services are related to the student's use of an assistive technology device. The Virginia Regulations, at 8 VAC 20-81-10, provide definitions of assistive technology services, parent counseling and training, and related services. For this discussion, the pertinent sections are:

"Assistive technology services" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes: (34 CFR § 300.6)…
5. Training or technical assistance for a child with a disability or, if appropriate, that child's family ….(emphasis added).

"Parent counseling and training" means assisting parents in understanding the special needs of their child, providing parents with information about child development, and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP (emphasis added) (34 CFR § 300.34 (c)(8)).

"Related services" …also includes…. parent counseling and training… (emphasis added) (§22.1-213 of the Code of Virginia; 34 CFR § 300.34(a) and (b)).

As the U.S. Department of Education's Office of Special Education Programs (OSEP) has emphasized, any related services provided for parents must assist the child in developing skills needed to benefit educationally or correct factors that interfere with the child's progress toward the child's IEP goals. (*Letter to Dagley*, 17 IDELR 1107, June 3, 1991). Types of such related services are found in the federal and Virginia regulations governing special education;

- Counseling and guidance of parents regarding hearing loss concerning the related service of audiology.
- Assistive technology services specific to training or technical assistance for the child's family (see reference above).
- Parent counseling and training.
- Planning and managing a program of psychological counseling for children and parents.
- Counseling of parents regarding speech and language impairments concerning the related service of speech pathology.
- Group and individual counseling with the child and family.

(34 CFR §300.34; 8 VAC 20-81-10)
OSEP further advises on this issue in its Commentary to the federal regulations:

Section 300.34(c)(8)(iii), regarding helping parents acquire the skills to allow them to support the implementation of their child's IEP or IFSP, was added in the 1999 regulations to recognize the more active role of parents as participants in the education of their children.

Although not included in the Act [IDEA], we believe it is important to retain this provision in these regulations so that there is no question that parent counseling and training includes helping parents acquire skills that will help them support the implementation of their child's IEP or IFSP. [Federal Register, 2006, p. 46573]

Specific skill instruction for parents may also be considered related services. Examples may include instruction in ASL, instruction in the use of alternative communication systems/devices, and instruction on specific assistive technology devices.

OSEP also spoke directly to the issue of ASL in Letter to Dagley. The specific query was whether or not sign language instruction for parents of children with hearing impairments is considered a related service under the IDEA. The argument in support of the parent receiving ASL is that the parent will acquire the necessary skills to help support the implementation of the IEP. OSEP's response focuses on the standard of appropriateness:

If a parent of a child with a hearing impairment or a school district believes that sign language instruction for the parent is needed in order for the child to benefit from the special education and related services included in the child's IEP, then the parent's need for such instruction must be considered by the participants on the IEP team. If the participants on the IEP team determine

that this service is needed, sign language instruction must be provided to the parent as a related service in the form of "parent counseling and training" and must be included in the child's IEP.

It is clear that when dealing with this issue the IEP team must review these considerations on a case-by-case basis. There are no absolutes. Conversely, such requests from parents may not be summarily dismissed. The IEP team's decision must rest on the threshold standard emphasized by OSEP: are such services needed in order for the child to benefit educationally or correct factors.