|  |  |
| --- | --- |
| **Virginia Board of Education Agenda Item** | **Seal of the Commonwealth of Virginia** |

# Agenda Item: N

## Date: November 18, 2021

### Title: First Review of Fast-Track Regulatory Action to Strike “Component” and Align Regulatory Language with Federal Requirements

#### Presenter: Jim Chapman, Regulatory and Legal Coordinator

#### Email: [jim.chapman@doe.virginia.gov](mailto:jim.chapman@doe.virginia.gov) Phone: 804-225-2540

## Purpose of Presentation:

Action required by state or federal law or regulation.

**Executive Summary:**   
During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109) of the Acts of the Assembly, which directed the Board of Education to amend [8VAC20-81-170](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section170/) B 2 a and e to remove the word “component” following the word “evaluation.” At its meeting on September 23, 2021, the Board approved an exempt action (“Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia,” effective November 24, 2021) to amend the regulation as required by the legislation.

However, the legislation did not strike similar language from 8VAC20-81-170 B 4, and so amending B 4 would have been inappropriate for the exempt action. The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 in order to align the current regulation with applicable federal regulations.

## Action Requested:

Other: The Board is requested to waive first review and approve.

## Superintendent’s Recommendation: The Superintendent of Public Instruction recommends that the Board of Education waive first review and approve the fast-track action.

## Rationale for Action:

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

## Previous Review or Action:

No previous review or action.

**Background Information and Statutory Authority:**  
The Board’s overall regulatory authority is found in § [22.1-16](https://law.lis.virginia.gov/vacode/title22.1/chapter2/section22.1-16/) of the *Code of Virginia*, which states that “[t]he Board of Education may adopt bylaws for its own government and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title.”

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

**Timetable for Further Review/Action:**  
Following Board approval, this regulatory action will be submitted to Town Hall pursuant to the Administrative Process Act.

## Impact on Fiscal and Human Resources:

This action will have no impact on the Department of Education’s resources. It is anticipated that any impact on local school divisions’ will be absorbed within existing operational resources.

# Attachment A

## Regulations Governing Special Education Programs for Children with Disabilities in Virginia

8VAC20-81-170. Procedural safeguards.

A. Opportunity to examine records; parent participation. (34 CFR 300.322(e), 34 CFR 300.500 and 34 CFR 300.501; [8VAC20-150](https://law.lis.virginia.gov/admincode/title8/agency20/chapter150/))

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.

(2) Participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.

b. Parent participation in meetings.

(1) Each local educational agency shall provide notice to ensure that the parent(s) of a child with a disability has the opportunity to participate in meetings described in subdivision 1 a (2) of this subsection, including notifying the parent(s) of the meeting early enough to ensure that the parent has an opportunity to participate. The notice shall:

(a) Indicate the purpose, date, time, and location of the meeting and who will be in attendance;

(b) Inform the parent(s) that at their discretion or at the discretion of the local educational agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, may participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child;

(c) Inform the parent that the determination of the knowledge or special expertise shall be made by the party who invited the individual; and

(d) Inform the parent(s), in the case of a child who was previously served under Part C that an invitation to the initial IEP team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of Part C to assist with the smooth transition of services.

(2) A meeting does not include informal or unscheduled conversations involving local educational agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that local educational agency personnel engage in to develop a proposal or a response to a parent proposal that will be discussed at a later meeting.

c. Parent involvement in placement decisions.

(1) Each local educational agency shall ensure that a parent(s) of each child with a disability is a member of the IEP team that makes decisions on the educational placement of their child or any Comprehensive Services Act team that makes decisions on the educational placement of their child.

(2) In implementing the requirements of subdivision 1 c (1) of this subsection, the local educational agency shall provide notice in accordance with the requirements of [8VAC20-81-110](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section110/) E.

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the local educational agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by the IEP or Comprehensive Services Act team without the involvement of the parent(s) if the local educational agency is unable to obtain the parents' participation in the decision. In this case, the local educational agency shall have a record of its attempt to ensure the parents' involvement.

(5) The local educational agency shall take whatever action is necessary to ensure that the parent(s) understand and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for a parent(s) with deafness, or whose native language is other than English.

(6) The exception to the IEP team determination regarding placement is with disciplinary actions involving interim alternative education settings for 45-day removals under [8VAC20-81-160](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section160/) D 6 a. (34 CFR 300.530(f)(2) and (g))

B. Independent educational evaluation.

1. General. (34 CFR 300.502(a))

a. The parent(s) of a child with a disability shall have the right to obtain an independent educational evaluation of the child.

b. The local educational agency shall provide to the parent(s) of a child with a disability, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the applicable criteria for independent educational evaluations.

2. Parental right to evaluation at public expense. (34 CFR 300.502(b) and (e))

a. The parent(s) has the right to an independent educational evaluation at public expense if the parent(s) disagrees with an evaluation component obtained by the local educational agency.

b. If the parent(s) requests an independent educational evaluation at public expense, the local educational agency shall, without unnecessary delay, either:

(1) Initiate a due process hearing to show that its evaluation is appropriate; or

(2) Ensure that an independent educational evaluation is provided at public expense, unless the local educational agency demonstrates in a due process hearing that the evaluation obtained by the parent(s) does not meet the local educational agency's criteria.

c. If the local educational agency initiates a due process hearing and the final decision is that the local educational agency's evaluation is appropriate, the parent(s) still has the right to an independent educational evaluation, but not at public expense.

d. If the parent(s) requests an independent educational evaluation, the local educational agency may ask the reasons for the parent's objection to the public evaluation. However, the explanation by the parent(s) may not be required and the local educational agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

e. A parent is entitled to only one independent educational evaluation at public expense each time the public educational agency conducts an evaluation component with which the parent disagrees.

f. If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the local educational agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria, a local educational agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

3. Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the local educational agency an evaluation obtained at private expense, the results of the evaluation: (34 CFR 300.502(c))

a. Shall be considered by the local educational agency, if it meets local educational agency criteria, in any decision regarding the provision of a free appropriate public education to the child; and

b. May be presented by any party as evidence at a hearing under [8VAC20-81-210](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section210/).

4. Requests for evaluations by special education hearing officers. If a special education hearing officer requests an independent educational evaluation ~~for an evaluation component,~~ as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense. (34 CFR 300.502(d))

C. Prior written notice by the local educational agency; content of notice.

1. Prior written notice shall be given to the parent(s) of a child with a disability within a reasonable time before the local educational agency: (34 CFR 300.503(a))

a. Proposes to initiate or change the identification, evaluation, or educational placement (including graduation with a standard or advanced studies diploma) of the child, or the provision of a free appropriate public education for the child; or

b. Refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education for the child.

2. The notice shall include: (34 CFR 300.503(b))

a. A description of the action proposed or refused by the local educational agency;

b. An explanation of why the local educational agency proposes or refuses to take the action;

c. A description of any other options the IEP team considered and the reasons for the rejection of those options;

d. A description of each evaluation procedure, assessment, record, or report the local educational agency used as a basis for the proposed or refused action;

e. A description of any other factors that are relevant to the local educational agency's proposal or refusal;

f. A statement that the parent(s) of a child with a disability have protection under the procedural safeguards of this chapter and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

g. Sources for the parent(s) to contact in order to obtain assistance in understanding the provisions of this section.

3. a. The notice shall be: (i) written in language understandable to the general public; and (ii) provided in the native language of the parent(s) or other mode of communication used by the parent(s), unless it is clearly not feasible to do so. (34 CFR 300.503(c))

b. If the native language or other mode of communication of the parent(s) is not a written language, the local educational agency shall take steps to ensure that:

(1) The notice is translated orally or by other means to the parent(s) in their native language or other mode of communication;

(2) The parent(s) understand the content of the notice; and

(3) There is written evidence that the requirements of subdivisions (1) and (2) of this subdivision have been met.

D. Procedural safeguards notice. (34 CFR 300.504)

1. A copy of the procedural safeguards available to the parent(s) of a child with a disability shall be given to the parent(s) by the local educational agency only one time a school year, except that a copy shall be given to the parent(s) upon:

a. Initial referral for or parent request for evaluation;

b. If the parent requests an additional copy;

c. Receipt of the first state complaint during a school year;

d. Receipt of the first request for a due process hearing during a school year; and

e. On the date on which the decision is made to make a disciplinary removal that constitutes a change in placement because of a violation of a code of student conduct.

2. The local educational agency may place a current copy of the procedural safeguards notice on its Internet website if a website exists, but the local educational agency does not meet its obligation under subdivision 1 of this subsection by directing the parent to the website. The local educational agency shall offer the parent(s) a printed copy of the procedural safeguards notice in accordance with subdivision 1 of this subsection.

3. The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available relating to:

a. Independent educational evaluation;

b. Prior written notice;

c. Parental consent;

d. Access to educational records;

e. Opportunity to present and resolve complaints through the due process complaint and state complaint procedures, including;

(1) The time period in which to file a complaint;

(2) The opportunity for the local educational agency to resolve the complaint; and

(3) The difference between the due process and the state complaint procedures, including the applicable jurisdiction of each procedure, potential issues, filing and decisional timelines for each process, and relevant procedures.

f. The availability of mediation;

g. The child's placement during pendency of due process proceedings;

h. Procedures for students who are subject to placement in an interim alternative educational setting;

i. Requirements for unilateral placement by parents of children in private schools at public expense;

j. Due process hearings, including requirements for disclosure of evaluation results and recommendations;

k. Civil actions, including the time period in which to file those actions;

l. Attorneys' fees; and

~~m. The opportunity to present and resolve complaints through the state complaint procedures, including:~~

~~(1) The time period in which to file a complaint;~~

~~(2) The opportunity for the local educational agency to resolve the complaint; and~~

~~(3) The difference between the due process and the state complaint procedures, including the applicable jurisdiction, potential issues, and timelines for each process.~~

4. The notice required under this subsection shall meet the prior notice requirements regarding understandable language in subdivision C 3 of this section.

E. Parental consent.

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](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section120/);

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))

2. Parental consent not required. Parental consent is not required before:

a. Review of existing data as part of an evaluation or a reevaluation, including a functional behavioral assessment; (34 CFR 300.300(d)(1))

b. Administration of a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of the parent(s) of all children; (34 CFR 300.300(d)(1))

c. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation; (34 CFR 300.302)

d. Administration of a test or other evaluation that is used to measure progress on the child's IEP goals and is included in the child's IEP;

e. A teacher's or related service provider's observations or ongoing classroom evaluations;

f. Conducting an initial evaluation of a child who is a ward of the state and who is not residing with his parent(s) if: (34 CFR 300.300(a)(2))

(1) Despite reasonable efforts, the local educational agency cannot discover the whereabouts of the parent(s);

(2) The parent's rights have been terminated; or

(3) The rights of the parent(s) to make educational decisions have been subrogated by a judge and an individual appointed by the judge to represent the child has consented to the initial evaluation.

3. Revoking consent.

a. If at any time subsequent to the initial provision of special education and related services the parent revokes consent in writing for the continued provision of special education and related services: (34 CFR 300.300(b)(4))

(1) The local educational agency may not continue to provide special education and related services to the child, but must provide prior written notice in accordance with [8VAC20-81-170](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section170/) C before ceasing the provision of special education and related services;

(2) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;

(3) The local educational agency's failure to provide the special education and related services to the child will not be considered a violation of the requirement to provide FAPE; and

(4) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the further provision of special education and related services.

b. If a parent revokes consent, that revocation is not retroactive in accordance with the definition of "consent" at [8VAC20-81-10](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section10/).

4. Refusing consent.

a. If the parent(s) refuses consent for initial evaluation or a reevaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))

b. If the parent(s) refuses to consent to the initial provision of special education and related services: (34 CFR 300.300(b)(3))

(1) The local educational agency may not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the services may be provided to the child;

(2) The local educational agency's failure to provide the special education and related services to the child for which consent is requested is not considered a violation of the requirement to provide FAPE; and

(3) The local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the special education and related services for which the local educational agency requests consent. However, the local educational agency may convene an IEP meeting and develop an IEP to inform the parent about the services that may be provided with parental consent.

c. If the parent(s) of a parentally placed private school child refuses consent for an initial evaluation or a reevaluation, the local educational agency: (34 CFR 300.300(d)(4))

(1) May not use mediation or due process hearing procedures to obtain parental consent, or a ruling that the evaluation of the child may be completed; and

(2) Is not required to consider the child as eligible for equitable provision of services in accordance with [8VAC20-81-150](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section150/).

d. A local educational agency may not use a parent's refusal to consent to one service or activity to deny the parent(s) or child any other service, benefit, or activity of the local educational agency, except as provided by this chapter. (34 CFR 300.300(d)(3))

5. Withholding consent.

a. If the parent(s) fails to respond to a request to consent for an initial evaluation, the local educational agency may, but is not required to, use mediation or due process hearing procedures to pursue the evaluation. The local educational agency does not violate its obligations under this chapter if it declines to pursue the evaluation. (34 CFR 300.300(a)(3) and (c)(1))

b. Informed parental consent need not be obtained for reevaluation if the local educational agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent(s) has failed to respond. (34 CFR 300.300(c)(2))

c. If the parent(s) fails to respond to a request to provide consent for the initial provision of special education and related services, the local educational agency follows the provisions of subdivision 4 b of this subsection. (34 CFR 300.300(b)(3) and (4))

6. Consent for initial evaluation may not be construed as consent for initial provision of special education and related services. (34 CFR 300.300(a)(1)(ii))

7. The local educational agency shall make reasonable efforts to obtain informed parental consent for an initial evaluation and the initial provision of special education and related services. (34 CFR 300.300(a)(1)(iii) and (b)(2))

8. To meet the reasonable measures requirement of this section, the local educational agency shall have a record of its attempts to secure the consent, such as: (34 CFR 300.322(d) and 34 CFR 300.300(a), (b), (c) and (d)(5))

a. Detailed records of telephone calls made or attempted and the results of those calls;

b. Copies of correspondence (written, electronic, or facsimile) sent to the parent(s) and any responses received; and

c. Detailed records of visits made to the parent's home or place of employment and the results of those visits.

F. Parental rights regarding use of public or private insurance. Each local educational agency using Medicaid or other public benefits or insurance programs to pay for services required under this chapter, as permitted under the public insurance program, and each local educational agency using private insurance to pay for services required under this chapter, shall provide notice to the parent(s) and obtain informed parental consent in accordance with [8VAC20-81-300](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section300/). (34 CFR 300.154)

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 [8VAC20-81-160](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section160/) and [8VAC20-81-210](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section210/), or resolution session in accordance with [8VAC20-81-210](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section210/), and in no case more than 45 calendar days after the request has been made.

b. The right to inspect and review education records under this section includes:

(1) The right to a response from the local educational agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the local educational agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

c. A local educational agency may presume that a parent has authority to inspect and review records relating to the parent's children unless the local educational agency has been provided a copy of a judicial order or decree, or other legally binding documentation, that the parent does not have the authority under applicable Virginia law governing such matters as guardianship, separation, and divorce.

2. Record of access. Each local educational agency shall keep a record of parties, except parents and authorized employees of the local educational agency, obtaining access to education records collected, maintained, or used under Part B of the Act, including the name of the party, the date of access, and the purpose for which the party is authorized to use the records. (34 CFR 300.614)

3. Record on more than one child. If any education record includes information on more than one child, the parent(s) of those children have the right to inspect and review only the information relating to their child or to be informed of the specific information requested. (34 CFR 300.615)

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)

5. Fees. (34 CFR 300.617)

a. Each local educational agency may charge a fee for copies of records that are made for a parent(s) under this chapter if the fee does not effectively prevent the parent(s) from exercising their right to inspect and review those records.

b. A local educational agency may not charge a fee to search for or to retrieve information under this section.

c. A local educational agency may not charge a fee for copying a child's IEP that is required to be provided to the parent(s) in accordance with [8VAC20-81-110](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section110/) E 7.

6. Amendment of records at parent's request. (34 CFR 300.618)

a. A parent(s) who believes that information in the education records collected, maintained, or used under this chapter is inaccurate or misleading or violates the privacy or other rights of the child may request the local educational agency that maintains the information to amend the information.

b. The local educational agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

c. If the local educational agency decides to refuse to amend the information in accordance with the request, it shall inform the parent(s) of the refusal and advise the parent(s) of the right to a hearing under subdivision 7 of this subsection.

7. Opportunity for a hearing. The local educational agency shall provide on request an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. (34 CFR 300.619)

8. Results of hearing. (34 CFR 300.620)

a. If, as a result of the hearing, the local educational agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

b. If, as a result of the hearing, the local educational agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the child's education records a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

c. Any explanation placed in the records of the child under this section shall:

(1) Be maintained by the local educational agency as part of the records of the child as long as the record or contested portion is maintained by the local educational agency; and

(2) If the records of the child or the contested portion is disclosed by the local educational agency to any party, the explanation shall also be disclosed to the party.

9. Hearing procedures. A hearing held under subdivision 7 of this subsection shall be conducted in accordance with the procedures under 34 CFR 99.22 of the Family Educational Rights and Privacy Act. (20 USC § 1232g; 34 CFR 300.621)

a. The local educational agency may:

(1) Develop local procedures for such a hearing process; or

(2) Obtain a hearing officer from the Supreme Court of Virginia's special education hearing officer list in accordance with the provisions of [8VAC20-81-210](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section210/) H.

10. Consent. (34 CFR 300.32; 34 CFR 300.622)

a. Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized without parental consent under the Family Education Rights and Privacy Act. (20 USC § 1232g).

b. Parental consent is not required before personally identifiable information is disclosed to officials of the local educational agencies collecting, maintaining, or using personally identifiable information under this chapter, except:

(1) Parental consent, or the consent of a child who has reached the age of majority, shall be obtained before personally identifiable information is released to officials of any agency or institution providing or paying for transition services.

(2) If a child is enrolled, or is going to enroll in a private school that is not located in the local educational agency where the parent(s) resides, parental consent shall be obtained before any personally identifiable information about the child is released between officials in the local educational agency where the private school is located, and officials in the local educational agency where the parent(s) resides.

11. Safeguards. (34 CFR 300.623)

a. Each local educational agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

b. Each local educational agency shall ensure that electronic communications via emails or facsimiles regarding any matter associated with the child, including matters related to IEP meetings, disciplinary actions, or service delivery, be part of the child's educational record.

c. One official at each local educational agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

d. All persons collecting, maintaining, or using personally identifiable information shall receive training or instruction on Virginia's policies and procedures for ensuring confidentiality of the information.

e. Each local educational agency shall maintain for public inspection a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

12. Destruction of information. (34 CFR 300.624)

a. The local educational agency shall inform parents when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide educational services to the child.

b. This information shall be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed shall be maintained without time limitation.

c. The local educational agency shall comply with the Records Retention and Disposition Schedule of the Library of Virginia.

H. Electronic mail. If the local educational agency makes the option available, parent(s) of a child with a disability may elect to receive prior written notice, the procedural safeguards notice, and the notice of a request for due process, by electronic mail. (34 CFR 300.505)

I. Electronic signature. If an electronically filed document contains an electronic signature, the electronic signature has the legal effect and enforceability of an original signature. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. (Chapter 42.1 (§ [59.1-479](https://law.lis.virginia.gov/vacode/59.1-479/) et seq.) of Title 59.1 of the Code of Virginia)

J. Audio and video recording.

1. The local educational agency shall permit the use of audio recording devices at meetings convened to determine a child's eligibility under [8VAC20-81-80](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section80/); to develop, review, or revise the child's IEP under [8VAC20-81-110](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section110/) F; and to review discipline matters under [8VAC20-81-160](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section160/) D. The parent(s) shall inform the local educational agency before the meeting in writing, unless the parents cannot write in English, that they will be audio recording the meeting. If the parent(s) does not inform the local educational agency, the parent(s) shall provide the local educational agency with a copy of the audio recording. The parent(s) shall provide their own audio equipment and materials for audio recording. If the local educational agency audio records meetings or receives a copy of an audio recording from the parent(s), the audio recording becomes a part of the child's educational record.

2. The local educational agency may have policies that prohibit, limit, or otherwise regulate the use of:

a. Video recording devices at meetings convened pursuant to this chapter; or

b. Audio or video recording devices at meetings other than those meetings identified in subdivision 1 of this subsection.

3. These policies shall:

a. Stipulate that the recordings become part of the child's educational record;

b. Ensure that the policy is uniformly applied; and

c. If the policy prohibits the use of the devices, the policy shall provide for exceptions if they are necessary to ensure that the parent(s) understands the IEP, the special education process, or to implement other parental rights guaranteed under this chapter.

# Attachment B



**townhall.virginia.gov**

**Fast-Track Regulation**

**Agency Background Document**

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

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

**Brief Summary  
[RIS1]**

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

During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109) of the Acts of the Assembly, which directed the Board of Education to amend [8VAC20-81-170](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section170/) B 2 a and e to remove the word “component” following the word “evaluation.” At its meeting on September 23, 2021, the Board approved an exempt action (“Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia,” effective November 24, 2021) to amend the regulation as required by the legislation.

However, the legislation did not strike similar language from 8VAC20-81-170 B 4, and so amending B 4 would have been inappropriate for the exempt action. The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 in order to align the current regulation with applicable federal regulations.

**[RIS2]  
Acronyms and Definitions**

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

None

**Statement of Final Agency Action**

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

The Board approved “Fast-Track Regulatory Action to Strike ‘Component’ and Align Regulatory Language with Federal Requirements” on November 18, 2021.

**Mandate and Impetus  
[RIS3]**

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

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

During the 2021 Special Session I, the Virginia General Assembly enacted [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109) of the Acts of the Assembly, which directed the Board of Education to amend [8VAC20-81-170](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section170/) B 2 a and e to remove the word “component” following the word “evaluation.” At its meeting on September 23, 2021, the Board approved an exempt action (“Legislative Amendments to Regulations Governing Special Education Programs for Children with Disabilities in Virginia,” effective November 24, 2021) to amend the regulation as required by the legislation.

However, the legislation did not strike similar language from 8VAC20-81-170 B 4, and so amending B 4 would have been inappropriate for the exempt action. The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 a in order to align the current regulation with applicable federal regulations.

**[RIS4]**

**Legal Basis**

**[RIS5]**

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

The Board’s overall regulatory authority is found in § [22.1-16](https://law.lis.virginia.gov/vacode/title22.1/chapter2/section22.1-16/) of the *Code of Virginia*, which states that “[t]he Board of Education may adopt bylaws for its own government and promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of this title.”

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

**[RIS6]**

**Purpose**

**[RIS7]**

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

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

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

**[RIS8]**

**Substance**

**[RIS9]**

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

The current action will amend 8VAC20-81-170 B 4 in a manner consistent with the amendment to B 2 a and e that was required by [Chapter 109](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0109). The current action will also amend the regulation in 8VAC20-81-170 D 3 and G 10 a in order to align the current regulation with applicable federal regulations.

**[RIS10]**

**Issues**

**[RIS11]**

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

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

**[RIS12]  
Requirements More Restrictive than Federal**

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

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

**Agencies, Localities, and Other Entities Particularly Affected**

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

This change will not affect other state agencies.

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

This regulatory change will not affect other entities.

**Economic Impact**

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

**Impact on State Agencies**

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

**Impact on Localities**

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

**Impact on Other Entities**

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

**Alternatives to Regulation**

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

There are no alternatives to the regulatory change.

**Regulatory Flexibility Analysis**

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

There are no alternatives to the regulatory change.

**Public Participation**

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

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

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

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

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

Jim Chapman

James Monroe Bldg.

101 N. 14th St, 25th Floor

Richmond, VA 23219

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

**Detail of Changes**

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

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

**Table 1: Changes to Existing VAC Chapter(s)**

|  |  |  |  |
| --- | --- | --- | --- |
| **Current chapter-section number** | **New chapter-section number, if applicable** | **Current requirements in VAC** | **Change, intent, rationale, and likely impact of new requirements** |
| 8VAC20-81-170 B 4 |  | “Requests for evaluations by special education hearing officers. If a special education hearing officer requests an independent educational evaluation for an evaluation component, as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense. (34 CFR 300.502(d))” | The proposed change will strike the words “for an evaluation component,” which is consistent with the change required by the General Assembly to 8VAC20-81-170 B 2 a and e. |
| 8VAC20-81-170 D 3 e |  | “Opportunity to present and resolve complaints through the due process procedures” | The proposed change will amend the current language to read as follows:  “Opportunity to present and resolve complaints through the due process complaint and state complaint procedures, including;  (1) The time period in which to file a complaint;  (2) The opportunity for the local educational agency to resolve the complaint; and  (3) The difference between the due process and the state complaint procedures, including the applicable jurisdiction of each procedure, potential issues, filing and decisional timelines for each process, and relevant procedures.”  The proposed change brings the current regulatory language into alignment with [34 CFR § 300.504(c)(5)](https://www.law.cornell.edu/cfr/text/34/300.504). |
| 8VAC20-81-170 D 3 m |  |  | The proposed change will strike this subsection since the requirement is being rolled into D 3 e. |
| 8VAC20-81-170 G 10 a |  | “Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized under the Family Education Rights and Privacy Act. (20 USC § 1232g).” | The proposed change will amend the current language to read as follows:  “Parental consent shall be obtained before personally identifiable information is disclosed to anyone other than officials of the local educational agency unless the information is contained in the education records, and the disclosure is authorized without parental consent under the Family Education Rights and Privacy Act. (20 USC § 1232g).”  The proposed change brings the current regulatory language into alignment with [34 CFR § 300.622(a)](https://www.law.cornell.edu/cfr/text/34/300.622). |