



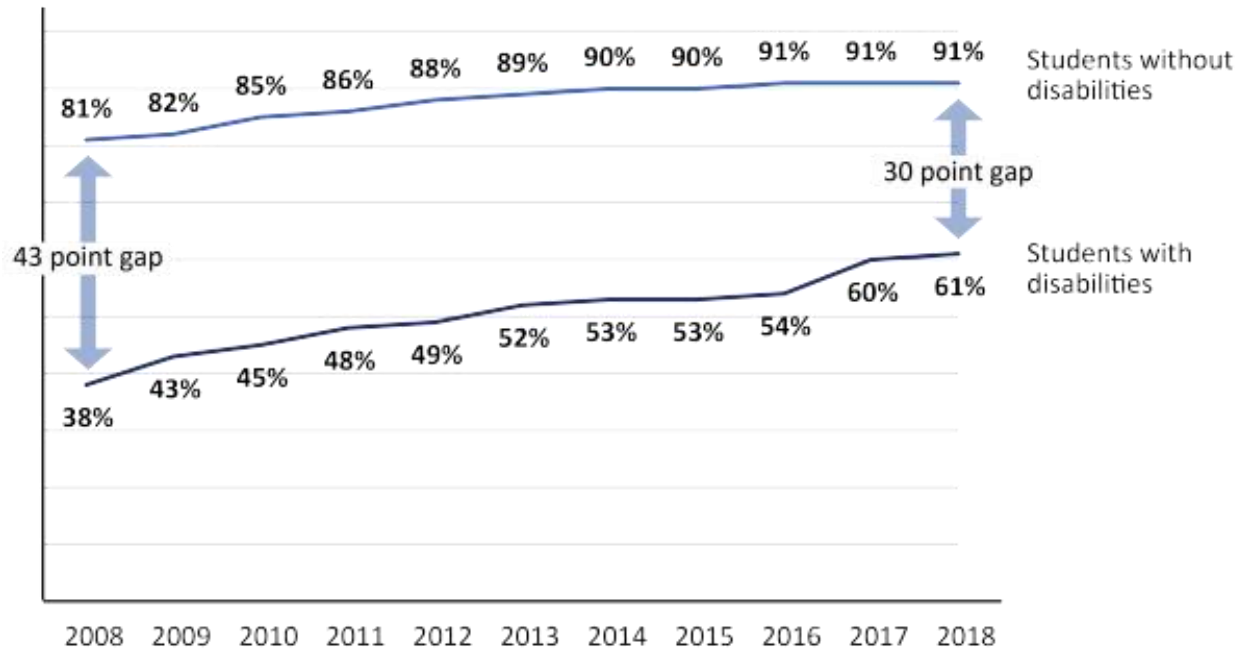
Special Education Advocacy 101:

Educating All Children in the Commonwealth

December 15, 2022

The Southwest Virginia Legal Aid Society, Inc.





SOURCE: JLARC analysis of VDOE data

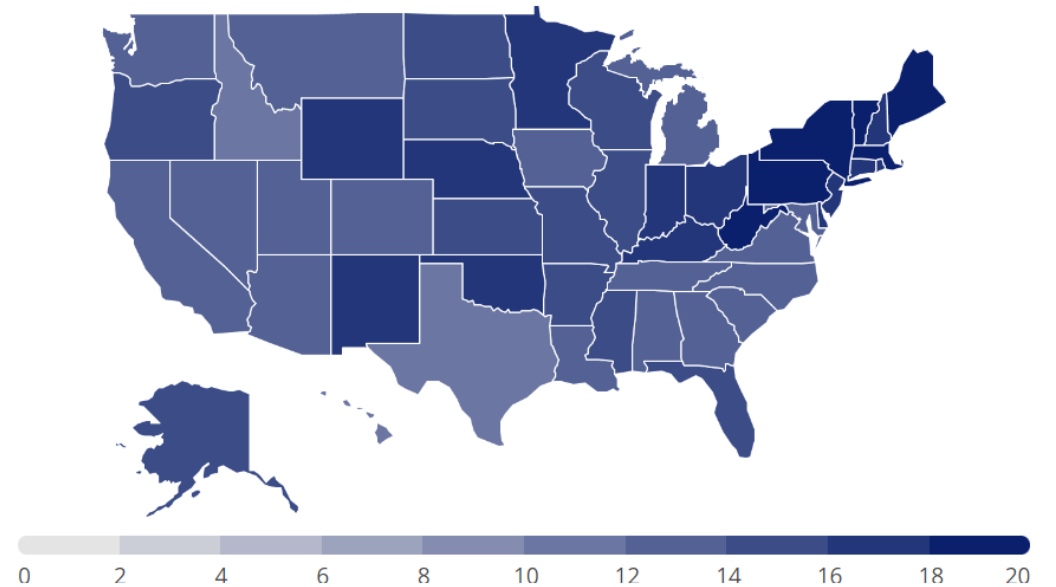
NOTE: Includes standard, advanced, and IB diplomas; four-year graduation rates. "Disability" indicates that student had an IDEA-qualifying disability at time of graduation. Excludes students who transferred or died before graduation. The Modified Standard Diploma was no longer an option for students with disabilities who entered the ninth grade for the first time beginning in 2013, affecting four-year graduation rates in 2017 and 2018.



In the 2018–19 school year, about 164,000 K–12 students were enrolled in special education, about 13 percent of Virginia’s total student population.

-2020 Joint Legislative Audit and Review Commission

Percent of Students in Special Education by State



SOURCE: National Center for Education Statistics, Common Core of Data (CCD), 2020-21.

-EducationWeek. Special Education: Definition, Statistics, and Trends. (Updated July 2022).



COVID-19

How COVID-19 Has Affected Special Education Students

Of all K-12 students, those with special needs are especially hard hit by the pandemic, say Tufts special education experts

National, State-by-State Data Show Depth of Mental Health Pandemic for Youth

POSTED AUGUST 8, 2022, BY THE ANNIE E. CASEY FOUNDATION

NEA NEWS

What COVID-19 Taught Us About Special Education

Students with special needs, their parents, and educators faced uniquely complicated challenges during the pandemic.

neaToday

By: Cindy Long, NEA staff writer
Published: 01/14/2021

SHARE



Special needs students and teachers face hurdles that seem impossible

The challenges in education this fall are hard for everyone, but special education students are especially suffering.





MENTAL HEALTH



An increasingly diverse population of children require equitable opportunities and solutions that target the unique needs and experiences for children of color, children in immigrant families, and children in under-resourced communities.

CHILD PREVALENCE

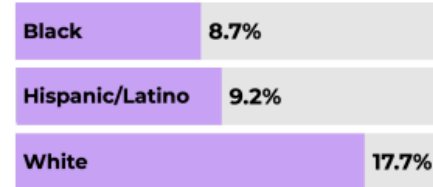
The most common mental health conditions for children are ADHD, behavior problems, anxiety, and depression.



RECEIVING CARE

Nationally, children of color are less likely to receive mental health care than white children.

Mental Health Treatment in the Past 12 Months



MENTAL HEALTH



YOUTH MENTAL HEALTH

Before the pandemic, mental health concerns among high school students were gradually increasing.



PANDEMIC IMPACT

Parents and children experienced a decline in their mental health during the pandemic.

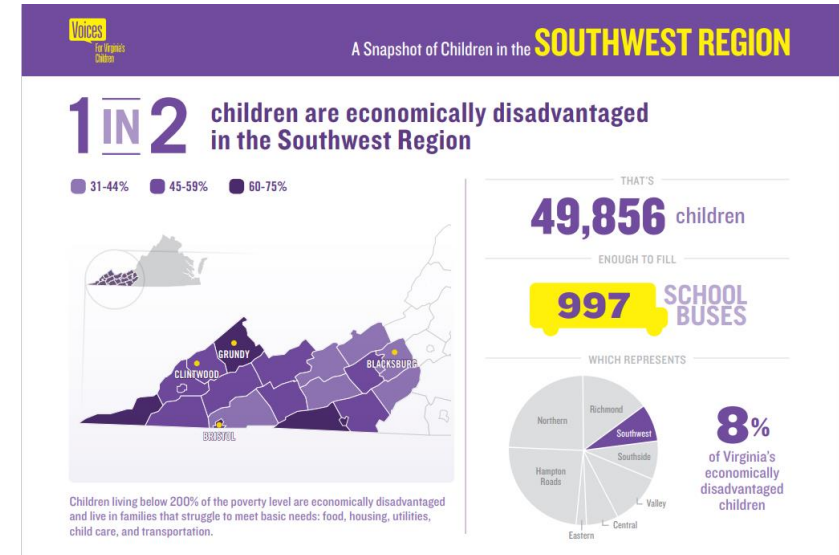
PERCENT MENTAL HEALTH WORSENERD

32%

of parents felt anxious during the pandemic

30%

of parents report their children's mental health has worsened during the pandemic

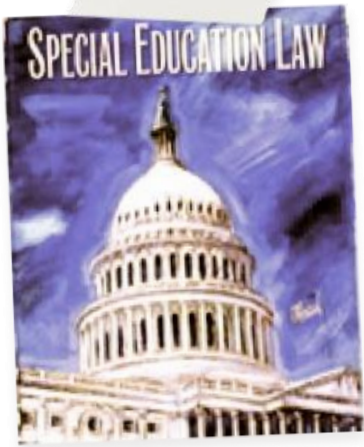


Voices for Virginia's Children. 2018 Kids Count Data.
<https://vakids.org/kids-count-data/virginia-data>

Voices for Virginia's Children. "The State of Virginia's Children: A Data Snapshot of Children, Youth, and Families." November 2021.

<https://vakids.org/wp-content/uploads/2022/01/State-of-Virginias-Children.pdf>





Education for All Handicapped Children Act of 1975 (Public Law 94-142)

- Context: Federal court decisions in the early '70s re: 14th Amendment



Individuals with Disabilities Education Act (IDEA)

- 1990: EAHCA reauthorized as **IDEA**



Individuals with Disabilities Education Improvement Act (IDEIA)

- Bipartisan revisions and enhancements of IDEA in 2004



Child Find

Every school division in the Commonwealth of Virginia must identify, locate and evaluate each child, birth to age 21 inclusive, residing within the jurisdiction of the division who has a disability or is suspected of having a disability, regardless of the severity of the disability, and who needs special education and related services. This **Child Find** obligation extends to all children with disabilities, including those who are homeless, highly mobile, migrants, in foster care, homeschooled, court-involved or attending private schools within the jurisdiction of the division.
34 C.F.R. § 300.111(a); 34 C.F.R. § 300.111(c).

Categories of Eligibility

Students may be eligible for special education and related services under these categories of disability specified under state and federal law: autism, deaf-blindness, auditory impairment, emotional disturbance, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech impairment, traumatic brain injury, and visual impairment, including blindness. 34 C.F.R. § 300.8(a)(1).




In Virginia, this list can include **developmental delay**. See 8 VAC 20-81-80; 8 VAC 20-81-10 ("Definitions").

Suspicion of Need?

Response to Evidence-Based General Education Interventions or Multi-Tiered Systems of Support. If a child is having difficulty in the general education setting, has she been considered for response to evidence-based intervention and other academic or behavior support services?

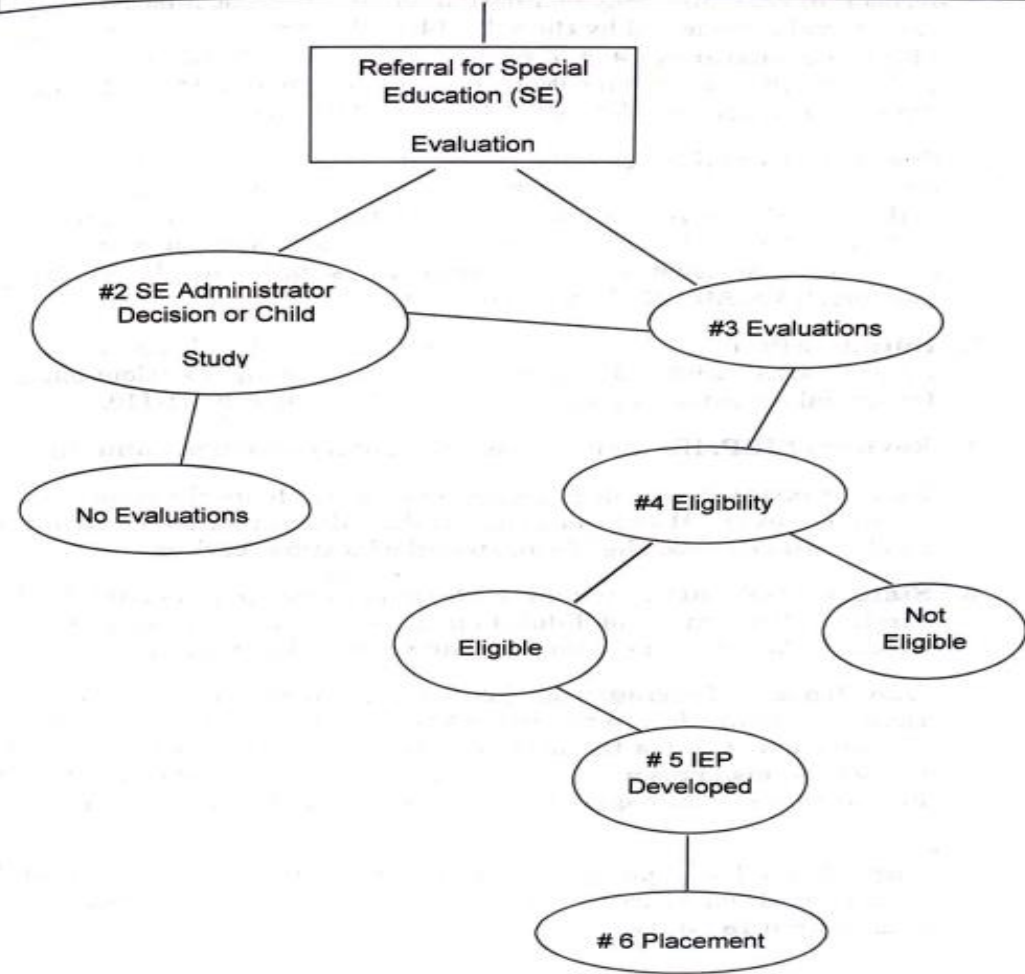
Rtl cannot be used to delay or deny a special education evaluation.

 **Passing grades may be irrelevant.** The school must provide special education to a child with a disability “even though the child has not failed or been retained in a course or grade and is advancing from grade to grade.” 34 C.F.R. § 300.111(c)(1).

Overview of the Special Education Process: Evaluation to Placement

Overview of Special Education (SE) Process

#1 Student having trouble, such as failing grades, problem reading or paying attention, repeated misbehavior and suspensions = SUSPECTED DISABILITY



Referral and Evaluation

- A referral for a special education evaluation may be initiated by parent or legal guardian, or another person involved in the education or care of the student.
- A referral should be considered **(1) if there is evidence of a suspected disability and (2), as a result of the suspected disability, a suspicion that the student may require specially designed instruction.**

Scope of a Special Education Evaluation

D.B. v. Bedford County School Bd., 708 F.Supp.2d 564 (2010)
259 Ed. Law Rep. 608

708 F.Supp.2d 564
United States District Court,
W.D. Virginia,
Lynchburg Division.

D.B., et al.,
v.

BEDFORD COUNTY
SCHOOL BOARD, Defendant.

Civil Action No. 6:09-cv-00013.

April 23, 2010.

Synopsis

Background: Student and his mother brought action against county school board, alleging that board violated the Individuals with Disabilities Education Act (IDEA) by failing to provide student with a free appropriate public education (FAPE). Parties cross-moved for summary judgment. Plaintiffs also moved for leave to file supplemental exhibits, and board moved to strike plaintiffs' motion for such leave.

*566 Henry Green Bostwick, II, Legal Aid Society of Roanoke Valley, Roanoke, VA, for D.B.

Eric Eldridge Harrison, Frank Austin Wright, Jr., Overbey, Hawkins & Wright, Rustburg, VA, for Defendant.

Education — Free appropriate public education

County school board failed to properly evaluate student for a specific learning disability, and, thus, student was not provided free appropriate public education (FAPE) required by the IDEA, although he was promoted a grade every year, where he consistently showed a lack of measurable progress, he was making only trivial, minimal academic advancement toward goals in his IEP, and goals, services, and placement proposed in the IEP were not reasonably calculated to confer an educational benefit beyond minimal academic advancement. Individuals with Disabilities Education Act, § 612(a)(1)(A), 20 U.S.C.A. § 1412(a)(1)(A).

The IDEA mandates that, when evaluating a child “to gather relevant ... information ... that may assist in determining ... whether the child is a child with a disability ... and ... the content of the child's individualized education program,” the LEA “shall ... use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” 20 U.S.C. § 1414(b)(2). The IDEA imposes “[a]dditional requirements,” including the requirement that “[e]ach local educational agency shall ensure that ... *the child is assessed in all areas of suspected disability.*” 20 U.S.C. § 1414(b)(3)(B) (emphasis added). An IEP must contain



Timeline for the Referral and Evaluation Process

From *Fact Sheet For Virginia's Parents: Key Timelines for Special Education Processes*. Parent Educational Advocacy Training Center (PEATC). www.peatc.org. April 2020.

REGULATION	ACTION	TIMELINE	
		Calendar Days	Business Days
8VAC20-81-50 (D) Referral	Referral to Administrator for Special Education Evaluation (SPED). SPED Administrator must:		
	Initiate Eligibility Evaluation Process, or require that School Based Team review and respond, or deny the request.		Within 3 days from receipt of referral
	School Based Team must meet to review the referral from SPED administrator.		Within 10 days from receipt of referral
	School-based team must refer to SPED administrator for evaluation for special education if determined appropriate.		Within 3 days from receipt of referral
8VAC20-81-60 (B) Initial Evaluation	Evaluation must be completed and decision on eligibility made.* Unless child is not made available, enrolls in school after the beginning of 65-day timeline, or more information is needed, and the parents agree to extend.		Within 65 days of receipt of referral by SPED Administrator/ designee.*
8VAC20-81-70(D) Evaluation/ Reevaluation	Evaluation reports must be available to parents to review before a meeting to determine eligibility.		No later than 2 days before the meeting
	Copies of evaluation reports to be provided to parents at the eligibility meeting or immediately following but:	No later than 10 days after the meeting	
8VAC20-81-70(E) Evaluation/ Reevaluation	Reevaluation shall be conducted at least once every 3 years or, if the school, parent or teacher requests a reevaluation. It must be completed within:		65 days of receipt of referral by SPED administrator or designee; same exceptions as for initial eligibility-8VAC20-81-60

Independent Educational Evaluations (IEEs)

64 Fed. Reg. 12, 608 (March 12, 1999). “If a parent refuses to consent to a proposed public evaluation in the first place, then an IEE at public expense would not be available since there would be no public evaluation with which the parent can disagree.”

71 Fed. Reg. 46,689 (August 14, 2006). “If a parent disagrees with the results of a completed evaluation . . . the parent has a right to an IEE at public expense . . . The parent, however, would not have the right to obtain an IEE at public expense before the public agency completes its evaluation [...].”

SCOTUS AND THE IEE RATIONALE. IDEA “ensures parents’ access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion . . . They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”

- See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60-61(2005)



Independent Educational Evaluations (IEEs)

- Evaluation conducted by a qualified examiner independent of the local educational agency (LEA) or school division.
- Parent has the right to request an IEE, at public expense, if the parent “disagrees” with the school’s evaluation.
- The school division must provide the IEE “without unnecessary delay” or file due process complaint.
- Parent may choose any evaluator so long as the evaluator meets the requirements that the school division applies to its own evaluators.

Who can consent to evaluations and special education services?

- A **parent** is defined by IDEA. 20 U.S.C. § 1401(23)(A).
- Both parents of a child with a disability may meet that definition and have equal rights to act individually, even over the objections of the other natural parent. **School divisions can seek the consent of either parent.**
- Under Virginia law, schools must get a parent's consent for an initial evaluation or reevaluation, including a functional behavioral assessment; an initial eligibility determination; initial provision of services to a child; revision to the child's IEP services; partial or complete termination of special education and related services; changes in the identification of a child's disability; and changes made to a child's eligibility for special education and related services. See 8 VAC §20-81-170 (E)(1).

Who can consent to evaluations and special education services?

- **Potential Family Law Issue?** Even if one parent dissents, school systems often maintain they have the statutory authority to accept one parent's consent over the objection of the other. See Va. Code Ann. § 20-124.6.
 - IDEA provides various methods for parents and schools to resolve their disputes, like mediation, a due process hearing, and appeal of a decision of a due process hearing officer to state or Federal court. 20 U.S.C. § 1415(e)-(i). However, the law does not provide for the situation where parents are divided on whether the school is meeting its legal obligations or not.
- **Judicial Mechanism.** "If a judicial decree or order identifies a specific person or persons . . . 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 this section." 34 C.F.R. § 300.30(b)(2) (citing as authority 20 U.S.C. § 1401(23)).

Free, Appropriate Public Education (FAPE)

- **FAPE**. Every eligible student with a disability is entitled to a **free appropriate public education** under IDEA.
- The **Individualized Education Program (IEP)** is the centerpiece of the plan for providing appropriate special education and related services that are **reasonably calculated to enable the student to make progress appropriate considering the student's unique and individual circumstances**. See 34 C.F.R. § 300.17; *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988 (2017).
- The IEP must be provided in the student's **Least Restrictive Environment (LRE)**.

Individualized Education Plan (IEP)

The components of an **IEP** include—

- **Parent and Student Concerns.** Educational, social, behavioral and/or emotional concerns of the parent and student.
- **Student Strengths and Relevant Evaluation Results.** An explanation of how the student's disability impacts the student's progress and participation in the general curriculum.
- **Present Levels of Academic Achievement and Functional Performance.** The IEP must include evidence that the student's IEP Team considered present levels of academic achievement and functional performances in each disability-related area in which the student demonstrates weakness as determined by the student's most recent evaluation, reevaluation or Review of Existing Evaluation Data (REED).

Individualized Education Plan (IEP)

- **Specially Designed Instruction.** “Adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.” 34 CFR § 300.320; 34 C.F.R. § 300.38(b)(3).
- **Supplementary Aids and Services.** Description of these “aids and services” must include an explanation of how the student’s disability impacts the student’s progress and participation in the general curriculum. 34 C.F.R. § 300.42; 34 C.F.R. § 300.320.
- **Program Modifications and Supports.** Individualization is key.

Individualized Education Plan (IEP)

- **Measurable Annual Goals.** Includes at least one goal in all academic and nonacademic skills deficit areas or areas of educational need identified by the student's IEP Team, which must consider and document the unique circumstances of the student's disability and past rate of progress when crafting the student's current IEP to develop appropriately challenging goals and objectives. U.S. Dept. Of Education, 71 Fed. Reg. 46662 (August 14, 2006).
- **Related Services** include transportation and such developmental, corrective, and other supportive services like speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. 34 C.F.R. § 300.34(a).
- **Behavioral Supports and Interventions.** Think, positive interventions & BIPs.
- **Accommodations.** See 504.

Individualized Education Plan (IEP)

- **Placement and Justification for Removal from General Education.**
 - Can education in the general education classroom, with the use of supplemental aids and services, be achieved satisfactorily?
 - If it cannot and the school intends to provide special education or to remove the child from her or his general education placement, what steps has the school taken to accommodate the student in the general education setting?
- **Extended School Year (ESY) Services.** One or more critical areas addressed in the student's current IEP goals and objectives, the student has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period. Severe or substantial regression means that the student has been, or will be, unable to maintain one or more acquired critical skills in the absence of ESY services.

Individualized Education Plan (IEP)

- **Transition Services.** Beginning not later than the first IEP to be in effect when a student turns 14 and then updated annually, the school must ensure that the student's IEP includes appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the student in reaching those goals. 34 CFR § 300.320 (b)(1); 71 Fed. Reg. 46,668 (2006).
- **Minutes or Deliberations.** A verbatim transcript is not required but advocates should insist on a thorough explanation of the decisions of the IEP Team and the data used to justify those decisions.



PRIOR WRITTEN NOTICE



Individualize d Education Plan (IEP)

From *Fact Sheet For Virginia's Parents: Key Timelines for Special Education Processes*. Parent Educational Advocacy Training Center (PEATC). www.peatc.org. April 2020.

8VAC20-81-110(A) Individualized Education Program	IEPs must be in effect at the beginning of each school year except for children parentally placed in private school.	
8VAC20-81-110(B) IEP	IEPs must be developed as a result of initial or redetermination of eligibility , if the IEP team decides changes are needed or if the parent request changes.	Within 30 days
	IEP must be implemented as soon as possible following parent consent.	
	A copy of the IEP must be provided to parents at the IEP meeting or:	Within 10 days
8VAC2-81-120 Children who Transfer	IEP meeting must be held after the new school completes its evaluation and determines eligibility.	Within 30 days
8VAC20-81-170 (G) Access to Records	School must comply without delay , especially when needed for any IEP or dispute resolution proceeding and:	In no case than 45 days from request
8VA20-81-180(A) Transfer of Rights	Student and Parent to be notified of transfer of rights to the student at least one year before he reaches the age of majority (18).	

Individualized Education Plan (IEP)

The IEP Team must **review and revise** the student's IEP as follows—

- Periodically, but not less than annually, to determine whether the annual goals for the student are being achieved
- To address any lack of expected progress toward the annual goals in IEP and in the general education curriculum, if appropriate
- To review the results of any reevaluation of the student or any information about the student provided to, or by, the parents, relevant to the student's program of special education and related services
- To consider the student's anticipated needs and other matters, as appropriate. 34 C.F.R. § 300.324(b).

Individualized Education Plan (IEP)

IDEA does not mandate additional information in an IEP other than what is expressly required under 20 USC § 1414; 34 CFR § 300.320 (d)(1). —

- **The identity of specific teachers or specific educational methodology.** *Letter to Hall*, 21 IDELR 58 (OSERS 1994).
- **Extracurricular activities unrelated to the student's IEP.** *Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).
- **Services unrelated to the student's special education program.** *Letter to Montano*, 18 IDELR 1232 (OSEP 1992).

Special Education & the Discipline Process

Unless limited by the student's IEP, a school division may remove a student with a disability who violates the Student Code of Conduct from his or her current IEP placement to any other setting authorized by Board Policy and the Student Code of Conduct (*to the extent those alternatives are applied to students without disabilities*) on a short-term basis (*less than 10 consecutive school days*) so long as the short-term removal does not constitute a **DISCIPLINARY CHANGE OF PLACEMENT.**

Special Education & the Discipline Process

The authority of the school division to remove a student with a disability on a **short-term basis** extends to additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct. 34 C.F.R. § 300.530(b)(1).

DISCIPLINARY CHANGE IN PLACEMENT. A removal or series of removals constitutes a disciplinary change of placement if:

- The removal is for **more than 10 consecutive school days**; or
 - The student has been subjected to a **series of removals that constitute a pattern**—
 - Because the series of removals total more than 10 school days in a school year;
 - Because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and
 - Because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.
- See 34 C.F.R. § 300.536(a).

Special Education & the Discipline Process: Manifestation Determination Review

An **MDR** must take place within 10 school days of any decision to make a disciplinary change of placement. 34 C.F.R. § 300.530(e)(1).

An **MDR** must answer two questions—

Was the conduct in question the direct result of the school's **failure to implement** the student's IEP? 34 C.F.R. § 300.530(e)(1)(ii).

Was the conduct in question **caused by, or did it have a direct and substantial relationship** to, the student's disability? 34 C.F.R. § 300.530(e)(1)(i).

Special Education & the Discipline Process: Manifestation Determination Review

If the behavior at issue is **not** a manifestation of the child's disability, she may be disciplined according to the Student Code of Conduct. See 34 C.F.R. § 300.530(c) ("same manner and for the same duration").

If yes to either MDR question, the school division must—

- conduct a **functional behavioral assessment (FBA)**, unless the division conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred and implement a **behavioral intervention plan (BIP)** for the student.
- Returns the student to the placement from which the student was removed, unless the parent and the IEP Team agree to a change of placement as part of the modification of the behavioral intervention plan. See 34 C.F.R. § 300.530(f).

Special Circumstances Removal. Drugs, guns and extreme violence. Interim alternative education setting for no more than 45 days.



Special Education Services During Disciplinary Removal

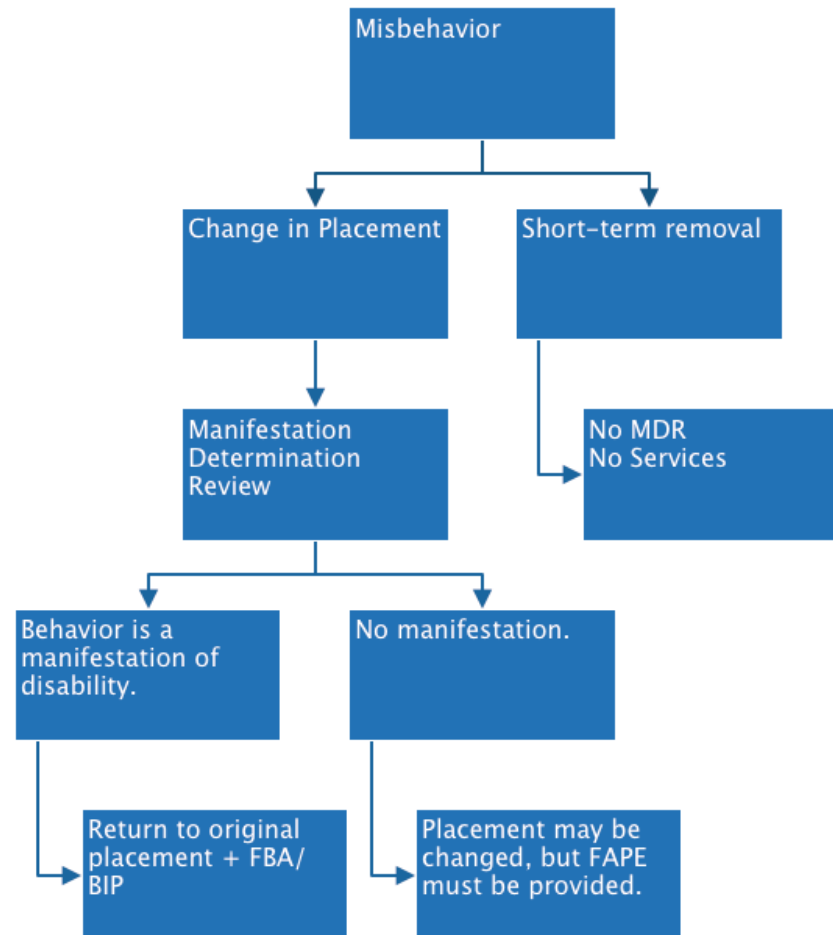
After the student has been removed for 10 school days in a school year, what services must be provided to the student during periods of removal?

Beginning on the 11th day of removal in a school year, the school division must continue to provide educational services to the student during periods of removal to enable the student—

- to **continue to participate** in the general education curriculum, although in another setting; and
- to progress toward meeting the goals set out in the student's IEP. See 34 C.F.R. § 300.530(d)(1)(i).

NOTE: "Continue to Participate" does not mean that the school must replicate every aspect of the services that a student would receive in his or her normal classroom, such as in those classes with a hands-on component or using specialized equipment or facilities. See U.S. Dept. of Education, 71 Fed. Reg. 46716 (August 14, 2006).

Special Education Disciplinary Flowchart



Resolving Special Education Disputes

Parents' Guide to Special Education Dispute Resolution

*Virginia Department of Education
Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services*

Informal Resolution through the IEP Process

State Complaint to the Virginia Department of Education

- Can Be Made By ANYONE
- Formal Complaint (written, signed, statement of violation)
- Schools Submit Response
- Investigation by VA DOE
- 60 days to VA DOE decision
- 1-year statute of limitations

Resolving Special Education Disputes

Parents' Guide to Special Education Dispute Resolution

Virginia Department of Education
Division of Special Education and Student Services
Office of Dispute Resolution and Administrative Services

Special Education Mediation

- Formal request—by school after both parents and school agree to mediate
- Voluntary
- Qualified, impartial mediators appointed by VDOE

Special Education Due Process Hearing

- An evidentiary hearing on the record before an impartial hearing officer; burden of proof falls on party bringing the complaint.
- 2-year statute of limitations (unless misrepresentation).
- Formal hearing to resolve disputes relating to—
 - Identification (*Child Find*, eligibility, change in eligibility, termination of any service)
 - Evaluation
 - Educational placement and services
 - FAPE
- **STAY PUT.** During the litigation (*beginning from filing of the due process hearing request*), the child stays in the current educational placement. Doesn't apply to disciplinary removals.



Special Education Advocacy in the Juvenile Justice System



NCD Policy Areas

- CRPD
- Civil Rights
- Cultural Diversity
- Education
- Emergency Management
- Employment
- Financial Assistance & Incentives
- Health Care
- Housing
- International
- Long Term Services & Support
- Technology
- Transportation
- Youth Perspectives

Contact Us

Preview NCD's New NCD.gov Website in Beta

Take a look at the new beta site, an early, in-progress version at beta.NCD.gov

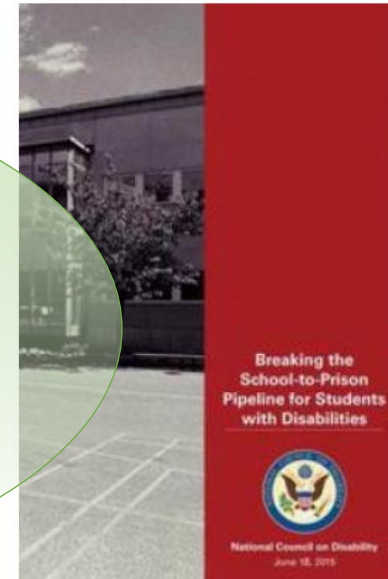
Breaking the School-to-Prison Pipeline for Students with Disabilities

Full Report (PDF)

June 18, 2015

PURPOSE AND SCOPE:

In conjunction with its fall quarterly meeting, NCD convened a stakeholder forum in Atlanta in October 2014 to receive testimony on the role of special education in the School-to-Prison Pipeline. The findings and recommendations in this report are based upon the culmination of that testimony, interviews with experts, and review of available research. Studies show that up to 85 percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services, yet only 37 percent receive these services while in school. A disproportionate percentage of these detained youth are youth of color. These statistics should lead to the conclusion that many disabled youth in the juvenile justice and criminal justice systems are deprived of an appropriate education that could have changed their School-to-Prison Pipeline trajectory. NCD has concluded that IDEA can and should be an important part of the solution to the School-to-Prison Pipeline crisis. Thus, the recommendations in this report focus on ways to improve existing special education



“Studies show that up to 85 percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services, yet only 37 percent receive these services while in school.”

-National Council on Disability. “Breaking the School-to-Prison Pipeline for Students with Disabilities.” June 18, 2015



K-12 Students in Juvenile Detention

K-12 kids receiving special education services who are incarcerated in an adult or juvenile correctional facility or center must continue to receive special education and related services until they turn 22. 20 U.S.C. § 1412(d)(7); 34 C.F.R. § 300.324(d).

EXCEPTION. Youth ages 18-21 in an adult correctional facility must have an IEP in place prior to incarceration. 34 C.F.R. § 300.103(a)(2).

Key Takeaways for Advocacy

All federal rules and regulations that apply to outside facilities apply to students with disabilities in juvenile detention. See Va. Code Ann. § § 22.1-209.2, 22.1-345.

- Including IEP Team participants, like—
 - Attorneys and advocates
 - Invitees of the parent with special knowledge or expertise related to the child



Transition Services. Planning for transition services in Virginia begins at age 14 and those services must be implemented by the time the child turns 16, or younger, if appropriate. See 8 VAC 20-81-110(G)(10).

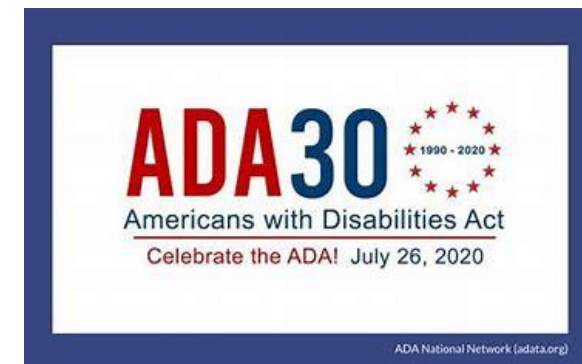
Section 504 of the Rehabilitation Act of 1973

*Preventing Discrimination Against Students with Disabilities
in Extracurricular Activities and Academics*

U.S. Department of
Education



Office for Civil Rights



Identification, Assessment, and Placement

Disability means—

- “a physical or mental impairment that substantially limits one or more major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.” 42 U.S.C. §12102(1).

Major Life Activity includes functions, like—

- caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. §12102(2)(A).

Major Life Activities also include—

- “the operation of a major bodily function” as follows: (1) the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. §12102(2)(B).

Identification, Assessment, and Placement

Physical or Mental Impairment—

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitor-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
29 C.F.R. §1630.2(h).

Mitigating Measures?

Identification, Assessment, and Placement

Child Find. Every year, a school division must make efforts to identify and locate every qualified child with a disability who is not receiving a public education and take appropriate steps to notify those persons and their parents or guardians of the District's duty under Section 504.

Response to Intervention. General education accommodations available to all students.

Section 504 Committee. Campus-based team composed of a group of persons knowledgeable about the student, the meaning of the evaluation data, placement options, and the legal requirements regarding least restrictive environment and comparable facilities for students with disabilities.

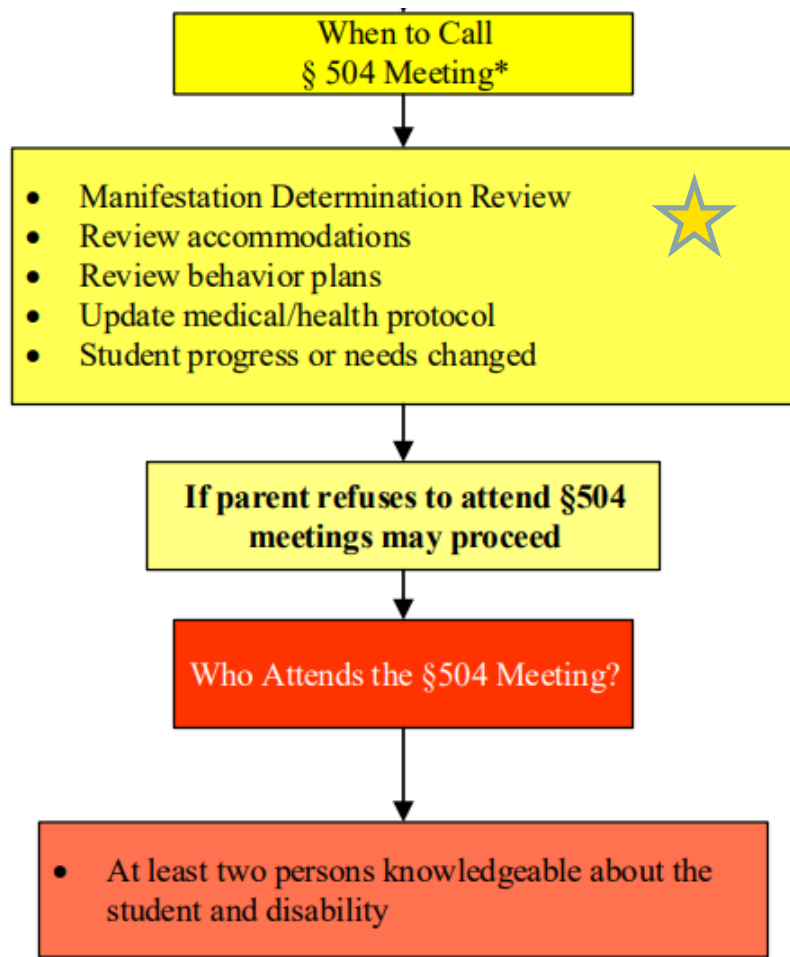
Qualified Student with a Disability?

Definition of Disability in Section 504 and the ADA interpreted broadly. *Dear Colleague Letter* (OCR 2012).

Temporary Impairment qualifies if "severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time." See *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Educ. of Children With Disabilities* (OCR 2015).

Episodic Impairment (remission) qualifies if "it would substantially limit a major life activity when active." *Id.*





Acommodations when there is no need for specialized instruction

504 FAPE. Every school division “shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.” 34 C.F.R. § 104.33(a). 504 Plan must be “designed to meet individual educational needs of handicapped persons as **adequately** as the needs of nonhandicapped persons.” 34 C.F.R. § 104.33(b).

As adequately as the needs of nonhandicapped persons are met? IDEA is concerned with progress as measured in relation to a student’s own potential and unique needs [See *Endrew F.* (SCOTUS 2017)]. 504 focuses on whether a student with a disability is receiving educational services as effective as those made available to her nondisabled peers.

Boilerplate and generic 504 Plans may violate 504.
In re: Student with a Disability (OCR 01/30/2014).

* This is a general and simplified outline of ways to approach the 504 Plan development process. Each 504 Plan should be individualized to the needs of a specific student.



Key Takeaways for 504 Plans

Insist on clear, well-defined, data-based accommodations—

- Avoid boilerplate accommodations, like “extra time”
- Avoid vague descriptors, like “as needed” (should be quantifiable)
- Avoid subjective language open to interpretation, like “provide a structured learning environment”
- 504 Plan should translate easily to parents & substitute teachers
- Rationale for the plan should be understood by folks who didn’t attend the 504 meeting
- Involve student in the development of the 504 Plan for greater *buy-in*



Accommodation—any technique that alters the academic setting or environment, but does not change the content of required work.

504 & EXTRACURRICULARS

Leveling the Playing Field, Not Changing the Game

Extracurricular activities, because they are extra, are not a necessary component of an appropriate education. Board of Educ. v. Rowley (SCOTUS 1982).

BUT Section 504 guarantees that students with disabilities must have an equal opportunity for participation in extracurricular and nonacademic services to the same extent as their nondisabled peers. 34 CFR § 104.37 (a)(1).

Title II of the ADA provides that a public entity, in providing any aid, benefit, or service, may not directly or through contractual licensing or other arrangements deny on the basis of disability a qualified individual the opportunity to participate in or benefit from the aid, benefit, or service. 28 CFR § 35.130 (b)(1)(i).

Necessary Assistance Required

Districts must provide the necessary assistance to permit a student to equally participate in an extracurricular activity, even if the activity is not included in the student's IEP or Section 504 plan. *Winooski (VT) Sch. Dist.* (OCR 2006).

- *Berkeley Unified Sch. Dist.* (OCR 08/19/14)("participation in an ... extracurricular program need not be required by the student's IEP or Section 504 plan ... for the student to receive ... aids, supports, services, and/or modifications")

Reasonable Accommodation or Fundamental Alteration?

When a student cannot participate in an activity even with reasonable accommodations, a school district can deny the child participation in the activity.

- *Dear Colleague Letter*, (OCR 2013); and *In re: Dear Colleague Letter of Jan. 25, 2013* (OCR 2013).



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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Reference: [REDACTED]

Case Study:

Cheerleading Public Schools (OCR 2014)

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint against [REDACTED] School District (CSISD), College Station, Texas, which was received in our office on May 7, 2014. The complainant alleged that CSISD discriminated against his daughter (the Student) on the basis of disability. Specifically, the complainant alleged that on or about March 21, 2014, CSISD denied the Student an equal opportunity to participate on the cheerleading squad because of her disability.



Cheerleading Public Schools **(OCR 2014)**

FACTS: “Student tried out for a spot on the High School cheerleading squad . . . but was unsuccessful. He stated that the Student has a disability, and that he therefore requested that the Student be permitted to participate in some limited capacity on the cheer squad, despite the result of the tryout, but that the request was denied.”

- “Student participated in middle school cheerleading . . . middle school cheer was open to any student who was interested . . . Student's eligibility for the [high school cheer squad] was determined by a tryout process. [Student] requested that [the school division] provide the Student with reasonable modifications to the tryout procedure . . . [504 or IEP Meeting was held] for the stated purpose of considering what accommodations may be necessary for the Student to participate in cheerleading clinic and tryouts.”

Cheerleading Public Schools (OCR 2014)

FACTS: “[The School Division] considered the Student's individual disability-related needs (i.e., anxiety, need for redirection, and visual needs) in deciding to provide her with the following accommodations: providing the Student a video of the tryout routine on the first day of cheerleading clinic, allowing the Student's special education teacher to be present throughout the clinic and tryout for redirection and support, and allowing the Student's parents to be present at the tryout. . . . The evidence indicates that the Student failed to earn a score sufficient to earn a spot on the squad. The complainant confirmed that the Student received the above-stated modifications [. . .]”

Cheerleading Public Schools **(OCR 2014)**

CONCLUSION: “OCR has determined that the Student , although she did not make the squad, was afforded an equal opportunity to participate in cheerleading through the modifications to the try out process that were implemented by [the District].” Therefore, there was “insufficient evidence” of discrimination under 504/ADA.

“OCR policy states that modification would be a fundamental alteration if it would give a particular student with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition.” (Parent wanted changes to the scoring requirements)



Key Takeaways

School Divisions Must Provide Reasonable Modifications (read, accommodations) that are necessary to ensure students with disabilities have an equal opportunity to participate in athletic and other extracurricular programs offered to non-disabled students.

School Divisions may only deny participation in an athletic program when the district shows that the modification would represent a fundamental alteration to the athletic program.

A fundamental alteration is a modification that changes such an essential aspect of the activity or game that it would be unacceptable even if it impacted all competitors equally (i.e., an extra base in baseball). *Dear Colleague Letter* (OCR 2013).

ANY
QUESTIONS?



This webinar was prepared and presented by SVLAS solely for general information and is not to be considered specific legal advice to any individual or organization in attendance. If specific legal advice is needed, please consult an attorney. Thank you!

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