



January 11, 2022

The Honorable L. Louise Lucas
Chair, Senate Education and Health
Pocahontas Building, Room E604
900 East Main Street
Richmond, Virginia 23219

The Honorable Glenn Davis
Chair, House Education
Pocahontas Building, Room W439
900 East Main Street
Richmond, Virginia 23219

Dear Madame and Sir:

During its 2021 Session, the General Assembly passed House Bill 2299 and Senate Bill 1288, which directed the Virginia Department of Education (VDOE) to “study the need for and feasibility of allowing parents to provide partial consent to the initial implementation [emphasis added] of their child’s individualized education program (IEP), including an assessment of the use of partial parental consent... by school divisions in the Commonwealth.” The VDOE was to report its findings to the Board of Education, the House Committee on Education, and Senate Committee on Education and Health by the end of 2021. We are pleased to submit the attached report, which is in fulfillment of the legislative mandate.

Background

It is important to note several key differences between the regulations required as a floor under federal special education law (the Individuals with Disabilities Education Act (IDEA)) and the more expansive special education regulations currently in effect in the Commonwealth (Regulations Governing Special Education Programs for Children with Disabilities in the Commonwealth).

Both of these federal and state special education regulations recognize the vital role played by parents as participants in the special education process. Both contain provisions ensuring parental participation at the evaluation, eligibility, and Individualized Education Program (IEP) development stages, and provide that parental consent is necessary before the initial provision of special education

and related services (34 C.F.R. § 300.300(b)(1); 8 VAC 20-81-170.E.1.c). Consent to the “initial provision” of services authorizes the school division to develop an IEP for the student; significantly, federal regulations (34 C.F.R. § 300.323(c)) do not require parental consent for initial IEP implementation; accordingly, partial consent to an initial IEP is not an issue under the federal regulations (or in the 70 percent of states whose regulations mirror them). Further, the federal regulations do not require parental consent for subsequent IEP revisions. Rather, in the case of initial or subsequent IEPs, school divisions are to make special education services available “as soon as possible” following IEP development.

Under federal law and in most other states, after a student is found to be eligible for special education and related services, parents are asked to provide consent for their child to receive services. A school division is not required to develop an IEP prior to obtaining this more generalized consent. The school division thereafter develops the IEP with parent input and participation, but, having done this, it may implement the initial and any subsequent IEP even if the parent disagrees. The school division must provide specified “prior written notice” to the parent informing them of their intended actions and advising them of their procedural safeguards. The objecting parent may pursue special education dispute resolution options (i.e., seeking mediation, filing a state complaint or a request for a due process hearing) to resolve the matter. But, because parents do not have a right to consent to any IEP before its implementation, the concept of “partial consent” is a non-issue under federal law and for the majority of states.

Federal regulations also permit states to exceed federal consent requirements (34 C.F.R. § 300.300(d)(2)). The Office of Special Education and Rehabilitative Services (OSERS) within the U.S. Department of Education (USED) has advised that, when a State “creates additional parental consent rights, the State must ensure that each public agency in the State has effective procedures to ensure that the parent's exercise of these rights does not result in a failure to provide FAPE to the child.”

Virginia Exceeds Federal Consent Requirements

Virginia is among fewer than 15 states exceeding federal requirements governing parental consent in the context of IEP implementation. Specifically, the Virginia Regulations (8 VAC 20-81-110.B.2.d) (i) direct school divisions to ensure that an initial or subsequent IEP is implemented “as soon as possible” following parental consent; and (ii) require parental consent for “any revision to the child’s IEP services” (8 VAC 20-81-170.E.1.d).

The Virginia Regulations are largely silent regarding the provision of partial consent in the context of initial or subsequent IEP implementation. In the context of partial consent to initial IEP implementation, the VDOE has construed federal and Virginia regulations and guidance as follows:

- (i) If the parent has yet to provide consent (partial or full) to the initial IEP but has provided notations adding services or establishing conditions to the provision of services, the school division should convene another IEP Team meeting so that the IEP Team may review—and determine the appropriateness of—the additional requests;
- (ii) Similarly, if a parent has provided consent, but has added services or conditions that were not in the proposed initial IEP (in essence, expanding the school division’s proposal), the school division should implement those services for which consent was provided, and should offer an additional IEP meeting to discuss the parent’s additions;
- (iii) If a parent has provided partial consent to the initial IEP and the parent and school division agree that the child would be provided with a free and appropriate public education (FAPE) without a service with which the parent disagrees, the school division should remove the service from the child’s IEP and provide those services that are not in dispute;
- (iv) If a parent has provided partial consent, but the parent and school division disagree about whether the child receives a free appropriate public education (FAPE) without a particular service for which the parent has not provided consent, the school division should implement those services for which consent was provided. The parent may, but is not required to, access dispute resolution options of mediation, due process, or a state complaint investigation to address whether the service for which the parent has not provided consent is necessary to provide FAPE. The school division should continue to make available the services for which the parent failed to provide consent, as the school division proposed those services in the initial IEP as necessary for FAPE. Further the school division should provide prior written notice to the parent; and
- (v) If the parent’s notations are illegible or include commentary that make it impossible to determine the parent’s intentions, the IEP Team may conclude that the parent has not clearly conveyed consent and should provide the parent with prior written notice advising that the consent is inoperative.

Although the study directive is limited to partial consent to initial IEP implementation, the department's review confirms the unique complexities that may arise upon partial consent for a subsequent IEP revision. In exceeding federal requirements, the Virginia Regulations specify that parental consent is necessary for any subsequent IEP revision. Given this requirement, IEPs in Virginia do not "expire," but remain effective until the parent consents to a subsequent IEP. Thus, an IEP for which a parent provided consent may continue to govern a student's services long after a school division proposes an "updated" IEP developed as part of the subsequent, required annual IEP review.

Accordingly, consent to portions of a subsequent IEP may raise questions regarding what services or accommodations may "continue" to be operative until a parent provides full consent to a proposed subsequent IEP. Parents and school divisions may be challenged to understand, and accurately implement, a resulting "patchwork" IEP that may (i) sometimes involve a series of IEPs spanning several years; (ii) be internally inconsistent; and (iii) fail to provide the required free appropriate public education.

There is no Virginia regulatory mandate that school divisions initiate any dispute resolution options to resolve disagreements regarding partial consent to subsequent IEP implementation (in contrast with states including California, Minnesota, and Montana). Rather, Virginia has construed the federal regulation to require the school division to propose a free appropriate public education, for which a parent may refuse or grant full—or partial—consent. School divisions may, but are not required, to initiate a due process hearing to distill the varied provisions for which partial consent has been provided for a **subsequent IEP revision**. Data indicates, however, that Virginia school divisions rarely initiate due process hearings; in fact, no Virginia school division has initiated a due process hearing during this current and the two previous annual reporting periods. Mediation also remains a viable option for parents and school divisions in these instances.

Survey of Virginia School Divisions

The VDOE conducted a survey of 132 school divisions to inform the assessment of the use of partial parental consent... by school divisions in the Commonwealth required by the study directive and to ensure that this report provided an accurate account of local school division practices and challenges. Survey questions addressed, among other things (i) local policies, practices, and training regarding partial consent; (ii) documentation of partial consent; (iii) the frequency of partial consent; and (iv) use of dispute resolution in cases of partial consent. The survey also solicited school division

input regarding particular concerns or other information. The VDOE received 95 completed surveys, for a 70 percent overall response rate.

Survey responses indicated:

- Of the responding school divisions, about 11 percent indicated the existence of policies or procedures addressing partial consent to IEP implementation generally.
- About 28 percent of responding local educational agencies (LEAs) provide staff training on partial consent to IEP implementation. Training may occur on an annual, periodic, or “as needed” basis.
- Virginia school divisions employ a number of practices designed to inform personnel responsible for IEP implementation when parents have provided partial consent, such as (i) working with parents to reach consensus; (ii) convening additional IEP meetings; and (iii) documenting partial consent and ensuring personnel are informed of the provisions for which consent has been given.
- About 70 percent of responding LEAs document partial consent via prior written notice.
- Only seven (7) responding school divisions indicated that their IEP software specifically addresses partial consent; of these seven, six also responded that parent annotations or statements may denote partial consent as well.¹
- Survey responses indicate that dispute resolution—whether by informal, local means or via state-sponsored mediation or due process—is rarely used to address partial consent to initial IEP implementation. The infrequent—or nonexistent—use of partial consent reported by many divisions may inform lack of consequent dispute resolution efforts.
- Survey responses suggest a slight increase in partial consent (“sometimes”) for subsequent IEP revisions as well as associated dispute resolution efforts.

¹ Most Virginia school divisions (over 80%) employ the Virginia IEP system, discussed further herein. The Virginia IEP consent page denotes spaces for granting—or refusing—parental consent to implement a proposed IEP, but does not specifically include a space for the indication of partial consent. Regardless of the IEP software employed, Virginia parents may indicate partial consent in a variety of ways—for example, via handwritten annotation on the IEP itself or the attachment of a signed statement. In some cases, an IEP amendment or addendum may be created to set forth those provisions for which parental consent has been provided.

- Significantly, nearly half (46) of responding school divisions volunteered, in descriptive responses to other survey items, that the use of partial consent is infrequent or, in some divisions, nonexistent. These LEAs represented all eight superintendent regions in the Commonwealth.
- The infrequency of partial consent cited by these school divisions may be due to a variety of factors. In some instances, school divisions suggesting that partial consent is “not allowed” or “not utilized” have explained that local resolution efforts are employed to resolve areas of disagreement. In other cases, it is possible that parents are unaware of the option of partial consent.
- While many divisions reported cited the infrequent use of partial consent, others cited specific identified specific challenges:
 - There is always concern that a parent can “hold hostage” an IEP (particularly services) despite data to support that services are not necessary for FAPE.... It is unfortunate that after attempts to resolve with parent, the only true action a division has is due process, which is time consuming, costly, and unbelievably stressful to school staff.
 - The provision of partial consent has created issues regarding clarity as to what is being consented to in order to ensure IEP implementation fidelity. While parents/guardians have the right to provide consent, the provision of partial consent puts school divisions in a position to exclude elements of a plan that could jeopardize FAPE.
 - The implementation of partial consent can get very complex as at times what is being requested is not appropriate for the student. Additionally, we are experiencing several situations where parents are selecting goals, services and/or accommodations from multiple years of IEPs making implementation and progress monitoring very difficult.
 - Providing partial consent may impede the team from reaching [consensus.... Partial consent impedes the team’s ability to work collectively and lowers the authority of the school division to provide FAPE. The [number] of state complaints/due process cases may increase as a result of partial consent.
 - Partial consent unnecessarily muddies the waters around programming.

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A few divisions specifically expressed concerns regarding limitations in IEP software systems regarding documentation of partial consent. Some divisions requested additional guidance and information regarding partial consent to IEP implementation.

Other States

The majority of states follow the federal regulatory model: parental consent is required for the initial provision of services, but not for initial IEP implementation or subsequent IEP revision. Our examination of “consent” states (again, those exceeding federal consent requirements) revealed varying degrees of parental deference and a range of practices designed to ensure the provision of FAPE. Depending on interpretation of these different state requirements, the number of “consent” jurisdictions stands at fewer than 15.

The Department’s review suggested that Virginia’s additional parental consent requirements arguably far exceed the deference granted to parents in other “consent” states. About half of these “consent states” do not require parental consent to an initial IEP, thus eliminating the issue of partial consent to initial IEP implementation entirely. Some states identify narrow circumstances for which parental consent is required (e.g., Alaska, Delaware); some provide for “implied consent” in the absence of parental response to a subsequent IEP revision. Partial consent to an initial IEP is essentially mooted in one of these states (Ohio), as the school division may simply propose a subsequent IEP (for which parental consent is not required) to restore those services for which the parent did not provide initial consent. The Virginia Department of Education will continue to monitor this issue and provide guidance and technical assistance as necessary.

If you require additional information, please contact Holly Coy, Assistant Superintendent, Department of Policy and Communications, at (804) 225-2092 or Holly.Coy@doe.virginia.gov.

Sincerely,

A handwritten signature in blue ink that reads "Rosa S. Atkins". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Rosa S. Atkins, Ed.D.,

Acting Superintendent of Public Instruction

RSA/SMH/jgh

Enclosure