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

# Agenda Item: F

## Date: September 23, 2021

### Title: First Review of Exempt Action to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* based on 2021 General Assembly legislation

#### Presenter: Dr. Samantha Hollins, Assistant Superintendent, Department of Special Education and Student Services

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## Purpose of Presentation:

Action required by state or federal law or regulation.

## Executive Summary:

In 2021, the Virginia General Assembly passed several pieces of legislation that necessitate revisions to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*. These legislative items source both recent monitoring as a part of the U.S. Department of Education’s Office of Special Education Programs (OSEP) Differentiated Monitoring System and the Joint Legislative Audit and Review Commission’s (JLARC) study of K-12 Special Education in Virginia. The JLARC study was previously presented to the Virginia Board of Education on January 28, 2021, and April 22, 2021, respectively.

The proposed revisions to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* include multiple legislative changes detailed below. On May 28, 2009, the Board adopted revised regulations to reflect the *Individuals with Disabilities Education Act* (IDEA) and its 2006 implementing regulations. The Board’s revised regulations became effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, at 8VAC20-81-10 *et seq.* (the “Virginia Regulations”). The [Virginia Regulations](https://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf) are available online.

Relevant Legislation:

1. [House Bill 2299](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=hb2299) and [Senate Bill 1288](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=sb1288) requires the Department of Education and the Board of Education to develop new policies and procedures and effect numerous modifications to existing policies and procedures to improve the administration and oversight of special education in the Commonwealth. Specifically, that the Board of Education shall amend its *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* (8VAC20-81-20 et seq.) to include a provision requiring that, if a school division develops a draft Individualized Education Program (IEP) prior to a scheduled IEP meeting, it shall provide such draft to the parents at least two business days in advance of such IEP meeting.
2. [HB2182](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=HB2182) requires the Board of Education to amend its regulatory definition of “traumatic brain injury,” for the purpose of the provision of special education for children with disabilities, to include an acquired injury to the brain caused by a medical condition, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments. The current regulatory definition of “traumatic brain injury” includes only an acquired brain injury caused by an external physical force.
3. [HB2314](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=HB2314) requires the Board of Education to amend a definition within the regulations relating to special education to remove the word “component” following the word “evaluation,” thereby ensuring compliance with the relevant federal regulation and clarifying that the parent of a child with a disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the local educational agency.

The proposed exempt action to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* support Priority 1 of the Board’s Comprehensive plan to “*provide high quality, effective learning environments for all students.*”

## Action Requested:

## The Board is requested to waive first review and approve the exempt action to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia.*

## Superintendent’s Recommendation:

The Superintendent of Public Instruction recommends the Board of Education waive first review and approve the exempt action to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia.*

## Previous Review or Action:

No previous review of action.

**Background Information and Statutory Authority:**   
The proposed revisions to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* include multiple legislative changes detailed below. On May 28, 2009, the Board adopted revised regulations to reflect the *Individuals with Disabilities Education Act* (IDEA) and its 2006 implementing regulations. The Board’s revised regulations became effective on July 7, 2009, and were reissued on January 25, 2010, and on July 29, 2015, at 8 VAC 20-81-10 *et seq.* (the “Virginia Regulations”). The [Virginia Regulations](https://www.doe.virginia.gov/special_ed/regulations/state/regs_speced_disability_va.pdf) are available online.

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Summary of the exempt action revisions to the *Regulations Governing Special Education Programs for Children with Disabilities in Virginia.*

The table below highlights the changes made to the document.

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| Reason for the change | Page number in Attachment A | Regulatory Change |
| [HB2182](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=HB2182) (Definition of Traumatic Brain Injury (TBI)) | 23 | Replace definition:  “means an acquired injury to the brain caused by an external physical force or by other medical conditions, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 CFR 300.8(c)(12)).” |
| [House Bill 2299](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=hb2299) and [Senate Bill 1288](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=sb1288) (Draft Individualized Education Program (IEP)) | 30 | Add a new section 8 VAC 20-81-110.E.8:  If the local educational agency elects to use a draft version of an IEP in any IEP team meeting, such draft shall be developed and a copy shall be provided to the parent(s) at least two (2) business days in advance of the IEP meeting. |
| [HB2314](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=HB2314) (Clarification to the language regarding the provision of an Independent Educational Evaluation (IEE)) | 37 | Strike the word “component” located in 8VAC20-81-170 B.2.a. |

**Draft Individualized Education Plans**

Current state and federal regulations do not address the topic of a draft Individualized Education Program (IEP). While some have argued that a draft IEP can signal that the content of the IEP has been predetermined by the school division, others argue that it is a useful tool for starting the development of the IEP.

Like the current laws and regulations, HB 2299 and SB 1288 do not require preparation of a draft IEP. Rather, they provide that if a draft is used, it must be provided to the parent(s) at least two business days prior to the IEP meeting. The proposed regulatory amendment is designed to reflect this new requirement.

**Definition of Traumatic Brain Injury**

The Board’s *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* does include traumatic brain injury as one of the eligibility categories for receiving special education services. Traumatic brain injury (TBI) is defined in the Regulations at 8VAC20-81-10 as “an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 CFR 300.8(c)(12)).” This eligibility category and definition aligns with language set out in the *Individuals with Disabilities Education Act* (IDEA).

The 2021 General Assembly passed [House Bill 2182](https://lis.virginia.gov/cgi-bin/legp604.exe?ses=211&typ=bil&val=HB2182) requiring the Board of Education to amend the regulatory definition of “traumatic brain injury” in 8VAC20-81-10 to read as follows:

“Traumatic brain injury” means an acquired injury to the brain caused by an external physical force or by other medical conditions, including stroke, anoxia, infectious disease, aneurysm, brain tumors, and neurological insults resulting from medical or surgical treatments, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma (34 CFR 300.8(c)(12)). The expansion of the traumatic brain injury definition may allow more students to be identified under the traumatic brain injury category for special education services.

**Independent Educational Evaluation**

The VDOE was the subject of a Differentiated Monitoring and Supports (DMS) visit from the U.S. Department of Education (USED) focused on the general supervision and dispute resolution requirements in Part B of the *Individuals with Disabilities Education Act* (IDEA). As a result of this monitoring visit, a letter was sent June 23, 2020, that documented required actions as a result of the findings of the monitoring visit. The VDOE has been engaged since the initial monitoring visit in May 2019, with the USED Office of Special Education Programs (OSEP) in determining appropriate guidance regarding the provision of Independent Educational Evaluations (IEE). An IEE is defined as an evaluation conducted by a qualified examiner or examiners who are not employed by the local educational agency responsible for the education of the child in question. The results of this evaluation can then be communicated to the local school division and shared with the team charged with determining eligibility or conducting evaluations related to the student with or suspected of having a disability. The IEE must be conducted in accordance with the policies of the local school division. The regulations further provide that, if a parent requests an IEE, the school division must either grant the request or initiate a due process hearing to show that its evaluation was appropriate.

While there is regulatory language related to the provision of an IEE, there is also non-regulatory guidance (letters from OSEP) that offer clarification on the position of the USED on specific issues. These issues have been the subject of differing interpretations by various localities, states, and courts. The USED is requiring VDOE to modify its regulations to reflect current USED interpretation.

There are anticipated impacts from this update to the regulations. Parents and advocates who see the current language as limiting their ability to request evaluations outside the scope of team discussions see this revision as a way to increase flexibility on assessments that could provide data and information on the educational impact of a student’s disability. Local school divisions could see this as opening the number and frequency of the request of IEE (which have a financial impact on LEAs) as well as a limitation on its ability to deny a request for IEE.

**Timetable for Further Review/Action:**

Upon Board approval, these regulations will be submitted to the Regulatory Town Hall, pursuant to the Administrative Process Act.

Once effective, the VDOE will continue professional learning opportunities needed for school divisions to effectively revise local policy as needed and support professional development in these areas.

## Impact on Fiscal and Human Resources:

Local school divisions may incur costs associated with aligning local policy and procedures to the updated regulations. Specifics on each area have been identified in the background section above.