

May 4, 2020

Public Comment to the Vermont State Board of Education

RE: Vermont Rule 2360 Special Education in Vermont

Thank you for the opportunity to comment on the 2360 series of rules related to Special Education in Vermont.

I was admitted to the Vermont Bar in 1982 and the New Hampshire Bar in 1985. Since 1987 my practice has been focused on the representation of parents of students with educational disabilities in those two states.

I fully support the version of the 2360 rules drafted by Vermont Legal Aid's Disability Law Project. (DLP draft)

I also respectfully submit the following comments regarding specific sections:

1. 2360.2.12 Special Education Services 34 CFR 300.39

It is important to align Vermont rules with federal rules. The reference to 34 CFR 300.39 is useful in this alignment as are the other references to the CFR in the DLP draft. The definition of "Special Education Services" is clear in federal law and should not be altered from the federal language.

2. 2360.2.16 Related Services 34 CFR 300.34

The definition of Related Services is clear in federal law and should not be altered.

3. 2362 Eligibility for Children Ages Six Years through Twenty-One 34 CFR 300.306

The language proposed in the DLP draft, eliminating the second step of "adverse effect" in 2362 (a)(2) will bring Vermont into alignment with the simple 2 step process outlined in federal law.

That same simple process has been followed in New Hampshire for many years, where the eligibility decision is based upon 34 CFR 300.306 (c)(2)

If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child...

See NH Standards for the Education of Children with Disabilities Ed1108.01 (a)

The student's IEP team is uniquely qualified to make the determination about the need for an IEP based upon the expertise of the team members and the large amount of information that is available to the team. Vermont's adverse effect formula is not equitable and is not well suited to students who have significant functional needs but not significant academic needs. Vermont must create a system of equity to determine which students require an IEP.

4. 2362 (g) Basic skill areas, aligned with state standards.

It is of critical importance that Vermont's list of basic skill areas be expanded to include functional skills to the existing list of academic skills. For many years, in order to become eligible, students have had to demonstrate that they are impacted in the areas of oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, mathematics reasoning, or motor skills.

Vermont's list of basic skill areas must be expanded to include Functional Performance, which is already defined on the Vermont Special Education Rules at 2361.1(17), and to include Transferable Skills.

"Transferable skills" refers to a broad set of knowledge, skills, work habits, and character traits that are believed to be critically important to success in today's world, particularly in collegiate programs and modern careers.

<https://education.vermont.gov/sites/aoe/files/documents/edu-state-board-rules-series-2000.pdf>

The VLA draft recommends the expansion of the basic skill list and I fully agree.

There are numerous reasons why the basic skill list must be expanded.

1. The Individuals with Disabilities Education Act was reauthorized in 2004. When it was reauthorized, Congress stated that the first purpose of the IDEA was

(A) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to **meet their unique needs and prepare them for further education, employment, and independent living.** 20 USC 1400 (d)(1)(A)(emphasis added)

The mission outlined above cannot be accomplished simply by looking at whether a student is struggling with reading, writing or math. We must also look at functional skills, such as daily living skills, interpersonal and social skills, behavioral skills, and the skills needed to be prepared to get and hold a job and to become independent. Therefore we must expand the basic skills to encompass these things and be in alignment with the goals of the IDEA.

2. The reauthorized IDEA clarified the process of an evaluation under the new 2004 framework:

Conduct of Evaluation. In conducting the evaluation, the local educational agency shall-

(A) use a variety of assessment tools and strategies to gather relevant **functional**, developmental, and academic information, including information provided by the parent, that may assist in determining-

(i) whether the child is a child with a disability, and

(ii) the content of the child's individualized education program....

20 USC 1414 (b)(2)(A) (emphasis added)

It is essential that Vermont expand the basic skills to include functional skills, as the VLA draft recommends.

3. The reauthorized IDEA in 2004 also incorporated functional skills into the required elements of an Individualized education program stating

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed and revised in accordance with this section and that includes:

(I) a statement of the child's present levels of academic achievement and **functional** performance....

(II) a statement of measurable annual goals, including academic and **functional** goals, designed to....

20 USC 1414 (d)(1)(A) (emphasis added)

The 2004 IDEA also provide that during the development of the IEP the team *shall* consider " the academic, developmental and **functional** needs of the child."

20 USC 1414 (d)(3)(A)(iv) (emphasis added)

The repeated references to functional performance and functional goals reflects the expanded scope of the IDEA in 2004, and Congressional intent that the special education system address more than reading, writing and mathematics.

Congress made provision for functional skills in the purpose of the IDEA, in the evaluation of students, and in the writing of IEPs for those students.

Vermont must do the same and expand the basic skills to reflect our true goals. It is no longer acceptable to only look at academic skills when considering eligibility.

4. Vermont is placing more emphasis now on Proficiency Based Graduation Requirements (PBGRs) and less emphasis on the accumulation of credits when looking at the criteria for readiness for graduation. These requirements take effect with the graduating class of 2020.

On April 15, 2020, The Agency of Education published “ A Vermont Portrait of a Graduate with Performance Indicators” . The six areas of performance indicators include Learner Agency, Global Citizenship, Academic Proficiency, Communication, Critical Thinking and Problem Solving, and Well-Being,

Only one of these relates to academic proficiency, yet academic proficiency is the primary basis for all of our eligibility decision-making with respect to students with educational disabilities.

The website for Spaulding High School in Barre states

Spaulding High School, along with every other public high school in Vermont, is transitioning to a Proficiency-Based Learning and Scoring system. This change was brought about by Act 77 and the Vermont State Board of Education Quality Standards. The goal of Proficiency-Based Learning is to raise the bar for all students, improve clarity, and create equity. By improving clarity and making learning goals more explicit, more students will have a chance to be successful and acquire the necessary skills needed in work, college, and adult life.

<https://www.spauldinghs.org/academics/proficiency-based-learning>

We must expand our basic skill areas to include the functional skills and transferable skills recommended in the VLA proposed rules. Many years ago the basic skills provision was written with a focus on academic achievement. Much has changed since then and our rules must change.

The basic skills language proposed in the VLA draft at 2362 (g)(ix) and (x) will address these issues by adding functional skills and transferable skills to the academic skills already listed.

5. Parental Consent

Under the IDEA, consent means that-

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) **The parent understands and agrees in writing** to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity...

34 CFR 300.9 (emphasis added)

With respect to parental consent for services, such as those contained in an IEP, the IDEA provides:

(II) Consent for services . An agency that is responsible for making a free appropriate public education available to a child with a disability under this part shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child. 20 USC 1414(a)(1)(D)(i)(II)

I am fully in support of the VLA provisions regarding consent. The New Hampshire model works very well where parents receive a written notice about the IEP being proposed, and on the last page of the IEP they are asked to sign that they consent, refuse to consent, or partially consent. The simple form is returned to the School District within 14 days and everyone is clear that there is agreement, or that further work on the IEP is required. It is a simple but profound thing that Parents are asked for their consent, they are given a voice and they are invested in the decision-making. They are also more committed to the plan they have agreed to.

A sample of the relevant portion of a typical Parent Consent page is here:

Parent's Response to the Proposal for the IEP

Please indicate your response by checking the box(es) which reflect(s) your decision.

I understand that any portion(s) of the IEP that I accept will be implemented immediately.

I consent to the IEP as proposed	<input type="checkbox"/>
I refuse to consent to the IEP as proposed	<input type="checkbox"/>
I partially consent to the IEP as proposed	<input type="checkbox"/>

I have received the Procedural Safeguards Handbook: Yes No

I refuse consent for the following activities or services in the proposed IEP:

I request the following changes (additions or revisions) to the services or activities in the proposed IEP:

I request an IEP team meeting be convened within 21 calendar days to discuss what I refuse to consent to and/or the changes I have requested.

Signature of Parent/Guardian/ Surrogate/Adult Student	Date
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I fully agree with VLA's proposed language to address the consent issue. The VLA proposed language is at 2365.1.3.1.

6. MTSS

I also fully support VLA's proposed language around MTSS. (This would be a new section in the rules) VLA has proposed a short set of simple policy and procedure points related to the use of MTSS, how to monitor progress, and how to include parents.

The language is simple and leaves a lot of room for school districts to have flexibility and their own method of implementation, while creating the bare minimum of a policy and procedure applicable to MTSS.

7. Providing parents with copies of documents 5 days before meetings

This is a simple and much needed revision to the rules and I fully support the VLA proposed language. The issue is that parents arrive at meetings to discuss the student's recent evaluation or the most recent IEP, but they are looking at these documents for the first time. As a result, parents are struggling to process information and at the same time participate in the discussion. The process is very stressful for parents, and it's inefficient for everyone because often a second meeting is required to review the questions or concerns that parents have once they have a chance to review the documents. Providing parents with critical documents 5 days before a meeting allows parents to review information at home and arrive at the meeting informed, more relaxed, and ready to have meaningful dialogue with the team.

The VLA has proposed language on this point with respect to evaluation documents at 2362.2.4 (i), and with respect to IEP documents at 2363.9(c)

8. Transition services age 14

I agree with VLA's proposed language regarding the student age of 14 for meetings where transition services will be discussed. VLA's language on this point is at 2363.3 (b)(1)

9. LEA decides placement if team not able to reach consensus

This issue is about the decision-making regarding placement issues. The current rule states the LEA representative makes decisions about the specific site of the placement, such as a specific class or a specific school.

The rule should first allow the IEP team to discuss and attempt to reach consensus on this issue. Consensus is always better for decisions related to placement because all

team members are then more invested and more committed to the decision. The VLA language still reserves the final decision for the LEA if the team cannot reach consensus. See 2364.3 (a)(2)

10. Children with Disabilities Enrolled in Choice Districts

VLA's proposed rules include some provisions to address this issue, and I fully support the proposal. The VLA language is in a new section at page 173 of the VLA document.

The issue is that student's with disabilities who reside in choice districts should be able to choose to attend any of the independent schools that other students might choose. The issue is that the independent school may not feel that it has the ability to meet the needs of a given student.

To address that issue VLA proposes a simple process where the resident school district invites a representative of the independent school to an IEP meeting. The team then has a variety of options to meet the needs of the student. Two very important goals are addressed. The student with a disability has the ability to participate in and have access to the many benefits offered by independent schools. The independent school is not left alone to try to meet the needs of the student, but instead is part of a team to address the issues.

As VLA points out in the comments, the language is modeled after the Charter School system in New Hampshire, where there is a team meeting with the Charter School, the school district of residence, parents and other team members. With a variety of options to work with, the system has worked very well in New Hampshire.

11. Residential Placements

The AOE has proposed to renew multiple rules regarding residential placements made by Local Education Agencies. The bulk of these new rules have been deleted in the draft written by VLA. The bulk of the rules violate existing Vermont and/or federal law and/or create an unlawful chilling effect on the IEP and placement process.

First a review of existing law will show why the proposed AOE rules regarding residential placements should be adopted.

34 CFR 300.115 Continuum of alternative placements

- (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must –

- (1) Include the alternative placements listed in the definition of special education under 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).

34 CFR 300.116 Placements

(a) The placement decision--

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options

34 CFR 300.104 Residential Placement

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

20 USC 1414 (d)(1)(B) Individualized education program team

The term “individualized education program team” or “IEP team” means a group of individuals composed of –

- (i) the parents of the child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local education agency who—
 - (I) is qualified to provide, or supervise the provision of , specially designed instruction to meet the unique needs of children with disabilities;
 - (II) is knowledgeable about the general education curriculum; and
 - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related service personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

To the same effect, with respect to the IEP team is 34 CFR 300.321.

A recap of the federal law above establishes that there is a required continuum of placements, that residential placements are on that continuum, that when necessary a residential placement must be at no cost to the parents, that the placement decision is made by a group of persons including the parents, and that the IEP does NOT include the State Education Agency.

A review of relevant Vermont law is also useful.

“Residential placement” means the placement of an eligible child, as part of an individualized education program, in a 24-hour residential facility, within or outside Vermont that provides educational services consistent with the child’s program.

16 VSA 2942 (5).

Vermont already has a statute which addresses residential placement and the policies and procedures that *shall* be included in any rules.

16 VSA 2958 Residential Placement Review Team; residential placements.

The statute includes, inter alia:

(c) The State Board shall by rule establish policies and procedures for the operations of the Residential Placement Review Team. The rules shall be consistent with federal law and, at minimum, shall include the following:

(1) provision for the Secretary to initiate a due process proceeding to challenge the need for residential placement where the team believes that a less restrictive educational placement is both available and appropriate for the child with a disability, and to reimburse the supervisory union and the parents or guardian of the child for reasonable costs and attorney's fees in the event the Secretary does not prevail;

(2) provision for technical assistance, a plan for correction, or withholding of funds under this section where a supervisory union places a child in a residential facility more expensive than an available and appropriate alternative residential facility; however, such withholding of funds shall not exceed the difference between the cost of the two facilities and the rule shall provide an opportunity for appeal of the withholding; and

(3) procedures and timelines to ensure that residential placement of a child with disabilities is not delayed or disrupted so as to adversely affect the child.

16 VSA 2958 (c)

The rules being proposed by the Agency conflict with the statute because they do not contain the provision required by 16 VSA 2958 (c)(1) (process for the Secretary to initiate a due process proceeding and reimburse the supervisory union and the parents or guardian reasonable costs and attorney's fees in the event the Secretary does not prevail.)

Rather than the process identified above, the Agency proposes to maintain the following language which is in conflict with the statute:

- f. Where the residential review team has identified, with the timelines noted above, residential facilities or alternative educational programs that are available, appropriate and less costly, and has presented such facilities or programs to the IEP team for consideration during the IEP team's consideration of placement alternatives, and the IEP team has chosen to place the child in a more costly residential facility or program, the amount of reimbursement by the State to the LEA shall be based upon the less costly placement. In such an instance, the LEA may appeal the decision of the Secretary to the State Board of Education in accordance with Rule 1230.

The rule as proposed improperly shifts the burden of the appeal to the LEA and the rule does not provide for reasonable attorney's fees and costs for the supervisory union and parent or guardian if the Secretary does not prevail. In addition, the statute does not call for an appeal to the State Board, rather it calls for a "due process proceeding". A due process hearing is heard by a Hearing Officer appointed by the AOE with expertise in special education.

The rule should simply reiterate the provisions of 16 VSA 2958 (c)(1).

The proposed rules also conflict with 16 VSA 2958 (c)(3) because the residential placement rules do not include procedures and timeliness to ensure that the residential placement of a child with disabilities is not delayed or disrupted so as to adversely affect the child. In fact, the proposed rule at 2364.4.1.3 requires 30 days' notice from the LEA to the Secretary prior to a change of placement to a residential placement, "Unless extraordinary circumstances are presented". This rule could easily delay or disrupt the placement of a child by the IEP team. The rules should contain a provision that "No procedures outlined in these rules shall operate to delay or disrupt the residential placement of child when the need for that placement has been determined by the student's IEP team."