



COMMONWEALTH OF VIRGINIA
Department of Education
Division of Special Education and Student Services

STATE PERSPECTIVE ON IDEA 2004

What Special Education Administrators Need to Know about the
IDEA Proposed Regulations:
Changes, Challenges, and Landmines

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I. REVISION OF THE LAW AND REGULATIONS

December 3, 2004 Individuals with Disabilities Education Improvement Act
of 2004 [IDEA '04] P. L. 108-446
 signed into law by Pres. George W. Bush
 some elements of the definition of "highly qualified"
took effect

June 21, 2005 U.S. Department of Education, Office of Special Education
and Rehabilitative Services published Notice of Proposed
Rulemaking: Proposed federal regulations implementing
IDEA '04 [70 Federal Register 118, Proposed Rules]

July 1, 2005	IDEA '04 provisions in effect
September 6, 2005	Public Comments on the proposed federal regulations due to OSERS
December 2005- January 2006 2006-2007	Anticipated publication of final federal regulations VDOE revises <i>Regulations Governing Special Education Programs for Children with Disabilities in Virginia</i> , in accordance with the Code of Virginia, §2.2-4000, the Administrative Process Act

II. IDEA 2004 PROPOSED REGULATIONS

Although these are proposed regulations, the provisions serve as indicators of the USDOE's direction with the new statutory mandates.

A. In General

- Style: The proposed format incorporates the new statutory language with the proposed federal regulations; thus, providing one comprehensive document. This provides for one single reference document.
- Accountability and Flexibility: Threaded throughout the document is an emphasis on accountability with flexibility, which:
 - recognizes the significant diversity among states; and
 - provides a solid balance between mandated requirements and permissive standards in such critical areas such as permitting LEAs to provide early intervening services when needed, without determining the student eligible for special education and related services.
- Relief from nonstatutory mandates: Several provisions are proposed for removal on the basis that there is no statutory requirement to support the regulation. For example, the regulations relative to comprehensive system of personnel development have been deleted since the mandate was deleted from the IDEA 2004.

B. Definitions

The proposed regulations incorporate the new statutory language for the following definitions:¹

- | | |
|---|--|
| <input type="checkbox"/> core academic subjects | <input type="checkbox"/> developmental delay |
| <input type="checkbox"/> homeless children | <input type="checkbox"/> parent |
| <input type="checkbox"/> transition services | <input type="checkbox"/> universal design |
| <input type="checkbox"/> ward of the state | |

The proposed regulations retain generally the other definitions in the current regulations.

Assistive technology services

- The law eliminates the school division's responsibility for a medical device that is surgically implanted or the replacement of such a device. The proposed regulations include this factor in its definition of assistive technology device.
- However, the law and proposed regulations are silent whether the school division is responsible for services attendant to such a device.

Challenge: If the regulations are silent on the issue of services, IEP teams will be uncertain whether a student with a surgically implanted device is entitled to services, such as "mapping". Due process hearing officers and courts may then need to resolve the issue.

C. Highly Qualified Special Education Teacher

The proposed regulations amplify the law in specifying that "highly qualified" applies only to public elementary and secondary school special education teachers. The HQ requirements do not apply to private school teachers, even when the school division places the child in a private school.

Challenge:

Good news: school division cannot be sued for failure to meet HQ requirements.

Bad news: school division can be the subject of a complaint with VDOE regarding the claim that a teacher(s) does not meet HQ requirements.

¹ For an analysis of the IDEA 2004 changes, please see VDOE's Guidance Document on the Implementation of IDEA 2004-Part B Requirements. <http://www.doe.virginia.gov/VDOE/dueproc>

D. Related Services

The proposed regulations incorporate the new statutory language and generally retain the current regulations.

Additions The proposed regulations add two other provisions:

- “interpreting services” as used with respect to children who are deaf or hard of hearing, includes oral transliteration services, cued language transliteration services, and sign language interpreting services.
- “school nurse services” means services provided by a qualified school nurse, designed to enable a child with a disability to receive FAPE as describe in the child’s IEP.

E. Several Areas of Proposed Regulations incorporate the new statutory language, generally retain current regulations, and do not include additional requirements:

- Overidentification and disproportionality
- Evaluation and eligibility
 - determining eligibility factors
 - conduct of the evaluation
 - elements to be evaluated
 - reevaluations
 - screening
 - termination of eligibility
 - FAPE requirements
 - early intervening services
 - initial evaluation timelines
 - native language
 - prohibition re mandatory medication
- Mediation
- Surrogates
- Private Schools

F. Specific Learning Disabilities

The proposed regulations generally retain the current regulations and incorporate the new statutory language.

Additions The proposed regulations :

- Allow SEAs to prohibit the use of severe discrepancy between achievement and intellectual ability criterion for determining whether a child has an SLD.
- Clarify that an LEA must use the SEA's criteria in determining whether the child has an SLD.
- Add that the team determining whether the child has a learning disability must include a special education teacher.
- Revise the elements required for determining the existence of an SLD:
 - the child does not achieve commensurate with the child's age in one or more of the eight specific areas when provided with learning experiences appropriate to the child's age. [The 8 areas: oral expression; listening comprehension; written expression; basic reading skill; reading fluency skills; reading comprehension; mathematics calculation; mathematics problem solving.]
 - the child failed to make sufficient progress in meeting state-approved results when using a response to scientific, researched based intervention process, or the child exhibits a pattern of strengths and weaknesses that the team determines is relevant to the identification of an SLD. Prohibited: if the SLD is primarily the result of other visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.
 - the child was provided appropriate instruction prior to, or as a part of, the referral process.
- The timeline for completing the evaluation process and eligibility determination may be extended by mutual written agreement of the child's parents and the IEP team.
- At least one team member, other than the child's current teacher, who is trained in observation, shall observe the child, and the learning environment, including the regular education setting, to document academic performance and behavior in the areas of difficulty.
- Regarding the written report, the proposed regulations retain the components required by the current regulations, remove the current requirement for stating whether the child has a severe discrepancy between achievement and ability, and remove the reference to the effects of environmental, cultural, and economic disadvantage. The proposed regulations add two additional factors to the written report:

- whether there are strengths and weaknesses in performance and achievement, or both, or relative to intellectual development that require special education and related services; and,
- the instructional strategies used and the response to student data collected if the response to the scientific, research-based process was implemented.

Landmines:

- no documentation.

G. IEP

The proposed regulations generally retain the current regulations and the new statutory mandates for:

- Content
 - content
 - goals
 - progress reports
 - statement of services
 - present level of performance
 - benchmarks/objectives
 - essential components
 - accommodations/assessments
- Meetings
 - revising the IEP
 - transfer students
 - alternate means for meetings
 - consolidation of meetings
 - team membership
 - excusal of member
 - Part C member of IEP team

Additions The proposed regulations:

- Eliminate the specificity of the methods that the LEA must use to keep a record of its attempts to convince the parent that s/he should attend the meeting. Current regulations specify that the records include such information as:
 - detailed records of phone calls made/attempted and the results
 - copy of correspondence sent to the parents and any response received

- detailed records of visits made to the parents' home or place of employment and results of those visits

The proposed regulations eliminate this high degree of specific detailed documentation relative to parental contacts.

- Remove requirements for the use of interpreters or other action appropriate to ensure that parents understand the proceedings of the IEP meeting. Rationale: these requirements are in other federal statutes.
- Remove requirement that each person responsible for implementing the IEP is to be informed of his/her specific responsibilities related to implementing the child's IEP, and the specific accommodations, modifications, and supports. Rationale: these requirements are inherent in the IDEA; i.e. in order to provide FAPE, the service provider needs to know that for which s/he is responsible.
- Remove requirement that each eligible IDEA child be provided services in accordance with an IEP. Rationale: requirement is unnecessary because the entitlement to FAPE includes the provision of special education and related services in accordance with an IEP.

H. Secondary Transition

The proposed regulations generally retain the current provisions and incorporate the new statutory mandates for:

- age requirements
- IEP content
- summary of performance

Additions The proposed regulations:

- To the extent appropriate, and with the consent of the parents or child who has reached the age of majority, the LEA must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. [underscored is the proposed new language]
- Remove current requirement for the LEA to take steps to obtain the participation of the other agency in the planning for transition services if the other agency does not send a representative. Rationale: unnecessary burden.

- Reflect the IDEA 2004 in excluding the age 14 requirements and age 14 language. However, the proposed regulations replace the requirements with: “for children younger than age 16, if determined appropriate by the IEP teams”, to emphasize that consideration may, and in some instances, should be given to students prior to the age 16.

I. Consent

- The following consent requirements revised by the IDEA 2004 include:
 - Parent consent is required prior to the LEA providing initial special education and related services.
 - LEAs may not request due process to seek to provide services if parents have failed to provide consent for services. If the parents refuse consent for services, the school division will not be considered to have failed to provide FAPE to the child and shall not be required to convene IEP meetings about the child.
 - Wards of the state: consent for the initial evaluation may be given to an individual appointed by the judge to represent the child.

Additions The proposed regulations:

- Where consent override is permissible, the override provision applies to children who are enrolled in public schools or seeking to be enrolled in public schools. Consent override is not permitted for children who are home schooled or parentally placed.
- School divisions may obtain parental consent the first time the LEA wants to access the parent’s **public insurance**. The proposed regulation also adds that the LEA must notify parents that their refusal does not relieve the school division of its responsibility to ensure that all required services are provided at no cost to parents.
- School divisions must obtain parental consent each time the LEA wants to access the parent’s **private insurances**.

Pitfall: No documentation of agreement and parental consent.

J. Procedural Safeguards/Written Prior Notice

The proposed regulations generally retain the current provisions and incorporate the new statutory language for:

- when to provide
- content
- posting on the web
- written prior notice

Additions The proposed regulations:

- Remove the current requirement that schools divisions keep a record of attempts to involve parents in placement decisions, including information consistent with the records that must be maintained if an IEP meeting is to be held without a parent in attendance. Rationale: provides school personnel greater flexibility in how they document their efforts.
- The statute requires that the procedural safeguards be provided to the parents once a year, unless:
 - the student is initially referred for evaluation and eligibility consideration,
 - the parent requests an additional copy, or
 - a request for due process has been filed.

The proposed regulations clarify that the exception to the once a year provision includes when the parent files a first complaint, under the state's complaint resolution procedures, in a school year.

K. Discipline

The proposed regulations generally retain the current provisions and incorporate the new statutory language for:

- general standard
- stay-put
- expedited hearing timelines
- basis of knowledge
- interim alternative educational setting (causes; timelines)
- manifestation determinations (causation standard; FBA-BIP)

Additions:

The current regulations require that when determining whether a series of short term removals equate to a change in placement, triggering among other things, the need for a manifestation determination review, consideration must be given to the following factors:

the total number of suspensions; the proximity of the suspensions; and the length of the suspensions. The proposed regulations add a provision that when making these determinations, consideration also is given as to whether the child's behavior is substantially similar to the child's behavior in the previous and current incidents.

L. Due Process

The proposed regulations generally retain several current provisions and incorporate the new statutory language for:

- statute of limitations for filing request
- resolution session
- notice [identification of issues, content of notice, other]
- qualifications of hearing officers
- hearing officer's decision
- filing a complaint w. SEA
- filing litigation
- attorney's fees
- filing separate requests
- alternate means of participation in hearings

Additions The proposed regulations:

Clarify that the resolution session and due process hearing is delayed if the parent fails to participate in the resolution meeting.

M. State Complaint Procedures

The state complaint procedures are not driven by the federal statute. Historically, the procedures flow from the regulations. Until 1992, these procedures were found in the Education Division General Administration Regulations at 34 C.F.R. §§76-780 – 76.782. After 1992, the procedures became requirements under the IDEA Part B regulations.

The proposed regulations retain the current regulations, and revise or add new requirements as follows:

- Remove reference to monetary reimbursement as a corrective action option so as not to imply that such reimbursement would be appropriate to the majority of complaints.
- Provide the LEA an opportunity to resolve the complaint with the parent. [Note that this provision is already in VDOE's procedures.]
- Allow the 60-day timeline to be extended if the parties agree to the extension in order to resolve the complaint.

- Remove the current requirement that the LEA’s implementation of a hearing officer’s order may be the subject of the complaint process. Rationale: these are matters only subject to a court’s review.
- Add new information components for the complainant to include in filing a complaint. States must develop a model complaint form, similar to the state’s model due process form. Complainant must use the model complaint form, or include the form’s components in the complaint.
- Revise the statute of limitations to limit the filing of the complaint to 1 year; removes references to longer periods for continuing violations and for compensatory services claims.
- Add that the complaint must be filed simultaneously with the LEA.

N. State Advisory Panel

The IDEA 2004 retains the previous provisions for members and adds to the provision of state and local education officials, officials who carry out activities related to the McKinney-Vento Homeless Assistance Act. The statute also requires that the members include a representative from the State child welfare agency responsible for foster care.

The proposed regulations generally retain the current regulations and incorporate the new statutory language.

Additions The proposed regulations:

- Remove the panel’s duties for advising on eligible students with disabilities in adult prisons. Rationale: this is considered a nonstatutory mandate.
- Remove requirements relative to the advisory panel’s procedures; eliminating such mandates as:
 - submit an annual report
 - keep official minutes
 - announce agenda enough in advance to afford interested parties a reasonable opportunity to attend
 - have meetings open to the public

Rationale: provide greater flexibility for states in the operations of advisory panels.

ONE LAST WORD: in avoiding the pitfalls and the landmines, it is helpful to always remember to.....

