4. Educating Students With Disabilities

Basic Definitions and Applicable Law

4:1. What laws govern the education of children with disabilities?

The education of children with disabilities is governed by the following federal and state statutes and implementing regulations:

- The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400-1487, as amended in 2004 by the Individuals with Disabilities Education Improvement Act ("IDEIA"), and the implementing regulations, 34 C.F.R. Part 300, which will be amended, require local education agencies to provide a free appropriate public education ("FAPE") to all eligible students with disabilities. IDEA also prescribes a variety of procedural requirements and safeguards for serving students with disabilities.
- Section 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 705, 794 et seq., and its implementing regulations, 34 C.F.R. Part 104, as well as the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213, prohibit discrimination based on disability by recipients of federal financial assistance.
- Virginia Code § 22.1-214 et seq. requires the Virginia Board of Education to develop special education programs, and procedures for due process hearings. The Virginia Board of Education's Regulations Governing Special Education Programs, Title 8 of the Virginia Administrative Code 20-80-10 et seq., provide the requirements for implementing IDEA in Virginia. The Virginia regulations will need to be implemented in accordance with IDEIA once the federal regulations are developed.

As a general matter, Virginia's regulations track the language of IDEA and the federal special education regulations. Since the initial publication of this book, IDEA was reauthorized by Congress through the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA 04"). This reauthorization attempted to align IDEA with the requirements of No Child Left Behind ("NCLB"), to provide changes to improve the provision of special education and in some cases to lessen the burden on schools of implementing special education services. The changes to align IDEA with NCLB, including defining highly qualified special education teachers, became effective immediately in December 2004, while all other changes became effective July 1, 2005. As of the time of this publication the new and revised federal and state implementing regulations have not yet been

developed. Therefore, additional clarification and changes may be provided once the federal and state regulations are implemented. The following chapter incorporates the changes to the federal law and the current position of the Virginia Department of Education on how the new law will be implemented in Virginia before the revised regulations are provided.

4:2. How is the term "child with a disability" defined?

For purposes of IDEA and Virginia law, a "*child with a disability*" means a child evaluated, in accordance with Virginia's Special Education regulations, and "determined, as a result of this evaluation, to have autism, deaf-blindness, a developmental delay, a hearing impairment including deafness, mental retardation, multiple disabilities, an orthopedic impairment, other health impairment, an emotional disturbance, a severe disability, a specific learning disability,[1] a speech or language impairment, a traumatic brain injury, or a visual impairment including blindness, who by reason thereof, needs special education and related services" (8 VAC 20-80-10). In order to qualify as disabled under IDEA and Virginia law, an individual must be determined both: (1) to have a particular listed impairment; and (2) to require special education services as a result.

This definition is in some ways broader and in some ways narrower than the definition of an ''individual with a disability'' for purposes of § 504 of the Rehabilitation Act in the school setting. Under § 504, an individual with a disability means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment, or is regarded as having such an impairment. 29 U.S.C. §705(20)(B). Students who qualify as disabled for purposes of IDEA, also qualify under § 504. However, providing services pursuant to IDEA satisfies the requirements of § 504, so students need not simultaneously be found eligible under both laws. The reverse is not always the case. A student may not qualify as disabled for purposes of IDEA, but may still be considered disabled under § 504, and may require accommodations in order to access his/her education. Therefore, school divisions need to consider whether or not a student should be evaluated for § 504 eligibility even if they are not found eligible under IDEA.

[1] The criteria for determining whether or not a student has a "specific learning disability" was changed by IDEIA to allow school divisions discretion to no longer require a severe discrepancy between aptitude and achievement (see 20 U.S.C. § 1414(b)(6)). In place of the discrepancy model, school divisions have the discretion to utilize a response to research-based intervention model instead. This is not a mandatory change, however, and many schools may decide to continue to follow the discrepancy model, at least until the new federal and state implementing regulations are provided.

4:3. What does it mean to provide a "free appropriate public education" to a child with a disability?

According to Virginia's regulations, a "*free appropriate public education*" (FAPE) means special education and related services that meet the requirements of Virginia's special education regulations and are provided in conformity with a student's individualized education program (IEP) at public expense, under public supervision and direction, and without charge to the student (8 VAC 20-80-10). These special education services may be provided in a public school setting or in a private day or residential school at public expense, depending on the student's individual educational needs as determined by the student's IEP team. The courts have provided more guidance regarding what is required for special education to be considered "appropriate." An "appropriate" educational program is one that is reasonably calculated to offer a child some educational benefit (*Board of Education v. Rowley*, 458 U.S. 197, 203 (1982), and *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1259 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994)).

As the court discussed at length in *Rowley*, the Education of All Handicapped Children Act (now IDEA) was enacted to provide handicapped children a "basic floor of opportunity." Therefore, an "appropriate" education does not mean an ideal education, and it does not mean that the school division is required to maximize each child's potential. As the court in *Bales v. Clarke* made clear, "neither [plaintiffs] nor any other parents have the right under law to write a prescription for an ideal education and to have the prescription filled at the public expense" (*Bales v. Clarke*, 523 F. Supp. 1366, 1370 (E.D. Va. 1981)). Therefore, in order to provide a child with a disability a free appropriate public education, the school division must provide each child with an education at public expense, which is reasonably expected by that child's IEP team to provide the child with educational benefit.

4:4. What is an "individualized education program" ("IEP")?

Virginia's regulations define an "*individual education program*" ("IEP") as "a written statement for a child with a disability that is developed, reviewed, and revised in a team meeting" in accordance with Virginia's Special Education regulations (8 VAC 20-80-10). In accordance with IDEIA 04, each student's IEP, beginning on July 1, 2005, must include (1) a statement of the student's present level of academic achievement and functional performance, (2) a statement of measurable annual academic and functional goals, (3) a description of how the student's progress will be measured and when parents will receive progress reports, and (4) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research, that are necessary to meet the child's unique needs (20 U.S.C. § 1414(d)(1)(A)). IDEIA 04 also eliminated the

requirement for short term benchmarks and objectives in a student's IEP unless the student is taking alternative assessments. (*Id.*).

The IEP controls the special education, related services, and accommodations that each child with a disability receives. It is developed by an "IEP team" which includes the child's parents, teachers, and others knowledgeable about the school's programs and about the child's needs. In accordance with IDEIA 04, a student's IEP may be amended without a meeting after the annual IEP meeting with the parent's consent (see 20 U.S.C. § 1414(d)(3)(D)). In addition, IDEIA 04 allows IEP team members to be excused from attending particular IEP meetings with the parent's written consent in some situations (see 20 U.S.C. § 1414(d)(1)(C)).

While the IEP is developed by the IEP team, it must be agreed to by the student's parents before it is implemented (8 VAC 20-80-70(E)). If the parents do not agree with the proposed IEP, the child must continue to receive services in accordance with the last agreed IEP, if one exists, until agreement is reached on the new program, or the dispute is resolved through mediation or due process. Under IDEIA 04, if the parent does not agree with the initial proposed IEP, then the school system may not request mediation or due process to seek agreement from the parent to initiate services and the school system is not obligated to provide FAPE to the student at that time (see 20 U.S.C. § 1414(a)(1)(D)(ii)). Once the IEP is developed and agreed to, it must be implemented as written to provide an educational program to a child with a disability. The IEP must also be reviewed and revised, as needed, to meet the child's individual needs. At a minimum it must be reviewed annually.

4:5. What does it mean to provide students with disabilities with an education in the "least restrictive environment" (LRE)?

The requirement that students with disabilities be educated in the "least restrictive environment" (LRE) means that to the maximum extent appropriate, children with disabilities should be educated with non-disabled peers (8 VAC 20-80-10; 8 VAC 20-80-64(A)(1)). This means that children with disabilities should be educated in regular education classes, unless the nature or severity of the student's disability requires a more restrictive placement (*Id.*). However, for some students the regular education classroom will not be appropriate. The LRE for each student is the least restrictive *appropriate* environment where the student can receive some educational benefit (see, e.g., *DeVries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989)). For students who are unable to receive academic instruction in regular education classes, the LRE requirement also means that IEP teams must consider whether the students are able to attend other school activities, such as recess, music, art or school assemblies with their non-disabled peers.

As courts in Virginia have stressed, this is not merely "a laudable goal but is also a requirement of the Act" (*Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1259 (E.D. Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994)). In *Doyle*, for example, the court reversed a local hearing officer's decision granting tuition reimbursement to parents who had unilaterally placed their child in a private school because the hearing officer "misunderstood the mandatory nature of the least restrictive environment provisions" of the IDEA (*Doyle*, 806 F. Supp. at 1259). Therefore, schools must seriously consider the least restrictive appropriate environment for each student with a disability based on their unique needs when determining the appropriate placement for children to receive their special education program.

The LRE requirement of IDEA further means that, unless the IEP requires otherwise, a child with a disability should be "educated in the school that he or she would attend if non-disabled" (34 C.F.R. § 300.552(c)). However, in some cases students' IEPs will require the student to attend a school other than their local neighborhood school, and courts have found that this is consistent with the requirements of IDEA, since "mainstreaming" is not appropriate for all students based on their unique needs (see *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991)). The Fourth Circuit also held in *Barnett* that school divisions are not required to offer the same special education program at all public schools, that some specialized programs may be centralized, and that in some cases this may mean that a student with a disability will be required to attend a school other than his/her neighborhood school in order to receive the services of a special program.

If a child is unable to attend his or her neighborhood school, the school system still must ensure that the student's placement be "*as close as possible to the child's home*" (34 C.F.R. §§ 300.550(b)(1), § 300.552(b)(3); see also *Board of Education v. Rowley*, 458 U.S. 197, 202 (1982)). This means that once an IEP team has agreed that a student requires a more restrictive placement in a private day or residential facility, the school system has an obligation to first consider schools in Virginia, and then to go outside the state if no local schools are appropriate to meet the student's unique needs. In Virginia, this obligation is reinforced by the requirements of the Comprehensive Services Act ("CSA"), Va. Code 2.2-5200 et seq., and the obligations placed on local Family Assessment and Planning Teams ("FAPT") for considering private day or residential schools in Virginia first when funding student placements.

Finally, the LRE requirement also mandates that wherever possible, educational services must be provided to handicapped children in public schools" (20 U.S.C. § 1412(5); *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 369 (1985)). In fact, the least restrictive environment mandate makes clear that school systems can only consider private placements when a student's disability is so severe that he cannot be educated in a public

school setting (34 C.F.R. § 300.550(b); see also *Hessler v. State Board of Education*, 700 F.2d 134 (4th Cir. 1983)).

4:6. What is "specially designed instruction"?

The provision of special education to students with disabilities means that school divisions are providing "*specially designed instruction*" to meet the unique needs of the child in whatever setting is required by that child (8 VAC 20-80-10). In order to provide "*specially designed instruction*", school personnel must adapt, as needed, the content, methodology, or delivery of instruction to address the unique needs of the child and to ensure access of the child to the general curriculum, so that the child can meet the educational standards that apply to all children within the jurisdiction (8 VAC 20-80-10).

4:7. What are related services?

The IDEA and Virginia law require that school divisions provide special education and related services, as appropriate, to students with disabilities based on their unique needs as determined by the students' IEP teams. "*Related services*" means "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology and audiology services; interpreting and transliterating; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation and psychological counseling; orientation and mobility services; medical services for diagnostic or evaluation purposes; school health services; social work services in schools; and parent counseling and training" (8 VAC 20-80-10). IDEIA 04 specifically excludes from the definition of related services "a medical device that is surgically implanted," such as cochlear implants (see 20 U.S.C. § 1401(26)). A child must be found eligible for special education services in order for an IEP team to determine that the student requires related services to benefit from his/her special education (8 VAC 20-80-56(D)). A child cannot be eligible only for related services.

This list is intended to provide examples of the types of developmental, corrective and supportive services that may be provided as related services, but it is not intended as an exhaustive list, as the school system may be required to provide related other services if they are required for a child with a disability to benefit from their education (*Id.*). As discussed further below, some medically-related services may be required for children with disabilities as related services. Similarly, parent counseling and training can be considered related services for

students with disabilities if they are required to allow the student to benefit from his/her education.

4:8. What are assistive technology services?

The Virginia regulations define "*assistive technology services*" as, "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (8 VAC 20-80-10). This specifically includes evaluations of the child's assistive technology needs, selecting, adapting, purchasing and maintaining needed devices, coordinating the use of assistive technology with the child's other therapies and services, and providing training and assistance in the use of assistive technology devices for the child, teacher, related service providers and even the child's parents (*Id.*).

As part of the process of developing IEPs for students with disabilities, IEP teams must consider if the children requires assistive technology devices or services as part of their special education, related services or as supplementary aids or services in order to benefit from their education (8 VAC 20-80-60(E)(1); 8 VAC 20-80-62(E)(2)(f)). The IEP team may even determine that the child requires the use of school-provided technology at home or in other settings (8 VAC 20-80-60(E)(2)). The relevant question with regards to assistive technology devices or services is whether or not they are *required* to allow the child to benefit from his/her education, not simply whether the child may benefit from the assistance of the device. If the IEP team determines that a particular assistive technology device or service is required for the provision of FAPE, the school division must provide it as detailed in the student's IEP at no cost to the child's family.

The School Division's Responsibilities

4:9. What are the school division's basic responsibilities in providing services to children with disabilities?

School divisions must provide all eligible students with disabilities with a free appropriate public education in the least restrictive appropriate environment consistent with the student's individual education program, in order to meet their unique needs.

4:10. When do school division's responsibilities to students with disabilities end?

As a general matter, students with disabilities are eligible for special education services from age two to twenty-one. In Virginia, students whose second birthday falls on or before September 30, and who have not reached their 22nd birthday on

or before September 30 are eligible for special education services (8 VAC 20-80-10). However, the obligation to provide special education services to students with disabilities aged 2 to 21 may be terminated either by an IEP team determination in accordance with 8 VAC 20-80-58 that the student no longer qualifies as disabled, or when the student graduates with a standard or advanced studies high school diploma (8 VAC 20-80-60(A)(2)(a)).

Termination of special education services based on graduation with a regular high school diploma does not require an evaluation or a determination that the child is no longer eligible for special education services. However, graduation constitutes a change in placement, and parents must receive applicable notice of the change in placement before the student graduates. In addition, IDEIA 04 has added a requirement that special education students whose special education services terminate because of graduation or because they exceed the age of eligibility must receive a summary of their academic achievement and functional performance (20 U.S.C. § 1414 (c)(5)(B)(ii)).

For an IEP team to terminate a student's special education services, the student must be evaluated in accordance with the general evaluation procedures, 8 VAC 20-80-54, and the IEP team, with the parent's consent, must determine that the child is no longer eligible as a student with a disability under the provisions of IDEA (8 VAC 20-80-58). Special education services cannot be terminated in this situation without parental consent.

If a parent revokes his or her consent for special education services, the school division may not terminate services without following the procedures of 8 VAC 20-80-56 to determine that the child is no longer eligible for services. The school division also may not terminate services if doing so would deny the student a free appropriate public education. If the parent revokes consent and the school division determines that the child still requires special education services then the school division may request due process or mediation to resolve the issue.

4:11. What specific "child find" responsibilities does a school board have for identifying children with disabilities?

School divisions must maintain "active and continuing" programs to locate and identify all children with disabilities, aged 2 to 21, who live within the school divisions boundaries (8 VAC 20-80-50(A)(1)). This "child find" responsibility specifically extends to migrant and homeless children, children who attend private schools or are home-schooled, and children who are incarcerated (*Id.*). It also specifically extends to students who are suspected of having a disability, even if they are advancing from grade to grade (*Id.*). Once the school division identifies students who are suspected of having a disability the school division must seek parental consent to evaluate these students in accordance with the evaluation requirements of IDEA and Virginia law. If the parents refuse consent to an initial