

**GUIDANCE DOCUMENT
FOR
IMPLEMENTING
NEW SPECIAL EDUCATION REQUIREMENTS
FOR THE
DEFINITION OF PARENT**



**Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services
May 2009**

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INTRODUCTION

During its recent session, the Virginia General Assembly voted to amend the *Code of Virginia*, at § 22.1-213, which defines a number of terms related to special education. This amendment, which becomes effective July 1, 2009, creates a new § 22.1-213.1 and adds a definition of “parent”. This definition tracks the language contained in the federal regulations governing special education (34 CFR § 300.30) and includes the following provision:

C. THE LOCAL SCHOOL DIVISION SHALL PROVIDE WRITTEN NOTICE TO THE BIOLOGICAL OR ADOPTIVE PARENTS AT THEIR LAST KNOWN ADDRESS THAT A FOSTER PARENT IS ACTING AS THE PARENT PURSUANT TO THIS SECTION, AND THE LOCAL SCHOOL DIVISION IS ENTITLED TO RELY UPON THE ACTIONS OF THE FOSTER PARENT PURSUANT TO THIS SECTION UNTIL SUCH TIME THAT THE BIOLOGICAL OR ADOPTIVE PARENT ATTEMPTS TO ACT AS THE PARENT.¹

This amendment requires a school division to provide the biological or adoptive parents of a child in foster care with written notice informing the biological or adoptive parent that it will deal with, and rely upon the decisions of, the foster parent with regard to the child’s special education and related services, until the biological/adoptive parent “attempts to act as the parent.” The notice must be sent to the “last known address” of the biological/adoptive parent. The notice need not be sent to the biological or adoptive parents whose residual parental rights have been terminated.

This new written notice requirement is intended to prevent a delay in the provision of a free appropriate public education for a child in foster care, and is a provision specific to the Commonwealth of Virginia. The new law does not provide any practical detail for implementing the requirement. Accordingly, the following guidance is offered to school divisions on how to comply with this new requirement.

We reviewed this guidance with our department’s legal counsel and consider our recommendations responsive to these new requirements. School personnel should consult with their school board attorney on revising the school division’s policy, procedures, standards or protocols implementing these new requirements, as well as the application of the requirements in individual cases that raise concern.

Questions related to this document should be directed to staff in the Virginia Department of Education’s Office of Dispute Resolution and Administrative Services at (804) 225-2013.

¹ The complete definition of “Parent” is found in Appendix B.

1. **Timing of Notice**

The LEA should send this written notice to the biological/adoptive parent² prior to the beginning of each school year.

If the foster care placement occurs after school starts, the LEA should send this written notice to the biological/adoptive parent immediately upon the LEA learning of the foster care placement.

If the foster care placement changes during the school year, the LEA should send this written notice to the biological/adoptive parent immediately upon the LEA learning of the change in foster care placement.

There is no legal requirement as to the timing of the notice. Best practice, however, would support providing the notice in accordance with the above provisions so as to avoid subsequent confusion about who has standing as parent in IDEA-related matters.

The school division should send any IDEA-mandated notice that goes to the foster parent to the biological/adoptive parent, as well. Providing parallel notice may provide protection to the school division against parental allegations of a denial of rights particular to a specific event and against claims by the biological/adoptive parent that s/he has not received the written notice.

2. **Content of Notice**

The written notice to the biological/adoptive parent should:

- Explain the reason for the notice
- Explain the consequences of failing to respond
- Invite a response
- Provide contact information for responding
- Invite correction of information
- Document provision of notice
- Provide basic, relevant student information

A sample notice is provided in Appendix A of this document.

3. **Method and Destination of Delivery**

School personnel should deliver the written notice by any reasonable means which may include:

² The term “biological or adoptive parent” when used in this document refers to the biological or adoptive parent whose residual parental rights and responsibilities have not been terminated.

- First Class Mail: The written notice requirement does not specify a particular mode of delivery, except that the notice be provided to the “last known address” suggests that mailing the documents (first class, postage pre-paid) is anticipated.
- Hand-delivery or Posting: School divisions should be mindful, however, that if the last known address for the biological/adoptive parent does not have a mail receptacle, then alternative forms of delivery to the last known address may be required. In such instances, hand-delivery or some form of personal service or posting may be indicated.
- E-mail. An e-mail address may, in some instances, qualify as an “address.”

Delivery Preference. As noted above, the language of the statute suggests that mailing the documents is anticipated, although alternate forms of communication would meet compliance purposes. We are mindful that e-mailing may be problematic; for example, the e-mail message can easily be overlooked, forwarded to spam folders, accidentally deleted by the recipient, or be identified as undeliverable.

Not necessarily a residence. The law does not specify that “address” is necessarily a residence address; therefore, an employer’s address may, in some instances, qualify as a “known address.”

Duty to locate. The “last known address” requirement does not impose on the school division a duty to investigate the current whereabouts of the biological/adoptive parent if the notice directed to the “last known address” is returned to the school or otherwise proves undeliverable.

4. **The Burden of Coming Forward is on the Biological/Adoptive Parent**

In special education matters, time is of the essence. As a result, and consistent with federal and state mandates, school divisions are not required to wait for a biological/adoptive parent to respond to the notice provided prior to relying on the actions of a foster parent. The burden of coming forward lies with the biological/adoptive parent, and the school division is entitled to rely on the participation of the foster parent until such time as the biological or adoptive parent comes forward.

Alternatively, the school division could adopt a reasonable waiting period for the biological/adoptive parent to respond. In such a case, we recommend that the notice provide a date certain by which the biological/adoptive parent is to respond. In this instance, the school division must be mindful of any regulatory timelines associated with the school division’s actions and keep within those timelines.

5. Additional Point of Contact

Due to the practicalities involved, it may be prudent for the sole purpose of this notice to send a copy of the notice to the child's social worker. The social worker will, in most instances, be the one constant link between the child and the biological/adoptive parent(s) during the child's tenure in foster care. As a result, the social worker may have the best information related to the whereabouts of the biological/adoptive parent.

6. Parental Assertion of Rights

In the event that the biological/adoptive parent notifies the LEA of his/her intent to assert the parent's IDEA-parental right, § 22.1-213.1 B applies. This Code provision states that when more than one party is qualified to act as the parent, the biological/adoptive parent must be presumed to be the parent for IDEA purposes.

ATTACHMENTS:

- (1) Sample New Written Parental Notice for Children in Foster Care
- (2) Section 22.1-213.1, *Code of Virginia*

Initial distribution list:

- VDOE Special Education and Student Services Staff
- Directors of Special Education
- Education Directors, State Operated Programs
- Virginia School for the Deaf and the Blind
- VDOE Special Education Hearing Officers
- VDOE Special Education Mediators
- SSEAC
- Parent Resource Centers
- PEATC

APPENDIX A

**SAMPLE NOTICE TO THE BIOLOGICAL/ADOPTIVE PARENT
OF A CHILD IN FOSTER CARE**

NOTICE FROM _____ (School Division)

Pursuant to Virginia law, we are required to provide you with written notice, at your last known address, that your child's foster parent is acting as your child's "parent" pursuant to law for purposes of special education identification, evaluation, placement, and the provision of a free appropriate public education to your child. We are entitled by law to rely upon the actions and decisions of the foster parent until such time that you attempt to act as the parent. If you wish to act as the parent in connection with this, or any other educational matter, involving your child, please contact (or have someone acting on your behalf contact): _____ by phone at (____) _____ or e-mail _____

or by regular mail _____

Please contact us by _____.

If the last known address we have for you (listed below) is incorrect, or if there is a better address where we can reach you in the future, please let us know.

Student Name _____ Grade _____

Student ID Number _____ Date of Birth _____

Biological/Adoptive Parent(s) Name _____

Last Known Address _____

Social Worker Name _____

Social Worker Address _____

Student's most recent eligibility date _____/_____/_____

Most recent re-evaluation date _____/_____/_____

Next re-evaluation must occur before this date _____/_____/_____

Current IEP will be reviewed no later than this date _____/_____/_____

PROOF OF NOTICE

Date Sent ___/___/___ By: _____ (signature)

First Class Mail Hand-delivery/posting Other _____

APPENDIX B

SECTION 22.1-213.1. DEFINITION OF "PARENT"

- A. "Parent," for purposes of this article and regulations promulgated thereto, means:
1. A biological or adoptive parent of a child;
 2. A foster parent, even if the biological or adoptive parent's rights have not been terminated, but subject to subsection B;
 3. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the Commonwealth if the child is a ward of the Commonwealth);
 4. An individual acting in the place of a biological or adoptive parent including grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
 5. If no party qualified under subdivisions 1 through 4 can be identified, or whose parties are unwilling to act as parent, a surrogate parent who has been appointed in accordance with 8 VAC 20-80-80.
- B. The biological or adoptive parent, when attempting to act as the parent pursuant to this section and when more than one party is qualified under subsection A to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent has had their residual parental rights and responsibilities terminated pursuant to section 16.1-277.01, 16.1-277.02, or 16.1-283 or a comparable law in another state.
- C. The local school division shall provide written notice to the biological or adoptive parents at their last known address that a foster parent is acting as the parent pursuant to this section, and the local school division is entitled to rely upon the actions of the foster parent pursuant to this section until such time that the biological or adoptive parent attempts to act as the parent.
- D. If a judicial decree or order identifies a specific person or persons among subdivisions A 1 through A 5 to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of the special education identification, evaluation, and placement of a child and the provision of a free appropriate public education to a child.
- E. The Board of Education shall revise the regulations governing the provision of special education services in accordance with this section.

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