**Statutory/Regulatory Authority:**

Statutory authority for these rules derives from the following, all as amended from time to time:

16 V.S.A. Chapters 23, 25, 27, 51, 101, and 133;

PL 108-446 Individuals with Disabilities Education Improvement Act of 2004 (IDEA); and Section 504 of the Rehabilitation Act of 1973.

## 2360 Special Education

### 2360.1 Statement of Purpose

These rules are designed to ensure that:

(a) Eligible Vermont 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; in accordance with state and federal laws and regulations and in a cost-effective manner; and

(b) The rights of children with disabilities and their parents are protected.

### 2360.2 Free Appropriate Public Education (FAPE) (34 CFR §300.101)

These rules implement the Individuals with Disabilities Education Improvement Act (IDEA), as amended. These rules provide for the education of children, youth and young adults between the ages of 3 through 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in Rule 4313. The Department may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, the State could use joint agreements between the agencies involved for sharing the cost of that placement. Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability. Consistent with Rule 2363.2(a) and (d), the Department shall ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(a) FAPE for children beginning at age 3:

An eligible child shall be entitled to a free appropriate public education beginning no later than the child's third birthday and continuing, unless otherwise provided herein, through 21 years of age. An individualized education program (IEP), rather than an individualized family service plan (IFSP), shall be in effect for an eligible child by his or her third birthday. If a child's third birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP will begin.

(b) FAPE for children who have graduated:

A child who has graduated from high school with a regular high school diploma shall not be entitled to a FAPE. A child who has not yet graduated and whose entitlement to a FAPE ends because the upper age limit of eligibility is reached as described in Rule 2360.2(a), may be allowed to complete the remaining academic year with IEP team approval and approval from the Department of Education.

(c) FAPE for youth who have dropped out of school:

If a youth drops out of school, that youth may return at any time and request to be provided with a FAPE until the youth graduates with a high school diploma or the youth's entitlement to a FAPE ends because the upper age limit of eligibility is reached as described in Rule 2360.2(a).

(d) FAPE for children advancing from grade to grade:

Each LEA shall provide a FAPE to any individual child with a disability, who is eligible for special education, even though the child has not failed or been retained in a course or grade and is advancing from grade to grade. The determination that a child advancing from grade to grade may be eligible for special education shall be made on an individual basis by the child's EPT or IEP team.

(e) FAPE for youth who are incarcerated in adult correctional facilities:

(1) For a person between the ages of 18 through age 21:

(i) If a person in his or her last educational placement before incarceration had not been identified as a youth with a disability who was eligible for special education and did not have an IEP in place, the Department of Corrections will not be mandated to provide a FAPE.

(A) The Department of Corrections shall make reasonable efforts to obtain and review whatever information is needed to determine that the incarcerated individual has not been identified as a youth eligible for special education and did not have an IEP in his or her last educational placement prior to incarceration in an adult correctional facility.

(ii) A person who is incarcerated shall be entitled to a FAPE if:

(A) The person was provided services through an IEP before incarceration;

(B) The person had been provided services through an IEP, had left school, then was incarcerated; or

(C) The person had not been provided services through an IEP, but had been identified as a youth with a disability who was eligible for special education.

(iii) The following requirements do not apply to incarcerated youth aged 18 through 21 (34 CFR §300.324):

(A) The requirement to participate in district-wide assessment programs and

(B) The IEP requirements for transition planning and transition services, if the inmate will reach the upper age limit for a FAPE before release from prison based on consideration of sentence and eligibility for early release.

(iv) Modifications of IEP or placement.

(A) The IEP team may modify the youth's IEP or placement, if the Department of Corrections has demonstrated a bona fide security or other compelling interest that cannot otherwise be accommodated.

(B) The LRE requirements of §2364 do not apply to incarcerated youth on IEPs.

(2) For incarcerated persons under the age of 18, the Department of Corrections shall ensure that at intake a screening occurs to identify those who have a disability or who are suspected of having a disability and who are in need of special education. Those who are in need of special education shall be provided with an individualized educational program (IEP) and re-evaluations as prescribed under Rule 2362.

(f) Residential Placement (34 CFR §300.104)

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, shall be at no cost to the parents of the child.

(g) Assistive technology (34 CFR §300.105)

(1) Each LEA shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in Rule 2360.3, are made available to a child with a disability if required as a part of the child's—

(i) Special education services under Rule 2360.3.1;

(ii) Related services under Rule 2360.3.2; or

(iii) Supplementary aids and services under Rules 2362 (3) 2362.2.4 (d)(13) and 2362.2.5 (a)(1)(iii).

(2) On a case-by-case basis, the use of school purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE (34 CFR §300.105(b)).

(h) Extended School Year Services (34 CFR §300.106)

Each LEA shall ensure that Extended School Year Services (ESY) are available as necessary to provide FAPE consistent with Rule 2363.8(h) and at no cost to the parents of the child.

(i) Non-academic services (34 CFR §300.107)

(1) Each LEA shall take steps including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP team to provide non-academic and extra-curricular services and activities in the manner necessary to afford

children with disabilities an equal opportunity for participation in those services and activities.

(2) Non-academic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the LEA, referrals to agencies that provide assistance to individuals with disabilities, and employment of children, including both employment by the LEA and assistance in making outside employment available.

(j) Physical education (34 CFR §300.108)

Each LEA shall:

(1) Provide physical education services, specially designed if necessary, that shall be made available to every child with a disability receiving FAPE unless the LEA enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.

(2) Afford the opportunity to each eligible child to participate in the regular physical education program available to nondisabled children unless--

(i) The child is enrolled full time in a separate facility; or

(ii) The child needs specially designed physical education as prescribed in the child's IEP.

(3) Special physical education. If specially designed physical education is prescribed in a child's IEP, the LEA responsible for the education of that child shall provide the services directly or make arrangements for those services to be provided through other public or private programs.

(4) Education in separate facilities. The LEA responsible for the education of an eligible child who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with this section.

(k) Program options (34 CFR §300.110)

Each LEA shall ensure that children receiving special education have available to them the variety of educational programs and services available to nondisabled children in the LEA, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(l) Child find (34 CFR §300.111)

(1) All children with disabilities residing within the State, including children with disabilities who are homeless children or are children in State custody or are vulnerable adults, and children attending independent schools, regardless of the severity of their disability, and who are in need of special education and related services shall be identified, located and evaluated.

(2) Child-find procedures and activities shall be as follows:

(i) LEAs are responsible for establishing and implementing a comprehensive child-find system for children from birth through twenty-one years of age.

(A) Except for children who are parentally placed in independent elementary and secondary schools outside of the LEA of residence, the LEAs are responsible for assuring child-find for all children who reside within the LEA.

(B) For children kindergarten through age 21 who are parentally placed in independent elementary and secondary schools, the LEA shall have child-find responsibility for the children in any independent school located within the boundaries of the LEA.

(C) For children birth through three, a LEA may fulfill its child-find responsibility by contracting with a regional Children's Integrated Services/Early Intervention (CIS/EI) program or other entities.

(3) Each LEA shall ensure that public notification is given before conducting any significant activity that is designed to identify, locate and evaluate children birth through 21.

(i) All notices shall be available in the native languages of the various major population groups.

(ii) The notices shall indicate that information obtained during "child-find" shall remain confidential as required in sections 2365.2 – 2365.12 "Confidentiality of Information and Child Records", of these rules.

(iii) The notices shall contain a description of the children about whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(iv) A summary of the policies and procedures that participating agencies shall follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(v) A description of the Family Educational Rights and Privacy Act of 1974 and implementing regulations in 34 CFR, Part 99 shall be included in the notice.

(4) Each LEA shall annually inform the public regarding the availability of early intervention for children from birth to age three and special education services for children who are three through twenty-one years of age, including:

(i) Children who are not enrolled in school;

(ii) Children attending independent schools or who are enrolled in home study programs;

(iii) Children who are suspected of having a disability even though they are advancing from grade to grade; and

(iv) Children who are highly mobile such as migrant children; and

(v) Children who are homeless or a child in state custody or a vulnerable adult.

(5) In addition to posting notices in major newspapers, notification activities may also include the posting of notices on websites, fliers in various locations such as physicians' offices and health centers, radio or television announcements, and community outreach.

(6) Each LEA shall identify, locate and evaluate all infants, toddlers, children, and young adults, who may be eligible for special education and related services, birth through twenty-one residing within the jurisdiction of the responsible agency, who are in need of early intervention or special education services.

(i) For children birth up to age three, the child-find system shall employ specific elements of evaluation and assessment, including a comprehensive, multidisciplinary initial evaluation and assessment in all developmental areas.

(ii) For children birth up to three years of age, the LEA shall notify the regional Children's Integrated Services/Early Intervention (CIS/EI) host agency of all children found eligible for Part C services.

(7) Each LEA shall annually submit to the Department of Education in an electronic format specified by the Department, data requested by the Department on children ages three through twenty-one who have been found eligible for special education under the IDEA.

(i) For children birth to age three, the Coordinator of CIS/EI shall forward the child-count of children being served to the Department of Education.

(m) Individual Education Programs (IEP) (34 CFR §300.112)

An IEP shall be developed, reviewed and revised for each child with a disability consistent with Rule 2363.

(n) Routine checking of hearing aids and external components of surgically implanted medical devices (34 CFR §300.113)

(1) Hearing Aids

(i) Each LEA shall ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(2) Surgically implanted devices

(i) Each LEA shall ensure that the external components of surgically implanted medical devices are functioning properly.

(ii) LEAs are not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted or of an external component of the surgically implanted medical device.

## 2360.3 Definitions

(a) The following definitions shall apply to terminology used throughout the special education rules:

(1) ***Accommodations***. Accommodations means those evaluation procedures, curricula, materials or programmatic adaptations, behavior management interventions, and supplemental aids and services that are necessary for an eligible child to benefit from his or her general education or to participate in non-academic or extra-curricular activities.

(2) ***Adaptive behavior skills***. Adaptive behavior skills are the skills essential to independent functioning, personal responsibility, and social responsibility.

(3) ***Assistive technology device***. Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(4) ***Assistive technology service***. Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

(i) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(ii) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(iii) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(iv) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(v) Training or technical assistance for a child with a disability and/or, if appropriate, that child's family; and

(vi) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, and/or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(5) ***Basic skills***. Basic skills are those skills enumerated in Rule 2362(f).

(6) ***Child in state custody***. A "child in state custody" means a child placed in custody pursuant to Chapters 49 and 55 of Title 33. A "child in state custody" shall be afforded all rights and protections as a "ward of the State" as provided in 20 U.S.C. § 140 1(36).

(7) ***Child with a disability***. In this document, "child with a disability" is a child who has been found eligible for special education and related services consistent with the process found in Rules 2361 and 2362.

(8) ***Consent***. Consent means that—

(i) 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;

(ii) 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 and lists the records (if any) that will be released and to whom; and

(iii) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(iv) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(9) ***Core curriculum***. Core curriculum means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography which have instructional approaches that are based on scientifically validated research supporting the curriculum's effectiveness and demonstrate a high probability of success for a majority of children.

(10) ***Day***. Whenever a limit of "days" appears within these regulations, the following definitions shall apply:

(i) "Day" is defined as a calendar day, unless stated to be "business day" or "school day".

(ii) "Business day" means weekdays, excluding Federal and State holidays, unless the latter are specifically included.

(iii) "School day" means any day, including partial days, when children attend school for instructional purposes. The term school day has the same meaning for all children in school, including children with and without disabilities.

(11) ***Eligibility***. See Rule 2360.5.3 for children from birth through 2 years 11 months of age. See Rule 2361 for children ages 3 up to the sixth birthday. See Rule 2362 for children and children ages 6 through 21.

(12) ***Evaluation***. Evaluation means procedures used in accordance with Rule 2362 with the following exception: The screening of a child by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(13) ***Evaluation Planning Team (EPT)***. Evaluation Planning Team means a group of individuals including the parent that is responsible for developing an evaluation plan and reviewing the results to determine if a child is or continues to be eligible for special education and related services. The membership requirements are the same as those outlined for the IEP Team in Rule 2363.

(14) ***Extended School Year Services***. The term extended school year services means special education and related services that are provided to a child with a disability

beyond the normal school year of the LEA in accordance with the child's IEP and state standards and at no cost to the parents of the child.

(15) ***Functional Performance***. Functional performance is the acquisition of essential and critical skills needed for children with disabilities to learn specific daily living, personal, social, and employment skills, or the skills needed to increase performance and independence at work, in school, in the home, in the community, for leisure time, and for postsecondary and other lifelong learning opportunities.

(16) ***Free Appropriate Public Education (FAPE)***. A FAPE means special education and related services that—

(i) Are provided at public expense, under public supervision and direction, and without charge to the parent or child;

(ii) Meet the standards of the State, including the requirements of Part B of the IDEA; include preschool, elementary school, or secondary school education; and

(iii) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Rules 2363 – 2363.8.

(17) ***Highly Qualified Special Education Teachers***. Highly Qualified Special Education Teachers shall meet one of the following:

(i) Requirements for special education teachers teaching core academic subjects. For any public elementary or secondary school special education teacher teaching core academic subjects, the term highly qualified means that the special education teacher shall carry an endorsement appropriate to the assignment AND shall meet the content knowledge requirements for the highest grade level of the children who receive primary instruction from the teacher.

(ii) Requirements for special education teachers in general.

(A) When used with respect to any public elementary school or secondary school special education teacher, highly qualified requires that—

1) The teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), and holds a license to teach in the State as a special education teacher;

2) The teacher does not have provisional special education certification or licensure; and

3) The teacher holds at least a bachelor's degree.

(B) A teacher will be considered to meet the standard in paragraph (ii)(A) of this section if that teacher is participating in an alternative route to special education certification program under which the teacher—

1) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

2) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

3) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

4) Demonstrates satisfactory progress toward full certification as prescribed by the State of Vermont.

(18) ***Homeless children***. "Homeless children" means individuals who lack a fixed, regular, and adequate nighttime residence; and includes:

(i) Children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(ii) Children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;

(iii) Children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) Migratory children who qualify as homeless because the children are living in circumstances described in sections (i) through (iii).

(19) ***Individualized education program (IEP)***. Individualized education program means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with Rule 2363.

(20) ***Individualized education program team***. Individualized education program team or IEP team means a group of individuals described in Rule 2363 that is responsible for developing, reviewing, or revising an IEP for a child with a disability.

(21) ***Limited English proficient***. Limited English proficient means an individual, aged 3 through 21, who is enrolled or preparing to enroll in an elementary school or secondary school; and who meets one of the following criteria:

(i) Who was not born in the United States or whose native language is a language other than English; or

(ii) Who is a Native American or Alaska Native, or a native resident of the outlying areas; and

(A) Who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

(B) Who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

(C) Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual:

1) The ability to meet the proficient level of achievement on State assessments;

2) The ability to successfully achieve in classrooms where the language of instruction is English; or

3) The opportunity to participate fully in society.

(22) ***Local Education Agency (LEA)***. Local Education Agency means the supervisory union unless there is a unanimous vote at a supervisory union meeting that the supervisory union will only coordinate special education services on behalf of member districts in which case the LEA is the local school district (16 V.S.A . 261a(6)).

(23) ***Meeting***. A meeting is a session held for the development or review of a child's evaluation plan, eligibility determination or an IEP. A meeting does not include informal or unscheduled conversations involving school personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities in which school personnel might engage to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(24) ***Native language***. Native language, when used with respect to an individual who is limited English proficient, means the following:

(i) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (iii) of this section.

(ii) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(iii) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

(25) ***Parent***. Whenever the words "parent" or "parents" appear in these rules, the words shall mean:

(i) A biological or adoptive parent of the child

(A) Except as provided in (vi) below, the biological or adoptive parent, when attempting to act as the parent under these rules and when more than one party is qualified under (i) through (v) of this section to act as a parent, shall be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(ii) A legal guardian, but not the state if the child is in the custody of the Commissioner of the Vermont Department for Children and Families or the Commissioner of the Vermont Department of Disabilities, Aging and Independent Living. This provision does not diminish or otherwise alter any authority or responsibility of a state agency regarding general education decisions for a child in state custody pursuant to Chapter 49 and 55 of Title 33 or vulnerable adult in state custody pursuant to Chapter 215 of Title 18.

(iii) A person who is acting in the place of a biological parent or adoptive parent, including a grandparent, stepparent or other relative with whom the child lives, or a person who is legally responsible for the child's welfare;

(iv) A foster parent or developmental home provider who has been appointed the educational surrogate parent by the Vermont Educational Surrogate Parent Program; or

(v) An educational surrogate parent;

(vi) 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, except that a LEA that provides education or care for the child may not act as the parent.

(26) ***Personally identifiable***. Personally identifiable means information that contains:

(i) The name of the child, the child's parent, or other family member;

(ii) The address of the child;

(iii) A personal identifier, such as the child's social security number or student identification number; or

(iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(27) ***Scientifically based research***. Scientifically based research means research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and includes research that:

(i) Employs systematic, empirical methods that draw on observation or experiment;

(ii) Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

(iii) Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

(iv) Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;

(v) Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and

(vi) Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

(28) ***Services plan***. Services plan means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in an independent school or in a registered home study program, who has been designated to receive services, including the location of the services and any transportation necessary, and is developed and implemented in accordance with Rule 2368.

(29) ***Supplementary aids and services***. Supplementary aids and services means aids, services, and other supports that are provided in general education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in the least restrictive environment.

(31***) Universal Design***. The term "universal design", as provided in the Assistive Technology Act of 2004, means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies.

(32) ***Vulnerable adult in state custody***. For purposes of these rules, "vulnerable adult in state custody" is a youth that is 18 through 21 years of age and for whom guardianship authority to make educational decisions on behalf of the youth has been granted by a court to the Commissioner of the Department of Disabilities, Aging and Independent Living pursuant to Chapter 215 of Title 18. A vulnerable adult in state custody meets the definition of, and shall be afforded, all rights and protections as a "ward of the state" pursuant to 20 U.S.C. § 140 1(36).

(33) ***Ward of the state***. All rights and protections as a "ward of the state" pursuant to 20 U.S.C. § 1401(36) shall be afforded to a "child in state custody" or a "vulnerable adult in state custody" as those terms are defined in this section.

### 2360.3.1 Special Education Services

The term "special education" means specially designed instruction that cannot be provided within the school's standard instructional conditions or provided through the school's educational support system, at no cost to the parent, to meet the unique needs of an eligible child with a disability. Specially designed instruction means adapting, as appropriate, to the needs of an eligible child, the content, methodology, or delivery of instruction:

(a) To address the unique needs of the child that result from the child's disability; and

(b) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the LEA that apply to all children.

(1) Special education services include, as appropriate:

(i) Classroom instruction, home instruction, instruction in hospitals and institutions and instruction in other settings;

(A) Co-teaching services is the delivery of special education services in the general education setting provided jointly by the general education teacher and a special education teacher.

1) By selecting the co-teaching services model, the IEP team has determined that there is no compelling reason why the child's instruction cannot be provided jointly in the general education setting.

2) The general education teacher shall be an active participant in IEP meetings.

3) The general education and special education teachers will review and document each child's progress towards course objectives and IEP goals. Should a progress review at any grading period indicate that a child is in danger of failing a course or is not making satisfactory progress towards IEP goals, the IEP team shall meet immediately to:

a) Determine continued co-teaching services or change of placement, and

b) Revise the IEP as appropriate.

4) In order to offer co-teaching services, the LEA must complete a plan for implementation which includes continuous professional development and submit the plan to the Vermont Department of Education for approval.

(2) Instruction in physical education which is the development of physical and motor fitness; fundamental motor skills and patterns; and skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and includes special physical education, adapted physical education, movement education, and motor development;

(3) Speech–language pathology services for the prevention and/or habilitation of speech-language impairments may be special education, if provided as specially

designed instruction; or related services, if required to assist a child with a disability to benefit from special education.

(4) Travel training which is the provision of instruction, as appropriate, to children with significant cognitive disabilities and any other children with disabilities who require this instruction, to enable them to:

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment such as school, home, work, and in the community.

(5) Technical education which means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(c) To ensure successful post-secondary transition, transition services may be special education, if provided as specially designed instruction, or related services, if required to assist a child to benefit from special education.

(1) “Transition services” means a coordinated set of activities that:

(i) Are designed within a results-oriented process that is focused on improving the academic and functional achievement of the youth who is eligible to facilitate the youth’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(ii) Are based on the individual youth's needs, taking into account the youth's preferences and interests; and includes:

(A) Instruction;

(B) Related services;

(C) Community experiences;

(D) The development of employment and other adult living objectives; and

(E) If appropriate, acquisition of daily living skills and functional vocational evaluation.

**2360.3.2 Related Services**

(a) The term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child who requires special education services to benefit from his or her special education.

(b) Exception. Related services do not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device.

(c) A child will not be designated as a child who is eligible for special education, if the child needs only a related service, but not special education services.

(d) Related services shall include, but are not limited to:

(1) Audiology that includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) Counseling services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) Early identification and assessment of disabilities in children.

(4) Interpreting services, as used with respect to children who are deaf or hard of hearing, includes oral transliteration services, cued language transliteration services, sign language interpreting services and special interpreting services for children who are deaf-blind.

(5) Medical services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(6) Occupational therapy services shall be provided by a qualified occupational therapist and includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(7) Orientation and mobility services are:

(i) Services provided to blind or visually impaired children by qualified personnel to enable those children to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Travel training instruction, and teaching children the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) The use of the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8) Parent counseling and training as follows:

(i) Assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(9) Physical therapy services provided by a qualified physical therapist.

(10) Psychological services as in:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies

(11) Recreation includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(12) Rehabilitation counseling services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation,

achieving independence, and integration in the workplace and community of a youth with a disability. The term also includes vocational rehabilitation services provided to a youth with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

(13) School nurse services provided by a qualified school nurse, designed to enable a child with a disability to receive FAPE as described in the child's IEP.

(14) Social work services in schools include:

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(15) Transportation includes:

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(16) Speech-language pathology services include:

(i) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(ii) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(17) Transition services may be related services, if required to assist a child to benefit from special education.

**2360.3.3 Personnel Qualifications**

(a) The Vermont Department of Education has established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(b) Related services personnel and paraprofessionals- The qualifications under subparagraph (a) include qualifications for related services personnel and paraprofessionals that--

(1) Are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(2) Ensure that related services personnel who deliver services in their discipline or profession meet the requirements of section (b)(1) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(3) Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services to children with disabilities.

(c) Policy: In implementing this section, the Vermont Department of Education has a policy that includes a requirement that responsible LEAs in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this part to children with disabilities.

**2360.3.4 Required Forms**

The Commissioner shall develop, make available, and publish a list of required and suggested special education forms for use by LEAs in implementing special education and related services. Responsible agencies shall use the special education forms, which the Commissioner designates for required use. The forms provided by the Commissioner shall not require more paperwork than is required by federal law and regulation.

**2360.3.5 Use of Insurance**

(a) Nothing in these regulations or the regulations implementing the Individuals with Disabilities Education Improvement Act is intended to relieve an insurer, Medicaid or other third party from an otherwise valid obligation to provide or pay for services to a child who is eligible for special education. A LEA shall use funds from the State Medicaid reimbursement administrative special fund in accordance with 16 V.S.A. §2959a (e).

(1) Children with disabilities who are covered by public insurance.

(i) A LEA may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under IDEA Part B, as permitted under the public benefits or insurance program, except as provided in paragraph (1)(ii) of this section.

(ii) With regard to services required to provide FAPE to an eligible child under IDEA Part B, the LEA:

(A) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under these rules;

(B) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to IDEA Part B, but pursuant to paragraph (4)(ii) of

this section, may pay the cost that the parent otherwise would be required to pay;

(C) May not use a child's benefits under a public benefits or insurance program if that use would--

1) Decrease available lifetime coverage or any other insured benefit;

2) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

3) Increase premiums or lead to the discontinuation of benefits or insurance; or

4) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(D) Shall obtain informed written parental consent, consistent with Rule 2365.1.3(b) with notification to parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the LEA of its responsibility to ensure that all required services are provided at no cost to the parents.

(2) Children with disabilities who are covered by private insurance.

(i) With regard to services required to provide FAPE to an eligible child under IDEA Part B, a LEA may access a parent's private insurance proceeds only if the parent provides informed written consent consistent with Rule 2365.1.3(b).

(ii) Each time the LEA proposes to access the parent's private insurance proceeds, the agency shall--

(A) Obtain informed written parental consent consistent with (2)(i); and

(B) Inform the parents that their refusal to permit the LEA to access their private insurance does not relieve the LEA of its responsibility to ensure that all required services are provided at no cost to the parents.

(3) Use of Part B funds.

(i) If a LEA is unable to obtain parental consent to use the parent's private insurance, or public insurance when the parent would incur a cost for a specified service required under this part, to ensure FAPE the LEA may use its Part B funds to pay for the service.

(ii) To avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the LEA may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

(4) Proceeds from public or private insurance.

(i) Proceeds from public or private insurance will not be treated as program income for purposes of 34 CFR 80.25, Education Department General Administrative Regulations (EDGAR).

(ii) If a LEA spends reimbursements from Federal funds (e.g., Medicaid) for services under IDEA Part B, those funds will not be considered "State or local" funds for purposes of the maintenance of effort provisions in 34 CFR §300.163 Maintenance of State Financial Support and § 300.203 Maintenance of Effort obligation for LEAs.

(5) Nothing in these rules should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396v and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program.

## 2360.5 Early Intervention Services For Infants And Toddlers, Birth to Three Years Of Age: Part C Of the Individuals with Disabilities Education Act

Part C, provides early intervention services for children birth to the third birthday. While Part B of the IDEA provides a FAPE to eligible people from their third birthday through 21 years of age, Part C does not provide a FAPE to its eligible population. The Vermont Department of Education and the Agency of Human Services shall serve as the co-lead agencies in Vermont for the implementation of early intervention services under Part C of the Individuals with Disabilities Education Act (IDEA).

As required by federal law, school districts shall engage in child-find activities to identify children who may require early intervention services.

Information and outreach services such as screening, information and referral, and family support and education shall be available for any family with concerns about their infant or toddler's development.

### 2360.5.1 Role of Schools/Referral/Core Team

(a) By way of Vermont's Interagency Agreement for the Provision of Early Intervention Services, the role that each school district/supervisory union has in the provision of early intervention services shall be detailed in Regional Plans for Early Intervention. School districts/supervisory unions shall be primary referral sources and participating partners in the provision of early intervention services under Part C – IDEA.

(b) Each region shall designate a "host agency" that serves as the central point of referral for the Children's Integrated Services/Early Intervention (CIS/EI). School districts/supervisory unions receiving referrals for children under the age of three, with parent approval, shall forward the referral to the regional host agency.

(c) School districts/supervisory unions shall be members on the core team comprised of the family, regional early interventionist, school representative, community resource parent, and Children with Special Health Needs (CSHN) medical social worker for children with medical concerns. The core team shall:

(1) Determine who will make the initial visit with a family;

(2) Determine who will provide interim service coordination;

(3) Develop a multidisciplinary evaluation plan based on the family's concerns; and,

(4) Determine eligibility for early intervention services.

### 2360.5.2 Evaluation

(a) Informed parental written consent shall be required prior to initiating the evaluation process.

(b) A multidisciplinary evaluation shall be completed which includes:

(1) Observation/report/clinical judgments by the core team;

(2) Non-discriminatory and appropriate screening and assessment instruments which may include criterion referenced or norm referenced instruments or screening/development profiles;

(3) A review of pertinent medical records and current health status;

(4) Documentation of a diagnosis or established condition which has a high probability of resulting in developmental delays, when eligibility will be based on a high probability of a developmental delay;

(5) An evaluation of the child's:

(i) Cognitive development,

(ii) Physical development, including vision and hearing,

(iii) Communication development,

(iv) Social or emotional development, and

(v) Adaptive development.

(c) The initial evaluation shall be completed and a meeting held to develop the initial Individualized Family Service Plan (IFSP) for an eligible child within 45 days of the host agency receiving the referral.

(1) If, due to exceptional circumstances, it is not possible to complete the evaluation and assessment and hold the initial IFSP meeting within the forty-five day requirement, the core team shall:

(i) Document attempts to comply.

(ii) Document the exceptional circumstances preventing compliance.

(iii) Develop jointly with parents, strategies and timelines to complete the evaluation.

(2) If early intervention services are determined to be needed immediately before the completion of the evaluation, the core team may develop an interim IFSP which includes:

(i) The name of the service coordinator who shall be responsible for the implementation of the interim IFSP and coordination with other agencies and persons and

(ii) The early intervention services that have been determined to be needed immediately by the child and the child's family.

**2360.5.3 Eligibility**

(a) Families with children from birth through the third birthday, who have a developmental delay or a diagnosed physical or mental condition which has a high probability of resulting in a developmental delay, are eligible for early intervention services. Eligibility for services shall be based on the following criteria:

(1) Developmental Delay

A developmental delay is a clearly observable and measurable delay in one or more of the following areas: cognitive development, physical development (including hearing and vision), communication development, social-emotional development, or adaptive development, and the delayed development shall be at the level that the child's future success in home, school, or community cannot be assured without the provision of early intervention services.

(2) High probability for developmental delay

(i) A diagnosed physical or mental condition which has a high probability of resulting in a developmental delay. The delay in development may or may not be exhibited at the time of diagnosis.

(ii) Such a condition may include, but is not limited to:

(A) Chromosomal Anomalies/Genetic Disorders. This category can include Down Syndrome, other chromosomal anomalies with known developmental consequences, and genetic disorders such as cystic fibrosis;

(B) Inborn errors of metabolism including infant phenylketonuria (PKU) and hypothyroidism;

(C) Severe Infectious Diseases including prenatally acquired infections such as HIV, or postnatal infections such as meningitis or encephalitis;

(D) Neurological Disorders including neuromuscular disorders, cerebral palsy, seizure disorders and degenerative central nervous system disorders such as Tay Sachs and tuberous sclerosis;

(E) Congenital Malformations including birth defects of the respiratory or central nervous system (e.g., cleft palate, spina bifida) or conditions such as microencephaly or hydrocephalus;

(F) Sensory Disorders including severe hearing loss or deafness and visual loss or blindness;

(G) Severe Attachment and other Atypical Disorders, and Socio-Affective Disorders of Infancy including reactive attachment disorder, autism and pervasive developmental disorder;

(H) Severe Toxic Exposure including prenatal toxic exposure to drugs, postnatal lead poisoning (blood lead levels of 20 g/dl or greater), fetal alcohol syndrome;

(I) Medically Fragile including technology-dependent children with complex health care needs;

(J) Chronic Medical Illness including cancer, diabetes, heart problems, and renal failure;

(K) Severe Complications at Birth - Requires at least 2 of the following conditions to be present:

Birthweight - less than 1500 grams;

Apgar scores at 5 minutes - less than 6;

Intraventricular Hemorrhage (IVH) - Grade III or IV;

Intrauterine Growth Retardation (IUGR) - Symmetrical;

Respiratory Distress Syndrome - RDS;

Gestational Age - less than 32 weeks;

Asphyxiation; and/or

Periventricular Leukomalacia.

(b) Environmentally at Risk

Early intervention funds may be used to identify and evaluate environmentally at-risk infants and toddlers and to make referrals to other appropriate services. Periodic follow-up may be provided, within the limits of funds available, for infants and toddlers who are at-risk for developmental delays but who are determined to be not eligible for early intervention services to determine if the child's status may have changed with respect to eligibility for early intervention services.

(c) Eligibility Determination

(1) The core team shall determine a child's eligibility for early intervention services.

(2) The child's record or IFSP shall clearly reflect the methods or evaluations used to determine eligibility, the eligibility decision, and the participation of the core team in the determination.

(d) Transfer of a Child from Another Region in Vermont

A child determined eligible in one region continues to be eligible in any other region without need for another evaluation or determination of eligibility.

(e) Transfer from Another State

For a child who has previously been found eligible for early intervention services in another state, the Core Team shall review eligibility information from that state to determine if he/she is eligible under Vermont's eligibility definition. If any additional evaluations are needed, parental consent shall be obtained.

**2360.5.4 IFSP Meetings and Reviews**

(a) IFSP meetings shall be:

(1) Held at least annually;

(2) Held in settings and at times that are accessible and convenient for families;

(3) Held in the native language of the family or other mode of communication used by the family, unless it is clearly not feasible to do so;

(4) Arranged with, and written notice provided to, the family and other participants early enough before the meeting date to ensure that they will be able to attend;

(5) Attended at minimum by:

(i) The parent(s) of the child, and

(ii) The service coordinator.

(6) Also attended by or otherwise include the participation of:

(i) Other family members, as requested by the family;

(ii) An advocate or person outside the family as requested by the family;

(iii) The person(s) directly involved in the evaluation and assessment process; and

(iv) As appropriate, the person(s) who will be providing services to the child and/or the family.

(7) Participation may include:

(i) Sharing information through a telephone call and making pertinent records available; and

(ii) Having a knowledgeable authorized representative attend the meeting.

(b) The IFSP shall be evaluated once a year and a periodic review of the IFSP for a child and the child's family shall occur at least every six months, or more frequently if needed, or requested by the family. The review need not take place at a formal meeting but may occur through other means that are acceptable to the parents and other participants The purpose of the review is to determine:

(1) Progress made toward achieving the outcomes identified in the IFSP, and

(2) Whether modification or revision of the outcomes or services is needed.

**2360.5.5 Contents of the IFSP**

(a) The contents of the IFSP shall be fully explained to parents and shall include the following:

(1) A statement of the child's present level of development in the areas of physical (including vision, hearing and health status), cognitive, communication, social-emotional, and adaptive development. Present levels of development are based on professionally accepted objective criteria. This information shall be presented in easily understood language.

(2) With the concurrence of the family, a statement of the family's priorities and concerns related to enhancing the development of the child;

(3) A statement of the major family driven outcomes that are expected for the child and the family;

(4) The criteria, procedures and timelines used to determine the degree to which progress toward achieving the outcomes is being made;

(5) A statement of specific early intervention services necessary to meet the unique needs of the child and family to achieve the identified outcomes, including:

(i) The frequency, intensity, and method of delivering the services. Frequency and intensity and method means the number of days or sessions that a service will be provided, the length of time the service is provided during each session, and whether the session is provided on an individual or group basis.

(ii) A statement of the natural environments in which early intervention services shall be provided, including a justification of the extent, if any, to which the services will not be provided in the child's natural environment. Services shall be provided in a setting other than the child's natural environment only if early intervention cannot be achieved satisfactorily for the child in a natural environment. Natural environments, including the home and community, are settings that are natural or normal for the child's age peers who have no disability.

(iii) The location of services; and

(iv) Sources of payment for such services.

(6) As appropriate, a statement of medical and other services or supports which a child or family needs, but that are not early intervention services. The IFSP shall include funding sources that may be used to pay for these services, and if necessary, the steps that will be taken to explore and secure these services and supports.

(7) The projected dates for beginning the early intervention services as soon as possible after the IFSP meeting, and the anticipated duration of services.

(8) The name of the service coordinator who will be responsible for implementing the service plan and coordinating the process among other agencies and/or persons.

### 2360.5.6 Consent for Early Intervention Services: Termination of Services

(a) Informed written consent by parents is needed before early intervention services may be provided.

(b) Early intervention services may be terminated when the:

(1) Parent requests that all services or any service be terminated;

(2) IFSP team determines that there is no longer a need for all services or any service;

(3) Child is no longer a Vermont resident.

### 2360.5.7 Transition at Age Three

(a) Parents of children who are in transition to Essential Early Education (EEE) or other preschool services shall be included in all phases of the transition planning and process including participation in transition meetings, site visits, and the development of the transition plan.

(b) Eligibility for EEE Services

(1) A child who received special instruction, developmental therapy services or speech services through an IFSP shall be eligible for EEE without need for additional evaluation.

(2) A child who did not receive special instruction, developmental therapy or speech services through an IFSP, may be eligible for EEE services if the Evaluation and Planning Team determines that the child has a medical condition which may result in significant delays by the time of the child's sixth birthday.

(c) Notification of Transition Meeting(s)

(1) The IFSP service coordinator shall provide written notification to the supervisory union or local school district where the child resides at least six months prior to the child's third birthday. With the permission of the family, the IFSP service coordinator shall convene a meeting or series of meetings that include:

(i) The family;

(ii) School district personnel;

(iii) A representative from Children's Integrated Services/Early Intervention;

(iv) Other IFSP team members or service providers; and

(v) Others who are likely to be involved in service delivery after the child turns three.

(2) The purpose of such meetings is to begin transition planning at least 90 days and up to six months prior to the child's third birthday. A Children with Special Health Needs (CSHN) social worker shall participate in transition planning for children with medical needs enrolled in CSHN programs. Transition meetings may serve as IEP planning and development meetings for children who will transition to EEE services. Families shall be provided information about parental rights and responsibilities, i.e., procedural safeguards, regarding the transition process and EEE.

(d) Transition Plan for Children in Transition to EEE Services

(1) Transition meetings shall result in the development of a comprehensive transition plan that details the necessary steps to enable the child to receive EEE services and/or other preschool services as of the child's third birthday.

(2) The IEP shall be completed no later than the child's third birthday. When a child turns three shortly before the end of the school year or in the summer, the transition team shall meet to develop the IEP prior to the end of the school year or by the child's third birthday. The child's IEP Planning Team shall include all required components of an IEP which are listed in rule 2363.8.

(e) Records Sent To The EEE Program

With the parent's consent, copies of the following IFSP records shall be sent to the EEE program for the child's district of residence:

(1) Evaluations and information used to determine eligibility;

(2) IFSPs;

(3) Pertinent contact notes; and

(4) A signed consent from the parent to release information to the program.

(f) Consent to EEE Placement

For children who transition to EEE services, the parent shall be asked to consent to EEE placement for the period of time between age 3 and the date the initial evaluation under Part B is due. Initial consent for evaluation and placement under Part B shall occur when the initial evaluation for early intervention expires after 3 years or sooner if requested by the parent or responsible agency.

(g) Records

(1) Children's Integrated Services/Early Intervention records shall be the property of the co-lead agencies, the Vermont Department of Education and Agency of Human Services. The child's record at the host agency shall be the central record for children referred for early intervention services. Records at the host agency shall contain the following:

(i) Record of Access;

(ii) Consents for Release of Information;

(iii) Consent for Evaluation;

(iv) Documentation that parental rights have been given in writing and explained verbally;

(v) Evaluation reports or summaries used to determine eligibility;

(vi) Eligibility form;

(vii) Written notice of IFSP meetings;

(viii) The most recent and previous IFSPs;

(ix) Information related to IFSP reviews; and

(x) Information related to transition planning

(2) Additional components of the child's record may be maintained by service providers as indicated on the IFSP.

**2360.5.8 Procedural Safeguards.**

If a parent disagrees with the decisions made by the core team in subsection (c) of Rule 2360.5.1 the parent may pursue informal dispute resolution options or may utilize the appeal process set forth in Rule 2365.

# ELIGIBILITY FOR SPECIAL EDUCATION, AGES THREE THROUGH TWENTY ONE
## Pursuant to the Individuals with Disabilities Education Improvement Act, Part B

### 2361 Essential Early Education (EEE) Eligibility of Children Age Three Years Up To the Sixth Birthday

(a) A child age three years up to the sixth birthday shall be eligible for EEE if the child meets at least one of the following:

(1) Determined to be eligible under Rule 2360.5.7(b);

(2) After evaluation by an evaluation and planning team (EPT), the EPT finds that the child has a disability caused by a developmental delay and the child needs special education;

(3) The child has a medical condition which may result in significant delays, and the child needs special education;

(4) The child meets the eligibility criteria for children 6 through 21 pursuant to Rule 2362, including determination of a disability, adverse effect on educational performance and need for special education.

(b) For the purposes of this section, “medical condition” means a condition diagnosed by a licensed physician such as autism, cerebral palsy, Down Syndrome, attention deficit disorder with hyperactivity that may result in significant delays by the child's sixth birthday.

(c) For the purposes of this section, “developmental delay” is determined through an evaluation which consists of two assessments, one of which is a norm referenced assessment, where the child demonstrates at least a 40% delay in one or more of the following areas or exhibits a 2.0 standard deviation at, or below the mean (2nd percentile) in one of the following areas; or a 1.5 standard deviation at, or below the mean (7th percentile) in two or more of the following areas:

(1) Receptive and/or expressive communication;

(2) Adaptive development;

(3) Social or emotional development;

(4) Physical development including gross or fine motor skills; or

(5) Cognitive skills such as perception, memory, processing and reasoning.

(d) The administration of any assessments shall be in compliance with the evaluation requirements of Rule 2362.2.1.

(e) The percentage delay in a child’s performance on a norm referenced assessment may be measured by dividing the child’s age equivalent score in months by the child’s actual age in months, and then multiplying the quotient by 100. The result is then subtracted from 100 to determine the child’s percentage of delay.

### 2361.1 Transition for Children Moving into Kindergarten

In order to ensure a smooth transition to kindergarten, the IEP team shall:

(a) Meet three to six months prior to the child's entrance into kindergarten to ensure that an IEP is ready to be implemented at the beginning of the school year.

(b) Include in the meeting the parents of the child with a disability, a kindergarten teacher in whose school the child will be placed, and a special education teacher or other school representative from the LEA who is:

(1) Knowledgeable about the LEA's resources;

(2) Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities; and

(3) Knowledgeable about the general education curriculum.

(4) Other individuals with knowledge or special expertise regarding the child may be included in the meeting.

### 2361.2 Educational Placement in the Least Restrictive Environment (LRE)

In determining the educational placement of a preschool child with a disability, each LEA shall ensure that:

(a) The placement decision shall be made by the IEP team in conformity with the provisions regarding placement in the least restrictive environment set forth in Rule 2364.

(b) The child's placement shall be:

(1) Determined at least annually;

(2) Based on the child's IEP;

(3) In as close proximity as possible to the child's home; and

(4) Based on consideration of community based early care and education settings such as a childcare, or Head Start.

### 2361.3 IEP Content

The content of the child's IEP shall be as set forth in rule 2363.8. For preschoolers, the IEP may also address how the child's disability affects his or her participation in developmentally appropriate play activities.

## 2362 Eligibility for Children Ages Six Years through Twenty One (34 CFR §300.306)

(a) A child shall be eligible for special education if:

(1) He or she has one or more of the disabilities described in Rule 2362.1;

(2) The disability results in an adverse effect on the child's educational performance in one or more of the basic skill areas as described in subsection (g), below; and

(3) The child needs special education services to benefit from his or her educational program and this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school.

(b) The three criteria listed in section (a) above shall also be applied at the time the child receives a re-evaluation to determine eligibility.

(c) A formal evaluation process, documented in a report as required by Rule 2362.2.5, shall be used to determine whether the above criteria are met.

(d) Adverse Effect.

(1) To conclude that a disability has an adverse effect on the child's educational performance, the EPT shall determine and document that, as a result of his or her disability, the child is functioning significantly below grade norms compared to grade peers in one or more of the basic skills defined in Rule 2362(g).

(2) "Significantly below grade norms" means the 15th percentile or below, or a 1.0 standard deviation or more below the mean, or the equivalent, as reflected by performance on at least three of the six following measures of school performance, generally over a period of time:

(i) Individually administered nationally normed achievement test;

(ii) Normed group administered achievement tests, including nationally normed curriculum-based measures;

(iii) Grades;

(iv) Curriculum-based measures which could include benchmark assessments and continuous progress monitoring outcomes;

(v) Criterion-referenced or group-administered criterion- referenced assessments;

(vi) Student work, language samples or portfolios.

(3) With respect to each basic skill considered, the EPT shall specifically identify in its report:

(i) Each type of measure considered by the Team;

(ii) The finding of the Team, with respect to each measure considered, as to whether and why the measure met (or did not meet) the 15th percentile, -1.0 standard deviation, or equivalent standard, in order to support a finding of adverse effect;

(iii) The specific testing data/scores, Student work, and/or education records relied upon by the Team to support its finding under subparagraph (ii) that a measure did or did not meet the standard; and

(iv) A statement of each basic skill area in which the disability was determined to have an adverse effect, based upon (i)-(iii).

(e) A child may not be determined to be eligible under these rules if the determinant factor for that eligibility decision is lack of instruction in reading, including the essential components of reading instruction (phonemic awareness, phonics, fluency including oral reading skills, vocabulary development, reading comprehension strategies), or math, or limited English proficiency; and the child does not otherwise meet the eligibility criteria of these rules.

(f) If a child has a disability that results in an adverse effect on his or her educational performance in one or more of the basic skills, the EPT shall, in the following order:

(1) Consider the interventions, services, and accommodations the child may need, and

(2) Determine and provide justification that the child requires specially designed instruction that cannot be provided within the school's standard instructional conditions, or provided through the school's educational support system.

(g) Basic skill areas—

(1) Unless otherwise specified in the disability category in these rules, basic skill areas are:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skills;

(v) Reading comprehension;

(vi) Mathematics calculation;

(vii) Mathematics reasoning.

(2) For an individual with a sensory impairment, one or more comparable basic skills shall be considered to serve as an appropriate substitute for one or more of the above basic skills, for example, Braille skills for basic reading skills.

(3) The screening of a child by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

## 2362.1 Categories of Disability

The existence of one or more of the following categories of disability shall be established according to the criteria set forth below.

(a) ***Autism Spectrum Disorder*** means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three.

(1) Included in the spectrum are: autism, pervasive developmental disorder – not otherwise specified, Rett's Disorder, Asperger's Disorder, and childhood disintegrative disorder.

(2) Other characteristics often associated with autism spectrum disorder are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Characteristics vary from mild to severe as well as in the number of symptoms present. Autism spectrum disorder does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in Rule 2362.1(h).

(3) A child who manifests the characteristics of autism spectrum disorder after age three could be identified as having autism spectrum disorder if the criteria in subsection (1) & (2) are satisfied.

(4) The EPT shall obtain an opinion of a licensed psychologist and/or medical physician who have training and experience in understanding autism spectrum disorders and other developmental disorders as to the existence of an autism spectrum disorder and its effect on the child's ability to function and whether there is an adverse effect on the child's educational performance.

(b) ***Deaf-blindness*** means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(c) ***Emotional Disturbance*** means a condition including schizophrenia, exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance.

(1) Characteristics of an emotional disturbance:

(i) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(iii) Inappropriate types of behaviors or feelings under normal circumstances.

(iv) A general pervasive mood of unhappiness or depression.

(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) A child who is socially maladjusted shall not be considered to be emotionally disturbed unless, he or she also meets the definition of emotional disturbance as set forth in subdivision (1). A social maladjustment is a persistent pattern of violating societal norms, such as multiple acts of truancy, or substance or sex abuse, and is marked by struggle with authority, low frustration threshold, impulsivity, or manipulative behaviors. A social maladjustment unaccompanied by an emotional disturbance is often indicated by some or all of the following:

(i) Unhappiness or depression that is not pervasive;

(ii) Problem behaviors that are goal-directed, self-serving and manipulative;

(iii) Actions that are based on perceived self-interest even though others may consider the behavior to be self-defeating;

(iv) General social conventions and behavioral standards are understood, but are not accepted;

(v) Negative counter-cultural standards or peers are accepted and followed;

(vi) Problem behaviors have escalated during pre-adolescence or adolescence;

(vii) Inappropriate behaviors are displayed in selected settings or situations (e.g., only at home, in school or in selected classes), while other behavior is appropriately controlled; and/or

(viii) Problem behaviors are frequently the result of encouragement by a peer group, are intentional, and the child understands the consequences of such behaviors.

(3) The EPT shall obtain an opinion of a licensed psychologist or psychiatrist as to the existence of an emotional disturbance and its effect on the child's ability to function, based on the above criteria.

(4) Upon determination of the existence of an emotional disturbance disability, the parent shall be informed of the availability of interagency coordination of services, as defined by 33 V.S.A. §4301 et seq.

(d) ***Hearing Impairment*** means an impairment in hearing as determined by an audiologist, otologist, or otolaryngologist, and demonstrated by a 25 decibel HL threshold (ANSI, 69) or worse for one or more of the frequencies 250-8000HZ, in one or both ears, with or without amplification.

(e) ***Learning Impairment*** means a delay in learning of sufficient magnitude to cause a child's performance to fall at or below -1.5 standard deviations from the mean of a test of intellectual ability, existing concurrently with deficits in adaptive behavior.

(f) ***Multiple Disabilities*** means concomitant impairments (such as learning impairment-blindness or learning impairment-orthopedic impairment) (etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

(g) ***Orthopedic Impairment*** includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). The EPT shall obtain an opinion from a licensed physician as to the existence of the orthopedic impairment and its effect on the child's ability to function.

(h) ***Other Health Impairment*** means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:

(1) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, non-verbal learning disability and/or Tourette syndrome; and adversely affects a child's educational performance.

(2) In order to determine the existence of an other health impairment and its effect on the child's ability to function, the EPT shall obtain an opinion from a person:

(i) Whose professional licensure authorizes him or her to offer an opinion on the existence of the specific condition suspected to be an other health impairment and its effect on the child's ability to function, and

(ii) Who has specific training and experience in diagnosing and recommending treatment for the specific condition suspected.

(i) ***Specific Learning Disability*** means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia that adversely affects a child's educational performance.

(1) Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of learning impairment, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(j) ***Speech or Language Impairment*** means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment that adversely affects a child's educational performance and shall be demonstrated by significant deficits in listening comprehension or oral expression. The EPT shall obtain an opinion from a licensed speech-language pathologist as to the existence of a speech or language impairment and its effect on the child's ability to function. The determination of a speech or language impairment shall be based on the following criteria:

(1) Listening comprehension. A significant deficit in listening comprehension exists when a child demonstrates at least 2.0 standard deviations below the test mean on at least one composite score and other measures of auditory processing or comprehension of connected speech. Auditory processing or comprehension include:

(i) phonology,

(ii) morphology,

(iii) syntax,

(iv) semantics, or

(v) pragmatics.

(2) Oral Expression. For purposes of determination of a speech and language impairment, a significant deficit in oral expression exists when a child demonstrates one or more of the following conditions:

(i) Voice. A significant deficit in voice exists when both of the following are present:

(A) Documentation by an otolaryngologist that treatment is indicated for a vocal pathology or speech related medical condition, and

(B) Abnormal vocal characteristics in pitch, quality, nasality, volume or breath support, which persist for at least one month.

(ii) Fluency. A significant deficit in fluency exists when the child exhibits one or more of the following behaviors:

(A) Part word repetitions or sound prolongations occur on at least 5% of the words spoken in two or more speech samples, or

(B) Sound or silent prolongations exceed one second in two or more speech samples, or

(C) Secondary symptoms or signs of tension or struggle during speech which are so severe as to interfere with the flow of communication.

(iii) Articulation. A significant deficit in articulation attributed to an organic or functional disorder exists when a child is unable to articulate two or more of the unrelated phonemes in connected speech, set forth below, and it is not attributed to dialect or second language difficulties.

| Age | Phonemes |
|---|---|
| 6.0 – 6.11 | m, n, h, w, p, b, t, d, k, g, f, v<br>(y), (ch), (th) as in the word “mother”, (sh) and “j” as in jump |
| 7.0 – 7.11 | (th) as in the word “thin”, “l” |
| 8.0 and above | s, z, r, (zh) as in “measure”, ng<br>and consonant blends with s, l, and r |

(iv) Oral Discourse. A significant deficit exists when a child demonstrates a deficit of at least 2 standard deviations below the test mean on at least one composite score and other measures of oral discourse. Oral discourse includes:

(A) phonology,

(B) morphology,

(C) syntax,

(D) semantics, or

(E) pragmatics

(k) ***Traumatic Brain Injury*** means an injury to the brain caused by an external physical force or by an internal occurrence such as a stroke or aneurysm, resulting in total or partial functional disability or psychosocial impairment, or both. The EPT shall obtain an opinion of a licensed physician as to the existence of a traumatic brain injury and its effect on the child's ability to function, as defined by the following criteria:

(1) The condition includes open or closed head injuries resulting in impairments in one or more areas, including cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech.

(2) The condition does not include brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(l) ***Visual Impairment*** including blindness means an impairment in vision as evaluated by an optometrist or ophthalmologist, demonstrated by central visual acuity that is 20/70 or worse in the better eye with correction, or a peripheral field that subtends an angle not greater than 20 degrees at its widest diameter. For the purposes of this disability, mobility and orientation shall also be considered to be special education services. The term includes both partial sight and blindness.

**2362.2 Procedures for Evaluation and Determination of Eligibility**

(a) For purposes of this section, "evaluations" are defined as observations, tests and other diagnostic measures, individually selected and administered to determine the existence of a disability, the effect the disability has on the child's educational and functional performance, the need for specialized services, and for an appropriate program. An evaluation is a compilation of information that is designed to assist:

(1)The EPT in determining eligibility for special education;

(2)The IEP team in developing the child's individualized educational program including special education services, and as required, related services, transition services, assistive technology, supplementary aids and services; and

(3) The IEP team in determining an appropriate placement in the least restrictive environment.

(b) The screening of a child by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. (34 CFR §300.302)

### 2362.2.1 Initial Evaluations (34 CFR §300.301)

Either a parent of a child, or a LEA, or the Vermont Department of Education, or other State agency, may initiate a request for an initial evaluation to determine if the child is eligible for special education and related services.

(a) Each LEA shall conduct a comprehensive and individual initial evaluation, before the initial provision of special education and related services to a child with a disability under these rules.

(b)The initial evaluation shall be completed and the report issued within 60 days from either:

(1) The date parental consent has been received by the LEA.

(2) The date on the LEA's notice, which informs parents that it will be reviewing existing data as the sole basis for the initial evaluation.

(c) If completion of the initial evaluation will be delayed for a period exceeding 60 days as specified in sections (b)(1) and (2) above, the parent shall be given written notice of the delay and a schedule of evaluation activities. Such notice shall be sent to a parent before the expiration of the 60 day period. A notice of delay shall only be used for exceptional circumstances related to the child and/or family, which shall be documented.

(d) Consent shall be obtained before individual tests can be administered to children who receive special education services unless the assessment is being administered as an alternate assessment to district-wide or statewide assessments.

(e) The 60 day time limit for the completion of an initial eligibility evaluation identified in section (b) shall not apply to an LEA if the parent of a child repeatedly fails or refuses to make a child available for the evaluation or if:

(1) A child moves to a new LEA before the eligibility evaluation in the old LEA has been completed;

(2) The new LEA is making sufficient progress to ensure a prompt completion of the evaluation; and

(3) The parent and new LEA have agreed to the specific time when the evaluation will be completed.

### 2362.2.2 Re-evaluation Requirements (34 CFR §300.303)

(a) The LEA shall ensure that a re-evaluation of each child with a disability is conducted:

(1) If the LEA determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a re-evaluation; or

(2) If the child’s parent or teacher requests a re-evaluation.

(b) A re-evaluation conducted under sub-section (a):

(1) May occur not more than once a year, unless the parent and the LEA agree otherwise; and

(2) Shall occur at least once every 3 years, unless the parent and the LEA agree that a re-evaluation is unnecessary.

**2362.2.3 Evaluation Procedures**

(a) The LEA shall provide notice to the parents of a child with a disability in accordance with 2365.1.1 that describes any evaluation procedures the LEA proposes to conduct.

(b) In conducting the evaluation, the LEA shall:

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining:

(i) Whether the child is eligible for special education services; and

(ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining special education eligibility and for determining an appropriate educational program for the child; and

(3) Assess all child characteristics and other factors that may have a significant influence on eligibility, services to be offered or accommodations to be made, including, but not limited to:

(i) Physical characteristics:

(A) Vision

(B) Hearing

(C) Health

(D) Medical

(E) Nutrition

(ii) Social, behavioral, or emotional characteristics:

(A) Self-esteem

(B) Self-control

(C) Interaction with peers and adults

(iii) Adaptive behavior across settings:

(A) Independence skills

(B) Coping skills

(C) Self-care skills

(iv) Relevant life circumstances:

(A) Family

(B) Community

(C) Environmental factors

(v) Speech characteristics:

(A) Articulation

(B) Fluency

(C) Voice

(vi) Language and communication skills

(vii) Intellectual or cognitive characteristics:

(A) Learning abilities

(B) Learning styles

(C) Reasoning

(viii) Areas of concern in the basic skills areas:

(A) Oral expression

(B) Listening comprehension

(C) Written expression

(D) Basic reading skills

(E) Reading comprehension

(F) Mathematics calculation

(G) Mathematics reasoning

(H) Motor skills

(ix) Vocational needs

(x) Skills in the learning environment

(xi) Assistive technology needs related to devices and services

(xii) The EPT shall assess the child's current level of performance in all curriculum areas with respect to which special education, related services and supplementary aids and services may be required.

(4) Ensure that assessments and other evaluation materials used to assess a child are:

(i) Selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer;

(iii) Used for the purposes for which the assessments or measures are valid and reliable;

(iv) Administered by trained and knowledgeable personnel;

(v) Administered in accordance with any instructions provided by the producer of the assessments;

(vi) Those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient; and

(vii) Selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(5) Ensure that assessments of children with disabilities who transfer from one LEA to another LEA in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(6) Ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been found eligible.

(7) Ensure that assessment tools and strategies provide relevant information to directly assist the IEP team in determining that the educational needs of the child are provided.

(c) As part of an initial evaluation (if appropriate) and as part of any re-evaluation under this part, the EPT and other qualified professionals, as appropriate, shall:

(1) Review existing evaluation data on the child, including:

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers.

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:

(i)Whether the child is or continues to be eligible for special education and related services;

(ii) The present levels of academic achievement and related developmental needs of the child; and

(iii) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

(d) The EPT may conduct its review without a meeting.

(1) If a parent requests that the EPT review data through a formal meeting, then a formal meeting with required notices shall be held.

(2) A formal meeting shall be required whenever the initial eligibility of the child will be determined. When a satisfactory agreement on such time or place cannot be reached, the LEA shall use other, mutually agreed upon methods, to ensure parent participation, including individual or conference telephone calls, or video conferencing.

(e) The LEA shall administer such assessments and other evaluation measures as may be needed to produce the data identified under paragraph (c) of this section.

(f) If the EPT determines that no additional data are needed to determine whether the child continues to be eligible for special education and related services, the LEA shall notify the child's parents of:

(1) That determination and the reasons for the determination; and

(2) The right of the parents to request additional testing to determine eligibility.

(i) The LEA is not required to conduct additional testing unless requested to do so by the child's parents.

(g) The LEA shall evaluate a child before determining that the child is no longer eligible for special education and related services, unless the termination of a youth's eligibility is due to graduation from secondary school with a regular diploma, or due to reaching the age of 22.

(1) Under these circumstances, the LEA shall provide the youth with a summary of performance which shall include recommendations on how to assist the youth in meeting the youth's postsecondary goals.

(2) The LEA shall send a notice to the youth and his/her parent(s) that a change of placement is scheduled to occur and give the reasons why.

(h) Prior to conducting an initial or re-evaluation for eligibility purposes, the EPT shall complete a written evaluation plan which lists the areas to be assessed, the procedures to be used in carrying out the evaluation, and personnel by title responsible for performing the evaluations. All EPT members shall have the opportunity to provide input in the development of the written evaluation plan.

**2362.2.4 Additional Procedures for Identifying Children with Specific Learning Disabilities (34 CFR §§300.307-300.311)**

(a) In making the determination that a child has a specific learning disability the LEA shall decide whether to use a discrepancy model or a model based on whether the child responds to scientific, research based intervention.

(1) When using a discrepancy model, the EPT shall document that the child exhibits a discrepancy of 1.5 standard deviations or greater between ability and expected levels of performance in one or more of the basic skill areas.

(2) When using a model based on whether the child responds to scientific, research based intervention the EPT shall document use of the following:

(i) High-quality instruction and scientific research-based tiered interventions aligned with individual child need;

(ii) Frequent monitoring of child progress to make results-based academic decisions; and

(iii) Child's response data to evaluate the effectiveness of interventions.

(b) The determination of whether a child has a specific learning disability shall be made by the EPT, which shall include the following additional members:

(1) The child's general education teacher; or if the child does not have a general education teacher, a classroom teacher qualified to teach a child of his or her age; or

(2) For a child of less than school age, an individual licensed by the Vermont Department of Education to teach a child of his or her age; and

(3) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, special education teacher or remedial reading teacher.

(c) The EPT may determine that a child has a specific learning disability if:

(1) When provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards, the child does not achieve adequately in one or more of the following areas:

(i) Oral expression

(ii) Listening comprehension

(iii) Written expression

(iv) Basic reading skill

(v) Reading fluency skills

(vi) Reading comprehension

(vii) Mathematics calculation

(viii) Mathematics reasoning.

(2) The child does not make sufficient progress to meet age or State approved grade-level standards in one or more of the areas identified in (c)(1) when using either a discrepancy model or a model based on whether the child responds to scientific, research based intervention.

(3) The EPT determines that its findings under paragraphs (c)(1) and (2) of this section are not primarily the result of:

(i) A visual, hearing, or motor disability;

(ii) Learning impairment;

(iii) Emotional disturbance;

(iv) Cultural factors;

(v) Environmental or economic disadvantage; or

(vi) Limited English proficiency.

(d) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the EPT shall consider, as part of the evaluation, the following:

(1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in general education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of a child's progress during instruction, which was provided to the child's parents.

(e) The LEA shall promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and shall adhere to the timeframes described in Rule 2362.2.1 unless extended by mutual written agreement of the child's parents and other members of the EPT if:

(1) Prior to a referral, a child has not made adequate progress after an appropriate period of time when provided scientifically research based instruction/intervention; and

(2) Whenever a child is referred for an evaluation.

(f) At least one member of the child's EPT, other than the child's current teacher, who is trained in observation, shall observe the child, and the learning environment, including the general classroom setting, to document academic performance and behavior in the areas of difficulty.

(1) Children who are enrolled in a program of home study or who receive instruction delivered in a home, hospital, preschool, childcare setting or other out of school setting shall be observed in instructional environments appropriate for children of that age, by trained personnel who are not the teacher. This observation shall be reported in writing to the EPT.

(2) If, after reasonable efforts have been made, it is not possible to conduct a classroom observation due to chronic truancy or other extenuating circumstances, there shall be documentation of efforts made to observe the child in an instructional environment.

**2362.2.5 Evaluation and Planning Team Report**

(a) When all necessary information is collected, the EPT shall prepare a written report that documents whether the child is eligible. When a child is found eligible, the report shall be available for use by the IEP team in program planning. The report shall include the following and shall be provided to the parent by the EPT:

(1) A conclusion supported by a rationale as to whether or not the child is eligible for special education based on the following:

(i) The presence or absence of a disability;

(ii) If there is a disability, whether it has an adverse effect on educational performance in one or more of the basic skill areas; and

(iii) Whether the child needs special education services to benefit from his or her educational program and that this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school.

(2) The evaluation procedures used including:

(i) A Description of any modifications or changes made from the evaluation procedures specified in the evaluation plan; or

(ii) Changes which were necessary in test administration as described in Rule 2362.2.1;

(3) A summary of all educationally relevant information collected during the evaluation, including educational, medical and psychological information and a summary of other factors considered;

(4) Recommendations as to the need for accommodations in curriculum, assessments, material, or programmatic adaptation, behavior management interventions, supplemental aids and services;

(5) The initials of all team members indicating agreement or disagreement with the eligibility conclusion. A group member who does not agree with the conclusion shall submit a separate statement presenting his or her conclusions and this statement shall become part of the Evaluation Plan and Report; and

(6) The written report of an observation of the child, if an observation has been conducted.

(b) For a child suspected of having a specific learning disability, the evaluation report shall include documentation of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with Rules 2362.2.3 and 2362.2.4.

(3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

(4) Any educationally relevant medical findings;

(5) Whether:

(i) The child does not achieve adequately for the child's age or to meet Vermont grade-level standards in one or more of the basic skill areas, when provided with learning experiences and instruction appropriate for the child's age or grade level expectations; and

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, Vermont standards and grade level expectations or intellectual development consistent with the characteristics of a specific learning disability.

(6) The determination of the EPT concerning the effects of visual, hearing, or motor disability; learning impairment; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and

(7) If the child has participated in a process that assesses the child's response to scientific, research-based intervention:

(i) The instructional strategies used and the child-centered data collected; and

(ii) The documentation that the child's parents were notified about:

(A) The amount and nature of their child's performance data that would be collected and the general education services that would be provided;

(B) Strategies for increasing the child's rate of learning; and

(C) The parents' right to request an evaluation.

**2362.2.6 Children Who Are Determined to Have a Disability, But Are Not Eligible for Special Education**

(a) When an EPT determines that a child has a disability, but is not eligible for special education, it shall recommend accommodations, as needed, in such areas as assessment procedures, curriculum, material or programmatic adaptations, behavior management interventions, and supplemental aids and services. These recommendations shall be included in the written Evaluation Plan and Report. The Evaluation Plan and Report for such a child shall be referred to the child's building administrator who shall arrange for a Section 504 Team to consider whether:

(1) The child's disability and needs will require a Section 504 Plan or

(2) The child's needs can be met within the school's standard instructional conditions and through its educational support system.

(b) If the EPT determines that the child has a disability, but is not eligible for special education, it may proceed to operate as a Section 504 team to determine whether the child is eligible for reasonable accommodations under Section 504.

### 2362.2.7 Independent Educational Evaluation (34 CFR §300.502)

An "independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child in question.

(a) Upon completion of a LEA evaluation, a parent may request an independent educational evaluation at public expense if he or she disagrees with the evaluation obtained by the LEA. Except as provided in this rule, the LEA shall either pay the full cost of the requested evaluation, or ensure that the evaluation is otherwise provided at no cost to the parent.

(b) A parent is entitled to only one independent educational evaluation at public expense for each evaluation performed by the LEA with which the parent disagrees.

(c) If a parent requests an independent educational evaluation, the LEA shall, without unnecessary delay, either:

(1) Initiate a hearing to show that its evaluation is appropriate; or

(2) Ensure that an independent educational evaluation is provided at no cost to the parent.

(d) A LEA shall provide to a parent who requests an independent educational evaluation, information about where such an evaluation may be obtained.

(e) Any LEA criteria, under which an independent evaluation may be obtained, including the location of the evaluation and the qualification of the examiner, shall be the same as the criteria that the LEA uses when it initiates an evaluation. Criteria established by a LEA under this section shall not interfere with the parent's right to an independent educational evaluation.

(f) Except as provided in (d) above, timelines or conditions related to obtaining an independent educational evaluation may not be imposed by the LEA.

(g) A LEA may pursue mediation or a due process hearing to demonstrate that an independent educational evaluation obtained by a parent does not meet LEA criteria.

(h) If the LEA initiates a hearing and the final decision is that the district's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at the LEA's expense.

(i) If a parent requests an independent educational evaluation, the LEA may ask for the parent's reason why he or she objects to the district's evaluation. However, an explanation by the parent may not be required, and the LEA may not unreasonably delay either providing the independent educational evaluation at no cost to the parent or initiating a due process hearing to defend the district's evaluation.

(j) A parent is entitled to only one independent educational evaluation at public expense for each evaluation performed by the LEA with which the parent disagrees.

(k) If the parent obtains an independent educational evaluation at public or private expense, the results of the evaluation:

(1) Shall be considered by the LEA's EPT, if the evaluation meets the district's criteria, whenever it makes any decision with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing regarding the child.

(l) If a hearing officer requests an independent educational evaluation as part of a hearing, the LEA is responsible for ensuring that the independent evaluation is completed at no cost to the parent.

## 2363 Individualized Education Programs (IEP)

### 2363.1 Individualized Education Programs (34 CFR §300.320)

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 rule and includes:

(a) A description of all special education services, related services, and supplementary aids and services that the child will need to be able to derive benefit from his or her educational program;

(b) A description of the special education program; and

(c) Accommodations and/or modifications necessary for the child to progress in the general education curriculum.

### 2363.2 Timelines (34 CFR §300.323)

An IEP shall be:

(a) Developed within thirty days of an initial determination that the child is eligible for special education and related services;

(b) Revised, as appropriate, to address the results of any re-evaluation for special education and related services.

(c) In effect before special education and related services are provided to the child;

(d) In effect at the beginning of each school year unless the child has been determined to be eligible within 30 days prior to the first day of school, in which case subparagraph (a) above applies; and

(e) Implemented as soon as possible following the IEP meeting.

### 2363.3 Responsibility of LEAs for IEPs

Except as otherwise provided by these rules, each LEA shall ensure that an IEP is developed and implemented by the responsible LEA for each eligible child residing and attending public school in that district.

**2363.4 IEP Team (34 CFR §300.321)**

(a) The LEA shall ensure that the IEP team for each eligible child includes:

(1) A local education agency representative (LEA Representative) 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 curriculum;

(iii) Is knowledgeable about the availability of resources of the LEA;

(iv) An LEA representative may designate any LEA personnel member of the IEP Team to also serve as the LEA representative, if the criteria in subsections (i), (ii) and (iii) are satisfied; and

(2) Not less than one special education teacher of the child, or if appropriate, not less than one special education service provider for the child;

(3) Not less than one general education teacher of the child, to the extent appropriate, if the child is, or may be, participating in the general education environment. The teacher shall, to the extent appropriate, participate in the development of the IEP of the child including the determination of appropriate positive behavioral interventions and strategies, supplementary aids and services, program modifications, supports for school personnel that will be provided to allow the child an opportunity for participation and progress in the general curriculum and the attainment of annual IEP goals;

(4) At the discretion of the parent or the LEA, other individuals who, in the opinion of the parents or LEA, have knowledge or special expertise regarding the child, including related services personnel, as appropriate;

(5) An individual who can interpret the instructional implications of evaluation results, who also may be a member of the team as described in sections (1), (2), (3) and (4) above;

(6) The parent(s), guardian or educational surrogate parent of the child;

(7) If appropriate, the child;

(8) In the case of a child with a specific learning disability, at least one person qualified to conduct individualized diagnostic examinations of children, such as a school psychologist, speech-language pathologist, special education teacher, or remedial reading teacher: and

(9) In the case of a child previously served under the Children's Integrated Services/Early Intervention Program (Part C), at the request of the parent, the Part C service coordinator or other representatives of the Part C system may be invited to assist in the smooth transition of special education services. Parents shall be notified of their right to request such an invitation.

(b) Additional participants when the transition services of the child will be discussed.

(1) Not later than the IEP to be in effect when a youth is age 16 (or younger, if determined appropriate by the IEP team), the LEA shall continue inviting the youth to attend his/her IEP meetings to discuss transition services.

(2) If the youth does not attend the IEP meeting when invited, the LEA shall take other steps to ensure that the youth's preferences and interests are considered.

(3) In implementing the requirements with respect to transition services, the LEA also shall invite a representative of any other agency that is likely to be responsible for providing or paying for such services.

(4) If an agency invited to send a representative to a meeting does not do so, the LEA shall take other steps to obtain participation of the other agency in the planning of any transition services.

(c) IEP Team attendance

(1) A member of the IEP Team is not required to attend an IEP meeting, in whole or in part, if the parent of the child and the local educational agency agree, in writing, that the attendance of such member is not necessary because the member's area of curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the parent and local education agency agree, in writing, that a team member may be excused from the IEP meeting in which the member's area of curriculum or related services is being discussed. This agreement requires that the excused member submit, in writing to the parent and IEP Team, their input into the IEP development prior to the IEP meeting.

(d) Decisions by the IEP team

If the team cannot reach consensus, the LEA Representative shall determine the contents of the IEP pursuant to Rule 2363.8 and shall notify the parents of their rights to revoke consent pursuant to Rule 2363.9(e), seek mediation, file an administrative complaint or request a due process hearing.

**2363.5 Parent Participation in IEP Meeting (34 CFR §300.322)**

(a) Each LEA shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including:

(1) Notifying the parents of the meeting early enough that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed upon time and place.

(i) The LEA shall schedule meetings with parents at a mutually agreed upon time and place. When a satisfactory agreement on such time or place cannot be reached, the district shall use other, mutually agreed upon methods to ensure parent participation, including individual or conference telephone calls, or video conferencing.

(ii) When the district is unable to arrange the parents' participation, the district shall convene the IEP meeting to meet its obligation to provide appropriate services to the child as set forth in rule 2363.2 of this section.

(b) A meeting may be conducted without a parent in attendance, if the LEA is unable to convince the parent to attend. Under these circumstances, the LEA shall maintain a record of at least three attempts to arrange a mutually agreed upon time and place, such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence including emails sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(c) The LEA shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English.

(d) When the youth reaches age 17, the LEA shall notify the parent and the youth that at age 18, the youth, unless he/she is under guardianship, will become an adult under Vermont law. At that time, the LEA shall send a notice to the youth of his/her IEP meetings. The parent shall be given a copy of the notice unless the youth is incarcerated. When a youth becomes an adult, the parents may attend an IEP meeting at the discretion of the youth pursuant to Rule 2363.4(a)(4).

(e) A teacher or parent may request an IEP meeting at any time when they believe a component of the IEP should be changed. When the LEA receives the request:

(1) The LEA shall convene a properly notified IEP meeting within 30 days of receipt of the request, not counting days between the child's regular school sessions or days of school vacation in excess of 5 school days, or

(2) Refuse to convene an IEP meeting and shall provide written notice to the parent explaining why the LEA has concluded a meeting is not necessary to ensure the provision of FAPE to the child.

(3) The LEA's notice shall inform the parent of his or her right to initiate a due process hearing if the parent disagrees with the LEA's decision not to convene a meeting under this subsection.

**2363.6 Notice of IEP Meeting (34 CFR §300.322(b))**

(a) A notice of an IEP meeting shall:

(1) Indicate the purpose, time, and location of the meeting;

(2) State who will be in attendance; and

(3) Inform the parents of the right of the LEA and the parents to invite other people who, in their opinion, have knowledge or special expertise about the child.

(b) Beginning not later than the first IEP to be in effect when the youth is age 16, or younger if appropriate, for a youth with a disability the notice shall advise the parents and youth of the requirements of Rule 2363.4(b).

**2363.7 Development, Review, and Revision of IEP (34 CFR §300.324)**

(a) In the development, review, and revision of an IEP, the IEP team shall consider:

(1) The strengths of the child and the concerns of the parent for enhancing the education of their child;

(2) The results of the initial or most recent evaluation of the child;

(3) As appropriate, the results of the child's performance on any general State or district-wide assessment programs; and

(4) The academic, developmental, and functional needs of the child

(b) The IEP team shall also consider the following special factors:

(1) In the case of a child with limited English proficiency, the language needs of the child as those needs relate to the child's IEP;

(2) In the case of a child who is blind or visually impaired, provision for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(3) The communication needs of the child, and in the case of a child who is deaf or hard of hearing, the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode;

(4) Whether the child requires assistive technology devices and services.

(5) When the evaluation data indicates that the child’s behavior is impeding his or her learning or the learning of others, positive behavioral interventions and supports, and other strategies to address the behavior and to assist the child to develop skills in areas such as:

(i) Social skills;

(ii) Anger management; and/or

(iii) Conflict resolution.

(6) Supplementary aids and services, program modifications or supports for the child or school personnel who will be working with the child to help him/her:

(i) Attain IEP annual goals;

(ii) Progress in the general curriculum;

(iii) Participate in extra-curricular activities; and

(iv) Be educated in the least restrictive environment.

(7) Whether a child needs a particular device or service, including an intervention, accommodation, or other program modification, in order for the child to receive a FAPE.

(c) Each LEA shall ensure that the IEP team:

(1) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(2) Revises the IEP as appropriate to address:

(i) A lack of expected progress toward the annual goals;

(ii) A lack of expected progress in the general curriculum, if appropriate;

(iii) The results of any re-evaluation;

(iv) Information about the child provided to, or by, the parents;

(v) The child's anticipated needs; or

(vi) Other matters.

(3) In making changes to the IEP, after the annual review meeting, the parent of the child and the school may agree, in writing, not to convene an IEP meeting for the purpose of making such changes and, instead, may develop a written document to amend or modify the child's current IEP.

(i) Parents shall be given a copy of the written agreement document.

(d) To the extent possible, schools shall encourage the consolidation of re-evaluation meetings and other IEP meetings for the child.

### 2363.8 Content of IEP (34 CFR §300.320)

An IEP that contains information under one component need not repeat the same information under another component. The IEP for each child with a disability shall include:

(a) A statement of the child's present levels of academic achievement and functional performance, including:

(1) The child's abilities, acquired skills, and strengths;

(2) How the child's disability affects the child's involvement and ability to make progress in the general curriculum; or

(3) For preschool children, how the disability affects the child's participation in activities appropriate for the child;

(4) For youth, not later than one year before the youth reaches the age 18, a statement that the youth has been informed of their rights under these regulations that will transfer to them upon reaching the age of majority (18)

(b) Measurable annual goals related to the child's present levels of academic and functional performance which shall:

(1) Be written as measurable short-term objectives or benchmarks with projected dates for accomplishment, including a description of the evaluation procedures to be used to measure the child's progress towards meeting the short-term objectives or benchmarks;

(2) Enable the child to be involved in and progress, to the extent appropriate, in the same curriculum as children without disabilities. For preschool children, goals shall include participation in activities appropriate for children without disabilities;

(3) Enable the child to meet other educational needs that result from his or her disability;

(4) Be accompanied by a method of reporting the child's progress to the parents at least as often as other parents in the school receive progress reports. A progress report shall inform parents of:

(i) Their child's progress toward the annual goals; and

(ii) The extent to which the progress is sufficient to enable the child to achieve the goals by the end of the year.

(c) Special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of individual accommodations, program modifications, or supports that will be provided for school personnel to enable the child:

(1) To advance appropriately toward attaining his or her IEP annual goals;

(2) To be involved in and progress in the general curriculum, to participate in extra-curricular and other non-academic activities and in physical education services pursuant to the requirements in Rule 2360.2(f).

(3) To be educated and participate with a variety of children who do and do not have disabilities.

(d) The projected date for the beginning of the services and modifications, the title of the service provider, anticipated frequency, location, and duration of those services and modifications;

(e) The IEP Team shall determine the child's placement in accordance with Rule 2364.3. The IEP shall also include an explanation of the extent, if any, to which the child will not participate with children without disabilities in a general education class, general curriculum, extracurricular and other non-academic activities;

(f) Where the child's placement is a residential placement pursuant to Rule 2366.9, the child's IEP shall contain annual goals and short-term objectives or benchmarks designed to

reintegrate the child into a local LEA placement, and a description of how they will lead to reintegration.

(g) A statement of any individual accommodations in the administration of State, district-wide, or local assessments of student achievement that are needed in order for the child to participate in the assessment;

(1) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of:

(i) Why that assessment is not appropriate for the child; and

(ii) How the child will be assessed.

(h) A description of any extended school year services (ESY) which the IEP team finds are necessary to provide a FAPE to the child.

(1) ESY services shall be provided only if a child's IEP team determines that the services are necessary for the provision of FAPE to the child because one or more of the following factors is evident:

(i) ESY is essential to permit the child an opportunity to reach reasonably set educational goals;

(ii) There has been a significant amount of regression over the past winter, spring and summer vacations and recoupment did not occur within a reasonable amount of time;

(iii) The severity of the child's disability presents a danger of substantial regression; or

(iv) The youth's transition goals require continued programming beyond the school year IEP.

(2) A LEA or IEP team may not limit extended school year services to children with particular disabilities.

(3) A LEA shall not adopt a policy that limits the type, amount, or duration of ESY services for all children.

(i) Transition services

(1) For youth, beginning with the first IEP in effect when the youth is 16, or younger if determined appropriate by the IEP team, and updated annually thereafter, there shall be:

(i) Age appropriate and measurable postsecondary goals based upon age appropriate assessments related to:

(A) Education/training;

(B) Employment; and

(C) If appropriate, independent living;

(ii) Evidence that the youth's interests and preferences were taken into consideration during the formulation of the goals; and

(iii) Transition services, including courses of study, needed to assist the youth in reaching those goals.

(2) Contingent upon prior consent from the parent or adult student, representatives of any agency that is likely to be responsible for providing or paying for transition services to implement the goals, shall be invited to participate in the IEP meeting.

(3) If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the youth set out in the IEP.

(4) Nothing in these regulations shall relieve any participating agency of the responsibility to provide or pay for any transition service that the agency would otherwise provide to youth with disabilities who meet the eligibility criteria of that agency.

(5) When a youth is going to graduate, a "summary of performance" report shall be written for the youth as described at Rule 2362.2.3(g).

**2363.9 Consent to Initial Provision of Special Education Services (34 CFR §300.300(b))**

(a) A consent form shall be signed by the parent and received by the LEA prior to the initial provision of IEP services.

(b) If the parent of a child fails to respond or refuses to consent to services the LEA may not use due process procedures or mediation in order to obtain agreement or a ruling that the services may be provided to the child.

(c) If the parent of the child refuses to consent to the initial provision of special education or related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the LEA:

(1) Will not be considered to be in violation of the requirement to make available a free, appropriate public education to the child for the failure to provide the child with the special education and related services for which the LEA requests consent.

(2) Is not required to convene an IEP meeting or develop an IEP for the child for the special education and related services for which the LEA requests such consent.

(d) If the parent provides written consent for the initial provision of IEP services before they have begun and then revokes the consent, the services shall not commence. The child shall remain eligible for services and the LEA may attempt to resolve the matter with the parent by:

(1) Discussing the matter through appropriate informal means,

(2) Requesting mediation, or

(3) Requesting that the child be re-evaluated to determine if he or she continues to be eligible for special education services. A re-evaluation could consist of a review of existing data.

(e) A parent may revoke consent at any time subsequent to the initial provision of special education and related services. The revocation of consent shall be in writing, on a form provided by the LEA or in any other written form, and should indicate the date of revocation. Upon receipt of such a revocation of consent, the LEA:

(1) Shall provide prior written notice to the parent that it is ceasing the provision of special education and related services and then may not continue to provide special education and related services;

(2) May not use due process procedures or mediation in order to obtain agreement or a ruling that the services may be provided to the child;

(3) Will not be considered to be in violation of the requirement to make available a free, appropriate public education to the child for the failure to provide the child with the special education and related services for which the LEA requests consent; and

(4) Is not required to convene an IEP Team meeting or develop an IEP for the child after the date of the revocation of consent.

Revocation of consent is not retroactive and the LEA is not required to amend the child's education records to remove any references to the child's prior receipt of special education services.

**2363.10 Distribution and Explanation of the IEP Document (34 CFR 300.323(d))**

(a) The child's IEP shall be made accessible to each general education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation; and

(b) Each teacher and provider described above shall be informed of:

(1) His or her specific responsibilities related to implementing the child's IEP; and

(2) The specific accommodations, modifications, and supports that shall be provided for the child in accordance with the IEP.

(c) The LEA shall give the parent a copy of the child's IEP, or amended portions of the IEP, at no cost to the parent.

**2363.11 IEP Requirements for Placements by LEAs in Independent Schools or Tutorial Programs (34 CFR §300.325)**

(a) Before a LEA places a child t eligible for special education services in, or refers a child to, an independent school, or a tutorial program, the LEA shall initiate and conduct a meeting to develop an IEP for the child that reflects the change in placement.

(b) The LEA's placement shall be at no cost to the parents and the independent school or tutorial program shall provide an education that meets the standards that apply to education provided by the local LEA.

(1) Placements by LEAs in independent schools shall be in schools that have been approved according to Rule 2228.

(2) Placements by LEAs in tutorial programs shall be in programs that have been approved according to Rule 2230.

(c) The LEA shall ensure that a representative of the independent school or tutorial program either attends the meeting or is able to participate by other methods including individual or conference telephone calls.

(d) After a child with a disability enters an independent school or a tutorial program, any meetings to review and revise the child's IEP may be initiated and conducted by the school or tutorial program in accordance with the written agreement as entered into in conformance with Rule 2228.4.2. If the independent school or tutorial program initiates and conducts these meetings, the LEA shall ensure, to the extent required by Rule 2363.5, that a LEA Representative is involved in any decision about the child's IEP and agrees to any proposed changes in the IEP before those changes are implemented. Parent participation shall be required and documented as set forth in Rule 2363.5.

(e) When an independent school or a tutorial program implements a child's IEP, responsibility for compliance with the special education regulations with respect to that child remains with the LEA.

(f) A child placed in an independent school or a tutorial program by a LEA shall retain all of the rights of a child on an IEP who is attending a public school.

**2363.12 IEP For A Child Moving Into The LEA When The Child Has Been Eligible Or Was Being Evaluated For Special Education In Another State Or In Another Vermont LEA (34 CFR §300.323(e) and (f))**

(a) Child Moving From Another Vermont LEA — If a child eligible for special education services moves from one Vermont LEA to another, the receiving LEA shall either adopt the IEP the former LEA developed for the child or develop a new IEP for the child. The receiving LEA shall implement the current IEP to the extent possible until a new IEP is developed. In the absence of exceptional circumstances, IEP services shall commence within one week of the time the child enrolls in the receiving LEA.

(b) Child Moving From an Out-Of-State LEA — If a child eligible for special education services in another state moves into a Vermont LEA within the same school year, the receiving LEA, in consultation with the parent, shall provide a FAPE to that child, including services comparable to those described in the child's IEP from the previous school, until the Vermont LEA:

(1) Conducts an evaluation to determine initial eligibility in Vermont; and

(2) If eligible, develops, adopts, and implements a new IEP.

(c) Child Moving During an Evaluation Process – If a child transfers to another LEA within the state or moves into a Vermont school from out of state, the completion of the evaluation shall be coordinated and completed by the new school, including documentation with the parents of the child of the expected completion date of the evaluation should it differ from the original expected date of completion. This evaluation should be completed as expeditiously as possible.

(d) To facilitate the transition of a child described in (a) and (b) of this rule the previous LEA and the child's new LEA shall take reasonable steps to promptly send and receive, in accordance with the provisions of FERPA, the child's records, including the IEP, supporting documents and any other records relating to the child's special education and related services. This rule may not be interpreted to limit either the previous LEA or the new LEA's responsibilities pursuant to Rule 2365.2.13(a).

**2363.13 IEP Accountability**

(a) Each LEA shall:

(1) Provide special education and related services to an eligible child in accordance with the child's IEP; and

(2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

(b) These rules do not require that a LEA, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives. However, these rules do not prohibit a LEA from establishing its own accountability systems.

(c) Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that the efforts required in paragraph (a) of this section are not being made.

**2364 Least Restrictive Environment (LRE)**

**2364.1 General LRE Requirements (34 CFR § 300.114)**

(a) Each LEA shall ensure that:

(1) A child eligible for special education services shall be educated with his or her non-disabled chronological age peers, to the maximum extent appropriate in the school he or she would attend if he or she did not have a disability; and

(2) Special classes, separate schooling or other removal of children with disabilities from the general educational environment shall occur only if the nature or severity of the child's disability is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(b) Pursuant to 16 V.S.A § 2959b, the IEP team may consider the cost of the provision of special education or related services to the child if:

(1) The IEP has been developed with the parents in accordance with Rules 2363 - 2363.9;

(2) The IEP team has determined that the child's placement contained in the IEP is appropriate for the child,

(3) Each of the options under consideration by the IEP team for fulfilling the requirements of the child's IEP would constitute a free appropriate public education in the least restrictive environment for the child, and

(4) The funding mechanism for the special education service was not used to deny a free appropriate public education to the child.

**2364.2 Continuum of Alternative Placements (34 CFR § 300.115)**

(a) Each LEA shall ensure that a continuum of alternative placements is available to meet the needs of children who are receiving IEP services.

(b) The continuum shall include:

(1) Instruction in general education classes, special classes, special schools, independent schools, home instruction and instruction in hospitals, and residential facilities; and

(2) Provisions for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with general education class placements.

**2364.3 Placements (34 CFR § 300.116)**

(a) The IEP team shall determine the educational placement for the child given the following:

(1) Educational placement refers to the provision of special education and related services rather than a specific site;

(2) If consensus cannot be reached, the LEA determines the specific site of the educational placement, such as the specific classroom or specific school.

(b) Placement decisions shall be made on the basis of the child’s individual circumstances and not on the basis of the child’s disability category.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he or she would attend if nondisabled.

(d) Barriers to the participation of children with disabilities in the general education environment shall be addressed whenever possible by the provision of accommodations, modifications, and supplementary aids and services rather than by placement in separate programs.

(e) A child with a disability shall not be removed from education in age-appropriate general classrooms solely because of needed modifications in the general curriculum.

(f) In selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that he or she needs.

(g) The placement decided upon shall be:

(1) Determined at least annually;

(2) Consistent with the other provisions of the child's IEP; and

(3) As close as possible to the child's home, unless the parent agrees otherwise.

**2364.4 LRE for Non-Academic and Extra-curricular Activities (34 CFR § 300.117)**

(a) In providing or arranging for the provision of non-academic (examples: meals and recess periods) and extra-curricular services and activities as set forth in Rule 2360.2(i), the LEA shall ensure that an eligible child participates with non-disabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(b) The LEA shall ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in non-academic and extra-curricular activities.

**2364.5 Technical Assistance, Training and Monitoring Activities for LRE (34 CFR § 300.119-120)**

(a) The Vermont Department of Education shall:

(1) Provide training and technical assistance to teachers and administrators in public and independent schools approved for the provision of special education services to assist them in implementing the LRE requirements in Rule 2364.

(2) Monitor a LEA's compliance with LRE requirements in Rule 2364. If there is evidence that a LEA makes placements that are inconsistent with LRE requirements, the Department shall—

(i) Review the LEA's justification for its actions;

(ii) Assist in planning and implementing any necessary corrective action; and

(iii) Apply as necessary the enforcement policy and procedures contained in the Vermont State Board of Education policy on "Denial of Federal Special Education Funds to A LEA."

**2364.6 Instruction for Homebound or Hospitalized Special Education Children**

(a) Children who are eligible for essential early education services who are homebound or hospitalized due to a medical condition and are unable to access the services outlined in their current IEP shall receive direct instruction as determined by the child's IEP team unless inconsistent with medical recommendations.

(b) Homebound or hospitalized elementary special education children and elementary special education children whose IEPs call for tutorial services outside school shall receive instruction sufficient to provide a FAPE pursuant to their IEPs, for no less than six hours per week unless inconsistent with medical recommendations.

(c) Homebound or hospitalized secondary special education youth and secondary special education youth whose IEPs call for tutorial services outside school, shall receive instruction sufficient to provide a FAPE pursuant to their IEPs for no less than an average of two hours per subject per week unless inconsistent with medical recommendations.

## 2365 Parental Rights and Confidentiality of Information

### 2365.1 Parental Rights

#### 2365.1.1 Prior Written Notice (34 CFR §300.503)

The LEA shall provide written notice to the parent or guardian of a child within a reasonable time before it proposes to initiate or change, or refuses to initiate or change a child's identification, evaluation, educational placement or the provision of a free appropriate public education. This written notice shall contain:

(a) A description of the action proposed or refused by the agency;

(b) An explanation of why the LEA proposes or refuses to take the action;

(c) A description of other options the IEP team considered and reasons these options were rejected;

(d) A description of evaluation procedures, tests, records, or reports upon which the action is based;

(e) A description of other factors that are relevant to the proposed or refused action;

(f) A statement that the parents of special education children have procedural protections as set forth in the Parental Rights in Special Education Notice developed by the Department and, if this notice is not pertaining to an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(g) Sources for parents to contact to obtain assistance in understanding the provisions of their parental rights in special education; and

(h) The prior written notice shall be—

(1) Written in language understandable to the general public; and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(3) If the native language or other mode of communication of the parent is not a written language, the LEA shall take steps to ensure--

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (i) and (ii) of this section have been met.

(4) Available to the parent by electronic mail, if the LEA makes that option available and the parent elects to receive notices through this mode of communication.

**2365.1.2 Procedural Safeguards Notice (34 CFR §300.504)**

(a) A copy of the Parental Rights in Special Education Notice is required to be given to parents only one time per year, except that a copy shall also be given to parents upon:

(1) Initial referral or parent request for an evaluation;

(2) Receipt of the first administrative complaint under Rule 2365.1.5 or a request for mediation under Rule 2365.1.4(d) or a due process complaint under Rule 2365.1.6 in that school year;

(3) Request by a parent; and

(4) In accordance with the discipline procedures in Rule 4313.1(h).

(b) The Parental Rights notice includes a full explanation of all of the procedural safeguards available to the parent as they relate to:

(1) Independent educational evaluation;

(2) Prior written notice;

(3) Parental consent;

(4) Access to educational records;

(5) The opportunity to present and resolve complaints through the due process complaint and administrative complaint procedures, including--

(i) The time period in which to file a complaint;

(ii) The opportunity for the agency to resolve the complaint; and

(iii) The difference between the due process complaint and the State administrative complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

(6) The child's placement during pendency of due process complaint proceedings;

(7) Procedures for children who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private independent schools at public expense;

(9) The availability of mediation;

(10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;

(11) Civil actions including the time period in which to file those actions; and

(12) Attorneys' fees.

(c) The Parental Rights notice shall be:

(1) Written in language understandable to the general public;

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the LEA shall take steps to ensure:

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that (i) and (ii) above have been met.

### 2365.1.3 Parental Consent

(a) Informed parental consent shall be required:

(1) Before conducting an initial evaluation or re-evaluation which consists of more than a review of existing data pursuant to Rule 2362.2.3(b)(1)(i);

(2) Before the initial provision of special education and related services pursuant to Rule 2363.9. Consent for initial evaluation may not be construed as consent for initial provision of special education services.

(b) Consent, where given,

(1) Shall be after 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.

(2) Shall be in writing and shall indicate that it is given voluntarily with the knowledge that it may be revoked at any time, with the understanding that the revocation is not retroactive;

(c) Parental consent is not required:

(1) Before reviewing existing data as part of an evaluation or a re-evaluation;

(2) Before administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children; or

(3) Before a re-evaluation, if the LEA can demonstrate that it has taken reasonable measures to obtain consent and the parent failed to respond.

(d) If the parents of a child refuse consent for an initial evaluation or a re-evaluation which includes the gathering of new information:

(1) The LEA may continue to pursue these evaluations by seeking mediation, using due process, or reviewing existing data.

(2) The LEA may decide not to pursue the evaluation and shall document its justification for doing so in the child's record.

(3) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the LEA may pursue the initial evaluation of the child by utilizing mediation or due process. The public school shall not have violated its obligation to locate, identify, and evaluate children suspected of being children with disabilities if it declines to pursue an evaluation to which a parent has failed to consent.

(e) Except as otherwise provided in these regulations, a LEA may not use a parent's refusal to consent to an initial evaluation to deny the parent or child any LEA service, benefit, or activity outside of special education.

### 2365.1.4 Mediation

(a) A mediation process administered by the Commissioner shall be available to parents of children with disabilities, LEAs and other public agencies with a special education dispute, including matters arising prior to the filing of a due process complaint.

(b) The mediation process shall be voluntary on the part of the parties and shall not be used to deny or delay a parent's right to file a due process complaint or right to a due process hearing or any other rights. Mediation may be terminated at any time by any of the parties or by the mediator.

(c) The Commissioner shall provide the services of mediators at no cost to the parties.

(d) Written requests for mediation shall be submitted to the Vermont Department of Education, Special Education Mediation Service (VDE-SEMS), 120 State Street, Montpelier, Vermont 05620-2501. Upon receipt of such request, the Department shall send each parent who requests mediation the Parents' Rights in Special Education Notice and shall send its mediation procedures to all parties to the mediation. The agreement to mediate shall be in writing on a form approved by the Commissioner and signed by all parties. If the request cannot be in writing due to special circumstances, such as an inability to communicate in writing, the request may be made through other means of communication.

(e) The Department of Education shall maintain a list of qualified and impartial mediators who are trained in effective mediation techniques.

(f) Mediators shall:

(1) Be knowledgeable in law and regulations relating to the provision of special education and related services.

(2) Not be employees of the Department, a LEA or any other public agency that is involved in the education or care of the child and shall not have any personal or professional conflicts of interest.

(3) Be assigned to a case by the Commissioner on a random, rotational, or other impartial basis from the list.

(4) Be assigned to a case by the Department no later than five days from receipt of a joint written request for mediation or upon receipt of one party's written request and telephone or other confirmation by the other party or parties.

(g) Each party to mediation shall ensure that a person in attendance has decision-making authority for the party.

(h) Parents may be accompanied and advised at the mediation by an attorney, an advocate, a support person, and/or family members, however, they may not be represented by a non-attorney. If the parents plan to be represented by an attorney at mediation, they shall notify the LEA prior to the mediation. LEAs may be represented by an attorney at mediation only when the parents are represented by an attorney at mediation.

(i) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties. If the mediation was initiated subsequent to the initiation of a due process of the same matter, but not after the resolution period in Rule 2365.1.6.8(b) has lapsed, the due process timeline of Rule 2365.1.6 shall commence following the end of the resolution period.

(j) The parties to mediation shall be required to sign an Agreement to Mediate including a confidentiality clause prior to the commencement of the mediation to ensure that all discussions that occur during mediation remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding, except pursuant to subsection (k)(1) of this section.

(k) If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

(1) States that all discussions that occurred during the mediation process will remain confidential; the mediator shall not be called as a witness in any future due process proceeding to testify regarding any information gained during the course of mediation. Any statements made at the mediation shall not be used as evidence in any subsequent due process hearing or civil proceeding arising from that dispute; however, signed mediation agreements may be released for the purpose of enforcement thereof in a due process proceeding or court of competent jurisdiction; and

(2) Is signed by the parent, a representative of each other party who has the authority to bind such party and the mediator. The mediation agreement shall be confidential unless otherwise agreed upon; however, a copy shall be provided to the Vermont Department of Education.

(3) Is enforceable in a due process proceeding, any state court of competent jurisdiction or in a district court of the United States.

(l) The mediation agreement shall become a part of the child's educational record or the parties shall, at minimum, reference relevant provisions of the mediation agreement in the child's IEP.

## 2365.1.5 Administrative Complaints

(a) Any person or organization alleging that a LEA or public agency has violated a requirement of Part B of the IDEA or implementing federal or state special education regulations, may file a signed written complaint with the Commissioner of Education.

(b) The complaint may be filed utilizing the available state form, or other form, and shall include--

(1) A statement that a public agency has violated a requirement of Part B of the IDEA;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations against a specific child--

(i) The name, age and address of the residence of the child;

(ii) The name of the school the child is attending;

(iii) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(iv) A description of the nature of the problem of the child, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) Except for due process complaints covered under Rule 2365.1.6, the complaint shall allege a violation that occurred not more than one year prior to the date that the complaint is received.

(d) The party filing the complaint shall forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the Commissioner of Education.

(e) The Commissioner will not accept a complaint that fails to comply with (b) through (d).

(f) Upon receipt of a complaint, the Commissioner shall inform the complainant and the LEA of the option to use mediation. The Commissioner shall appoint a complaint investigator to conduct an investigation.

(1) The complaint investigator shall examine evidence presented on behalf of the complainant and on behalf of the LEA.

(2) At the discretion of the complaint investigator, the complaint may be investigated by way of a document review, meeting, hearing, on-site investigation, or any combination thereof. The complaint investigator will give the LEA the opportunity to respond to the complaint and at the LEA's discretion, the opportunity to respond with a proposal to resolve the complaint. Once the Commissioner notifies the complainant that s/he has

received the complaint, the investigator will give the complainant 15 days to submit additional information either orally, or in writing about the allegations in the complaint.

(3) If a hearing is scheduled, the complaint investigator shall have the powers and duties set forth below:

(i) Conduct pre-hearing conferences;

(ii) Conduct any hearings that may be required;

(iii) Prepare proposed findings of facts and conclusions of law for a decision by the Commissioner; and

(iv) Any other powers and duties set forth in State Board of Education Rule 1236.1.

(4) No later than sixty days after receipt of the complaint, the Commissioner shall issue a written decision regarding each allegation opened by the complaint investigator. This time limit may be extended only if exceptional circumstances exist with respect to a particular complaint or if the complainant and the LEA agree to extend the time to engage in mediation.

(g) If the Commissioner determines that the LEA has violated a requirement of Part B of the IDEA or implementing federal or state special education regulations, the investigation report shall address how to remediate the violation as well as any resulting denial of those services, including, as appropriate, requiring the evaluation planning team or IEP team to reconvene to reconsider an evaluation determination or offer of special education and related services, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child, as well as appropriate future provision of services for all children with disabilities.

(h) Administrative Complaints filed under this rule and due process hearings filed under Rule 2365.1.6 are subject to the following:

(1) If a written complaint is received that is also the subject of a due process hearing or subsequent appeal, or contains multiple issues, of which one or more are part of that hearing, the Commissioner shall set aside any part of the complaint that is being addressed in the due process hearing or appeal until the conclusion of the hearing or appeal. However, any issue in the complaint that is not a part of the due process action shall be resolved using the time limit and procedures described above.

(2) If the subject of an administrative complaint filed under this rule has previously been decided in a due process hearing involving the same parties:

(i) The due process hearing decision is binding; and

(ii) The Commissioner shall inform the complainant to that effect.

(3) If a parent, who prevailed at a due process hearing, files an administrative complaint alleging that a LEA failed to implement the hearing officer's decision, the Commissioner shall resolve the complaint.

(i) The Commissioner's written decision in subsection (f)(4) is not subject to appeal. Nothing herein shall be interpreted to preclude a parent or a LEA from filing a due process complaint on any matters regarding the identification, evaluation, or placement of the child or the provision of a FAPE pursuant to Rule 2365.1.6.2. If a parent or LEA files a due process complaint pursuant to Rule 2365.1.6.2 and the matter was previously the subject of an administrative complaint, the hearing officer will hear the case de novo (anew).

(j) A complaint may also be filed regarding provision of Part C of the IDEA. Investigation of a Part C complaint shall be completed in coordination with the Agency of Human Services, Department of Health, Child Development Division. A written complaint should be sent to the Part C Coordinator of Children's Integrated Services/Early Intervention at 103 S. Main Street, Waterbury, Vermont 05671-0204.

## 2365.1.6 Due Process Complaint Procedures

### 2365.1.6.1 Timeliness of Due Process Complaint Request

(a) A written due process complaint notice shall be filed with the Commissioner:

(1) Within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.

(2) Notwithstanding (1) above, within 90 days of a unilateral special education placement by the child's parent, where the request is for reimbursement of the costs of such placement.

(3) Exceptions to the timeline. The timelines described in (i) and (ii) of this section do not apply to a parent if the parent was prevented from filing a due process complaint due to:

(i) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(ii) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

(4) Where the parent has not been given proper notice of special education rights under state and federal law, including notice of the limitations in this section, such limitations shall run from the time notice of those rights is properly given.

(5) With same day notification to the LEA pursuant to rule 2365.1.6.3.

### 2365.1.6.2 Initiation of Due Process Hearing by a Parent, LEA, or the Commissioner

(a) The Commissioner shall make available a model form for a parent or LEA to use to initiate a due process complaint. However, the Commissioner may not require the use of this model form. If the parent or LEA uses a document other than the model form, that document shall meet the content requirements for filing a due process complaint in subsection (c).

(b) A parent or LEA may file a due process complaint on any matters regarding the identification, evaluation, or placement of the child or the provision of a free appropriate

public education by sending a written Due Process Complaint Notice to the Commissioner with a copy sent to the other party. If the notice cannot be in writing due to special circumstances, such as an inability to communicate in writing, the notice may be made through other means of communication.

(c) The party requesting a hearing shall submit the written due process complaint to the Commissioner and to all other parties, which shall contain the following information:

(1) The name and age of the child;

(2) The address of the residence of the child; in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child;

(3) The name of the school the child is attending;

(4) A description of the nature of the problem relating to the proposed, or refused initiation or change of the child's identification, evaluation, and/or educational placement, and the facts relating to the problem; and

(5) A proposed resolution of the problem to the extent known and available to the complainant at the time.

(d) A party may not have a hearing on a due process complaint or engage in a resolution session until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (c) of this section.

(e) The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the complaint filed, unless the other parties agree otherwise.

(f) The Commissioner may request a due process hearing in accordance with 16 V.S.A. §2958(c)(1) to challenge the need for residential placement where the residential placement review team recommends that a less restrictive educational placement is both available and appropriate for a child who is eligible for special education services.

(g) If a parent requests the information or if a due process complaint notice is received, the Commissioner shall inform the parent of any free or low-cost legal and other relevant services available in the area.

### 2365.1.6.3 Notification by Commissioner to LEA of Receipt of Request for Hearing

If the due process complaint is initiated by a parent, the Commissioner shall within 24 hours notify the LEA by facsimile transmission, telephone or electronic mail, confirmed in writing by first class mail. Notification to the LEA by the Department shall be made specifically to the special education administrator, if the LEA has a special education administrator on staff. If the LEA does not have a special education administrator on staff, notification to the LEA shall be made to the superintendent.

### 2365.1.6.4 Commencement of the Due Process Complaint; Elements of Complaint Process

(a) The hearing process shall commence on the date the Commissioner receives a request for a hearing. If received outside of regular business hours, the process shall commence on the next business day.

(b) A due process hearing shall include the following:

(1) An initial telephone conference call pursuant to Rule 2365.1.6.7(a)(2) and (b).

(2) A prehearing conference as in Rule 2365.1.6.11 for the due process hearing that results in a hearing officer's prehearing order.

(3) A hearing that, except for good cause shown, shall be limited to two business days. The hearing officer will grant additional time only if necessary for a full, fair disclosure of the facts necessary to arrive at a conclusion.

(4) A hearing officer's decision pursuant to Rule 2365.1.6.16 that shall be the final decision of the Department of Education.

### 2365.1.6.5 Sufficiency of Complaint

(a) The due process complaint shall be deemed sufficient unless an opposing party receiving the due process complaint notifies the hearing officer and the complaining party in writing, within 15 days of receipt of the due process complaint, that the opposing party believes that the due process complaint does not meet the requirements in Rule 2365.1.6.2(c). Filing of such a notification by an opposing party shall not be grounds to delay the resolution session required under Rule 2365.1.6.8.

(b) Within five days of receipt of notification under paragraph (a) of this section, the hearing officer shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of Rule 2365.1.6.2(b), and shall immediately notify the parties in writing of that determination and the status of the due process complaint. If the hearing officer determines that the due process is insufficient, he or she shall identify how the complaint is insufficient.

(c) A party may amend its due process complaint only if:

(1) The other parties consent in writing to the amendment and are given the opportunity to resolve the amended due process complaint through a resolution meeting held pursuant to Rule 2365.1.6.8; or

(2) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(d) If a party files an amended due process complaint, the timelines for the resolution session and the resolution period begin again with the filing of the amended due process complaint.

### 2365.1.6.6 Response to Issues Raised in Complaint

(a) LEA response

(1) If the LEA has not sent a prior written notice under Rule 2365.1.1 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA shall, within 10 days of receiving the due process complaint, send to the parent a response that includes:

(i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IEP team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of other factors that are relevant to the agency's proposed or refused action.

(2) A response by the LEA under (a)(1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient.

(b) Party other than LEA response. Except as provided in paragraph (a) of this section, the party receiving a due process complaint shall, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

### 2365.1.6.7 Scheduling of Resolution Session, Mediation, Prehearing Conference, and Due Process Hearing

(a) Within three business days of receipt of the complaint, the Commissioner shall schedule and notify the parties in writing of the following:

(1) The appointed hearing officer to preside at the due process hearing;

(2) The time and date of an initial telephone conference call with the hearing officer to be held with the parties or their attorneys no later than five business days from receipt of the complaint;

(3) The legal authority under which the hearing is held;

(4) A copy of the request for due process hearing;

(5) The right to have an attorney present to represent each party at the party's expense with the exception of Rule 2365.1.6.8(a)(1)(iii); and

(6) Information for the parent regarding any free or low-cost legal and other relevant services available in the area.

(b) In the initial telephone conference call, the hearing officer will establish and issue a due process scheduling order detailing the following:

(1) Whether the parties have agreed to waive in writing the resolution session and if they intend to attempt mediation.

(2) If the resolution session is not waived, a date and time for the resolution session.

(3) If the resolution session is waived and mediation accepted, the hearing officer will notify the Department of a date by which mediation shall occur, and the Department will assign a mediator.

(4) If the resolution session is waived and mediation rejected, the hearing process will commence consistent with the timelines in Rule 2365.1.6.8.

(5) The dates for the prehearing conference, 5-day rule disclosure, due process hearing, and final decision using the timelines in Rules 2365.1.6.7, 2365.1.6.9, and 2365.1.6.16.

(6) If both parties agree, the hearing officer may also address any concerns about the sufficiency of the complaint.

(7) The hearing officer may also address any modifications to Rule 2365.1.6 necessary to address special circumstances, such as a party's inability to communicate in writing or disability.

(8) The scheduling shall allow for the following:

(i) A date for a resolution session or a date by which mediation shall occur, if the parties so decide;

(ii) A half business day for a prehearing conference; and

(iii) Two business days for a hearing, except for good cause shown pursuant to Rule 2365.1.6.4(b)(3) and Rules 2365.1.6.15(e).

**2365.1.6.8 Resolution Session**

(a) Convening a Resolution Session

(1) The LEA shall convene a resolution session on the date scheduled by the hearing officer at the initial conference, if the parties have not been able to agree on a mutually convenient time and date. The resolution session shall be held no later than 15 days after receiving notice of the due process complaint. The session will include the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint, and:

(i) Shall include a representative of the LEA who has decision-making authority on behalf of the LEA;

(ii) The LEA and the parents determine the relevant members of the IEP team to attend the session; and

(iii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the session is for the party filing the complaint to discuss their due process complaint, and the facts that form the basis of the due process complaint, so that

the other part(ies) have the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The parties may agree in writing that discussions that occur during the resolution session are confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings arising from that dispute.

(4) The session described in paragraph (a)(1) and (2) of this section need not be held if:

(i) The parents and the LEA agree in writing to waive the session and so notify the hearing officer; or

(ii) The parents and the LEA agree to use the mediation process described in Rule 2365.1.4 and so notify the hearing officer.

(b) Resolution Period

(1) If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the due process complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing shall commence.

(2) The timeline for issuing a final decision under Rule 2365.1.16 begins at the expiration of this 30 day period.

(3) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented by making a record of its attempts to arrange a mutually agreed upon time and place), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(4) If the LEA fails to hold the resolution session within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline.

(5) Adjustments to the 30-day resolution period. The 45-day timeline for the due process hearing in Rule 2365.1.6.16 starts the day after one of the following events:

(i) Both parties agree in writing to waive the resolution meeting and reject mediation;

(ii) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(iii) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or LEA withdraws from the mediation process.

(6) The timelines for resolution session may be shortened pursuant to an expedited hearing request under Rule 2365.1.6.17.

(c) Written settlement agreement. If a resolution to the dispute is reached at the session described in paragraph (a) of this section, the parties shall execute a legally binding agreement that is

(1) Signed by both the parent and a representative of the LEA who has the authority to bind the LEA; and

(2) Enforceable by filing in any state court of competent jurisdiction or in a district court of the United States.

(d) Agreement review period. If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within three business days of the agreement's execution. Nothing in this rule shall preclude either party from consulting with an attorney at any time.

### 2365.1.6.9 Time of Hearing; Withdrawal or Other Action for Dismissal of Hearing

(a) The hearing shall be scheduled to begin as soon as possible but no later than 35 days after expiration of the resolution period pursuant to Rule 2365.1.6.8(b), provided that when an expedited hearing under Rule 2365.1.6.17 is requested, the hearing shall be scheduled to begin no later than 20 days after the receipt of the request by the Commissioner.

(b) A parent may withdraw a request for a due process hearing without prejudice until such time as the parent retains legal counsel. "Withdrawal without prejudice" does not stop or in any other way alter the statutory period(s) of limitations described in Rule 2365.1.6.1.

(c) Upon motion by a party or by independent action of the hearing officer, the hearing officer may order dismissal of a complaint for failure of any party to prosecute.

### 2365.1.6.10 Voluntary Production of Information; Motion for Production of Information

(a) Each party shall attempt in good faith to make a complete response to requests, as soon as practicable, for the voluntary production of information.

(b) When a dispute between parties arises concerning a request for the voluntary production of information, releases or documents, any party may file a motion requesting that the hearing officer order the parties to comply with information requests.

(1) The motion shall be filed at least seven business days before the prehearing conference, and a response shall be filed and provided to the moving party at least one business day prior to the prehearing conference, or as soon as possible after receiving a notice of intent to object to all or part of a request for production.

(2) The moving party's motion shall:

(i) List with specificity the information it is seeking to discover; and

(ii) Set forth in detail those factors which it believes justify its request for information.

(3) When a party has demonstrated that such request for information is relevant to the issues described in the hearing notice or identified by the hearing officer as a result of

the prehearing conference and is necessary for a full and fair presentation of the evidence at the hearing, the hearing officer shall grant the motion.

### 2365.1.6.11 Prehearing Conference Procedures

(a) The prehearing conference required by Rule 2365.1.6.4(b)(2) shall be conducted by a hearing officer at a neutral site located in or near the LEA in which the due process matter is pending. The prehearing conference shall be as follows:

(1) Detailed Written Statement: At least three days before the prehearing conference, the complaining party shall provide the hearing officer and the opposing party a detailed written statement of what he/she believes are the issues to be addressed in the due process hearing, including any procedural violations. At least one day before the prehearing conference, the opposing part(ies) shall provide to the hearing officer and the complaining party a detailed written statement of any defenses. Any procedural violations known to a party or defenses not raised at or before the prehearing conference may be excluded at the due process hearing at the discretion of the hearing officer.

(2) Witness List: At the prehearing conference, the parties shall provide to the hearing officer and the opposing parties a preliminary list of the witnesses they plan to call and a general summary of the testimony they expect from each witness. This list may be supplemented at the time of the final five day rule submissions.

(3) Statement of Facts: No later than the prehearing conference, each party shall provide to the hearing officer and the opposing party, a statement of facts. The intent of the statement of facts is to outline those facts which are not expected to be contested, so that only those issues which remain in dispute need be addressed at the hearing.

(4) Core Exhibits: No later than the prehearing conference, the LEA shall submit to the hearing officer and the parents a binder of proposed core exhibits consisting of the relevant portions of the child's file that the LEA expects will be introduced. Either party may supplement but not duplicate those proposed exhibits with the other material as long as the supplement is received by the hearing officer and the opposing party at least five days before the hearing.

(5) Order of Presentation at Hearing: The party that has initiated the hearing shall present its case first unless the hearing officer determines that the change in order of presentation would not materially prejudice any party's right to a full and fair hearing, and:

(i) The hearing would proceed in a more timely manner if the party not initiating the hearing presents their case first; or

(ii) The hearing would proceed in a more efficient manner if the party not initiating the hearing presents their case first.

(6) Hearing Officer's Prehearing Order: Following the prehearing conference, the hearing officer shall issue a prehearing order containing rulings on any motions heard at the conference, any decisions made about evidence or order of presentation, scheduling, or other related matters, and a clear and specific identification of the issues to be heard.

(7) Record of the Prehearing Conference: The hearing officer shall ensure that an electronic verbatim record shall be made of the prehearing conference. The recording shall become a part of the record of the case. Copies shall be made available to the parties on request.

### 2365.1.6.12 Use of Affidavits

(a) At hearing, parties may submit otherwise admissible testimony, in whole or in part, in the form of affidavits, so long as the witnesses are present at hearing for cross-examination by the opposing party.

(b) Testimony may also be submitted at hearing by affidavit, without an opportunity to cross examine the witness, by prior agreement of the opposing party.

(c) Affidavits to be introduced as evidence at hearing shall be disclosed to the opposing party no fewer than three business days prior to the hearing.

### 2365.1.6.13 Final Disclosure of Evidence Occurring Five Days before Hearing

(a) At least five business days prior to a hearing, each party shall disclose to all other parties all evidence, including a final witness list with a brief description of each witness's testimony and copies of documentary evidence including all evaluations completed by that date and recommendations based on such evaluations, that the party intends to use at the hearing. If neither party objects, the parties shall submit copies of their exhibits to the hearing officer two business days prior to a hearing.

(b) Any evidence supplementing the core exhibits shall be legibly labeled in the upper right-hand corner with consecutive Arabic numerals as either "LEA Exhibit (Number)" or Parent Exhibit (number)", as appropriate. An index, by title, of all exhibits submitted shall also be exchanged.

(c) Unless the other party consents to the inclusion, a hearing officer may exclude evidence, including an evaluation or recommendation, not disclosed in accordance with this section.

### 2365.1.6.14 Notification Concerning Agreement

(a) If the parent and the LEA reach a settlement agreement prior to the hearing, the LEA shall notify the hearing officer in writing and include a written statement signed by both parties requesting the cancellation of the hearing and the dismissal of the case with prejudice.

(b) A settlement agreement, whether reached through a resolution session, mediation, or other means of negotiation between the parties, shall not constitute a final decision or order of the hearing officer.

(c) A legally binding settlement agreement, whether reached through a resolution session subject to a review period pursuant to Rule 2365.1.6.8(d), mediation, or other means of negotiation between the parties, shall be enforceable in a due process hearing, any State court of competent jurisdiction or in a district court of the United States.

### 2365.1.6.15 Hearing Procedures

(a) All hearings shall be electronically recorded by the hearing officer or his/her designee. The hearing officer shall also arrange for a stenographic recording of the hearing

(b) The order of the presentation shall be determined pursuant to Rule 2365.1.6.11(a)(5).

(c) Any party to a due process hearing has the right to:

(1) Be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, however, they may not be represented by a non-attorney;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses and the production of relevant documents.

(3) Request that the hearing officer prohibit the introduction of affidavits pursuant to Rule 2365.1.6.12 that have not been disclosed to that party at least three business days before the hearing or any other evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or at the option of the parents, electronic, verbatim record of the completed hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(6) The record of the hearing and the findings of fact and decisions shall be provided at no cost to the parents.

(d) Parents involved in a hearing may:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public. If a due process hearing is open to the public, the hearing officer shall seat the members of the public in such a way that does not interfere with the proceedings.

(e) Each party shall have one day to present its case, unless the hearing officer determines that additional time is necessary for a full, fair disclosure of the facts necessary to arrive at a conclusion. The party filing the due process complaint has the burden of proof. The time allowed for each party's presentation shall include both direct examination of its witnesses and cross examination of its witnesses by the opposing party.

(f) The hearing officer may limit the number and examination of witnesses to eliminate redundant, cumulative, or irrelevant testimony.

### 2365.1.6.16 Decision; Extension of 45-Day Period

(a) The Commissioner shall ensure that not later than 45 days after expiration of the resolution period under Rule 2365.1.6.8(b):

(1) A final decision is reached in the hearing;

(2) A copy of the decision is sent by first class mail to each of the parties; and

(3) The final decision includes a statement regarding the appeal rights pursuant to Rule 2365.1.8.

(b) A hearing officer may grant extensions of time beyond the period set out in (a) above, except as to expedited hearings, for specific periods of time at the request of either party if:

(1) The child's educational progress or well-being would not be jeopardized by the delay;

(2) The party would not have adequate time to prepare and present the party's position at the hearing in accordance with the requirements of due process; and

(3) The need for the delay is greater than any financial or other detrimental consequences likely to be suffered by a party in the event of the delay.

(c) Decision of hearing officer

(1) Subject to subdivision (2) of this subsection, a hearing officer shall make a decision on substantive grounds based on a determination of whether the child received a FAPE.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in this section shall be construed to preclude a hearing officer from ordering a LEA to comply with procedural requirements under Rule 2365.1 through 2365.1.13.

(4) The Vermont Department of Education, after deleting any personally identifiable information, shall:

(i) Transmit the hearing officer findings and decisions to the State Special Education Advisory Panel; and

(ii) Make those findings and decisions available to the public.

### 2365.1.6.17 Expedited Due Process Hearings

(a) An expedited due process hearing procedure shall be available for disciplinary issues in accordance with Rule 4313.3.

(b) The expedited procedure shall provide a full due process hearing consistent with the requirements of Rules 2365.1.6.2(c) and (g), 2365.1.6.3, 2365.1.6.4, 2365.1.6.7, 2365.1.6.8, 2365.1.6.10 through 2365.1.6.16, but under a restricted time schedule as set out in subsections (c) – (j) of this section.

(c) Expedited hearings shall:

(1) Not exceed two days; and

(2) Be scheduled to be heard within 20 school days where the issue before the hearing officer will be whether there is a substantial likelihood of injury to self or others if the child is returned to the placement from which the child was removed.

(d) Upon being appointed, the hearing officer shall immediately arrange with the parties two days of hearing to occur within 20 school days of the filing of a complaint under Rule 2365.1.17(c)(2). At the same time, the hearing officer shall schedule an expedited resolution session to be held no later than seven days of the receipt of the written complaint. Unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the complaint, the due process hearing may proceed. The hearing officer shall schedule a prehearing conference prior to the hearing.

(e) At least five business days prior to the hearing, each party shall disclose to all other parties all evaluations completed by that date and evidence to be offered at the hearing, and recommendations based on the offering party's evaluations that the party intends to use at the hearing. Any party to the hearing has the right to request that the hearing officer prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

(f) Except for the timelines in subsections (c)(2), (d), (e), and (i), the hearing officer may waive any of the procedures in this section in a case, but only to the extent necessary to preserve the full and fair nature of the due process hearing. At the agreement of both parties, the hearing officer may reduce the timelines in subsections (c)(2), (d), (e), and (h).

(g) The hearing officer shall render a decision, including findings of fact and conclusions of law.

(h) The hearing officer shall mail a written decision to the parties by first class mail within 10 school days following the hearing.

(i) Any party aggrieved by a decision of the hearing officer may appeal the decision as provided in Rule 2365.1.8.

### 2365.1.7 Impartial Hearing Officer

(a) A hearing may not be conducted by a person who is an employee of the Department of Education or the LEA, or by any person having a personal or professional interest that would conflict with his or her objectivity in the hearing. A person who otherwise qualifies to conduct a hearing is not an employee of the Department solely because he or she is paid by the Department to serve as a hearing officer.

(b) The hearing officer shall be a licensed attorney who:

(i) Has the knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the Act, and legal interpretations of the Act by federal and state courts;

(ii) Has the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iii) Has the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(c) The Department shall keep a list of individuals to serve as hearing officers and that list shall contain a statement of the qualifications of each of those persons.

**2365.1.8 Finality of a Due Process Hearing Decision; Appeal**

(a) The decision of a hearing officer is final unless appealed to a state or federal court of competent jurisdiction within 90 days of the decision.

(b) Parties have right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction. An appeal from a due process hearing decision to a court of competent jurisdiction in accordance with Rule 2365.1.9 shall be commenced within 90 days from the notice of the final decision and not after.

**2365.1.9 Civil Action**

(a) Any party aggrieved by the findings and decision arising out of a due process hearing pursuant to Rule 2365.1.6 has the right to bring a civil action with respect to the matter. The action shall be commenced within 90 days of the hearing officer's decision in a state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) An award of attorneys' fees may be made pursuant to Rule 2365.1.10.

(c) In any action brought under paragraph (a) of this rule, the court:

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) Nothing in this rule restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under Rule 2365.1.6 shall be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

**2365.1.10 Attorneys' Fees**

(a) In any action or proceeding brought under Section 1415 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to--

(1) The prevailing party who is the parent of a child with a disability;

(2) To a prevailing party who is the Vermont Department of Education or a LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent

who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(3) To a prevailing party who is the Vermont Department of Education or a LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Prohibition on use of funds.

(1) Funds under Part B of the IDEA may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under Section 1415 of the IDEA and subpart E of the federal regulations relating to procedural safeguards.

(2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under Section 1415 of the Act.

(c) A court, in its discretion, may award reasonable attorneys' fees under Section 1415 of the Act consistent with the following:

(1) Fees awarded under Section 1415 of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2) (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under Section 1415 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if--

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action.

(iii) A resolution session conducted pursuant to Rule 2365.1.6.8 shall not be considered--

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.

(3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under Section 1415 of the Act, if the court finds that--

(i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skills, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with Rule 2365.1.6.2.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or LEA unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 1415 of the IDEA.

### 2365.1.11 Child's Status During Proceedings

(a) Unless placed in an interim alternative educational setting pursuant to Rules 4313.1, 4313.2, and 4313.4, the child shall remain in his or her current placement while waiting for the decision in a due process hearing or appeal, unless the State or the LEA and the parents of the child agree to another placement. The current placement shall be the placement that was in the last implemented IEP.

(b) If the due process hearing involves an application for initial enrollment in public school, the child, with the consent of the parents, shall be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under Part B from a child who is transitioning from Part C of the IDEA to Part B and is no longer eligible for Part C services because the child has turned three, the LEA is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under Rule 2365.1.3, then the LEA shall provide those special education and related services that are not in dispute between the parent and the LEA.

(d) If the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State and the parents for purposes of paragraph (a), above.

### 2365.1.12 Transfer of Parental Rights at Age of Majority

(a) When a youth who is eligible for special education services reaches the age of eighteen:

(1) The LEA shall provide any notice required by these rules to both the youth and his or her parents; and

(2) All other rights accorded to parents under these rules transfer to the youth.

(b) When a youth who is eligible for special education services reaches the age of eighteen and is incarcerated in a correctional institution, all other rights accorded to the parent transfer to the youth and any notice required by these rules shall be provided to both the youth and the parents.

(c) When a youth has been determined to be incompetent under State law, the guardian or educational surrogate parent shall receive any notice required by these rules.

(d) Whenever rights are transferred under this rule, the LEA shall notify the youth and the parents of the transfer of rights.

(e) Beginning one year before a youth reaches the age of 18, the youth's IEP shall include a statement that the youth has been informed of his or her rights under the IDEA, if any, that will transfer to the youth on reaching the age of 18.

(f) Rights afforded to parents under these rules transfer to the youth when the youth turns 18 years of age. All references to "parent" shall be read also to refer to a youth who has turned 18.

### 2365.2 Confidentiality of Information and Student Records

***Definitions for the purposes of Rule 2365.2 through 2365.2.15:***

(a) "Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) "Education records" means education records as defined in 34 CFR Part 99, Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA).

(c) "Participating agency" means any agency, school or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of IDEA.

(d) "Personally identifiable information" means:

(1) The name of a child, the child's parent, or other family member;

(2) The address of the child or the child's parents;

(3) A personal identifier such as the child's social security number or student identification number; or

(4) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty or make the child's identity easily traceable.

### 2365.2.1 Notice to Parents

(a) The Vermont Department of Education shall give notice, to the extent required by federal law that is adequate to fully inform parents about confidentiality requirements of §2365, including:

(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures that participating agencies shall follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR Part 99.

(b) Before any major identification, location, or evaluation activity, the notice shall be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

### 2365.2.2 Access Rights to Records

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the LEA under the IDEA. The participating agency shall comply with a request to inspect and review without unnecessary delay and before any meeting regarding an IEP or any administrative complaint, mediation, resolution session, due process hearing, or expedited hearing, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the participating agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) A participating agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable Vermont law governing such matters as guardianship, separation, and divorce.

### 2365.2.3 Record of Access

Each participating agency shall keep a record of parties obtaining access to a child's education records which are collected, maintained, or used under the IDEA, except access by parents and authorized employees of the participating agency. The record shall include the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

### 2365.2.4 Records on More than One Child

If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

### 2365.2.5 List of Types and Locations of Information

Each participating agency shall provide parents on request a written list of the types and locations of education records collected, maintained, or used by the agency.

### 2365.2.6 Fees

(a) A participating agency may charge a fee for copies of records made for parents under these provisions, if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under these provisions.

### 2365.2.7 Amendment of Records at Parent's Request

(a) A parent or eligible child who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the LEA that maintains the information to amend the information.

(b) The participating agency shall decide whether to amend the information as requested within a reasonable period of time of receipt of the request.

(c) If the participating agency refuses to amend the information as requested, it shall inform the parent or eligible child of the right to a hearing under Rule 2365.2.9.

### 2365.2.8 Opportunity for a Hearing

The participating agency shall, on request, provide an opportunity for a hearing within the agency where the parent or eligible child may challenge information in education records on the grounds that it is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

### 2365.2.9 Result of Agency's Hearing

(a) If, as a result of the participating agency's hearing, the agency finds that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information as requested and so inform the parent in writing.

(b) If, as a result of the participating agency's hearing, the agency finds that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent or eligible child of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the LEA.

(c) Any explanation placed in the records of the child under this section shall:

(1) Be maintained by the participating agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) Disclose the parent's or eligible child's explanation, if the records of the child or the contested portion are disclosed by the LEA to any party.

### 2365.2.10 Hearing Procedures

A participating agency shall, at a minimum, meet the following requirements when conducting a hearing under this section. The agency's hearing shall:

(a) Be held within a reasonable time after the agency received the request for the hearing from the parent or eligible child;

(b) Give the parent or eligible child notice of the date, time, and place, reasonably in advance of the hearing;

(c) Have the hearing conducted by an official of the agency or other person appointed by the agency, who does not have a direct interest in the outcome of the hearing;

(d) Give the parent or eligible child a full and fair opportunity to present evidence relevant to the issues raised about information in the record. The parent or eligible child may, at his/her own expense, be assisted or represented by one or more individuals of his/her own choice, including an attorney;

(e) Issue a written decision within a reasonable period of time after the hearing; and

(f) Issue a decision based solely on the evidence presented at the hearing, and shall include a summary of the evidence and the reasons for the decision.

### 2365.2.11 Consent

(a) With the exception of disclosures permitted to law enforcement and judicial authorities for which parental consent is not required by FERPA, parental consent shall be obtained before personally identifiable information is--

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information, subject to paragraph (b) and (c) of this section. or

(2) Used for any purpose other than meeting a requirement of these regulations.

(b) A participating agency subject to these regulations may not release information from education records to other participating agencies without parental consent, unless specifically authorized to do so by FERPA.

(c) Disclosure of special education and disciplinary records may be made without the prior written consent of the parent or a youth aged 18 or older, if:

(1) It is made in compliance with a lawfully issued subpoena or court order, and the school has made reasonable attempts to notify the parent or the youth aged 18 or older of the order or subpoena before complying with the request, so he or she may seek protective action from the court, such as limiting the scope of the subpoena or quashing it; and

(2) The subpoena or court order mandating disclosure specifies that the existence or the contents of, or the information furnished in response to, such subpoena or court order should not be disclosed by the receiving party; or

(3) It is to law enforcement or other appropriate parties, and, if the required information from the educational records is needed in connection with an emergency and knowledge of the information is necessary to protect the health or safety of the child or other individuals.

(4) If a parent refuses to give written consent when required for disclosure of personally identifiable information, the responsible LEA may seek an order from a due process hearing officer allowing disclosure.

### 2365.2.12 Safeguards

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official in each participating agency shall be identified as responsible for ensuring the confidentiality of any personally identifiable information.

(c) A participating agency shall have policies or procedures to ensure that all persons collecting or using personally identifiable information receive training or instruction regarding Vermont's policies and procedures under this rule and 34 CFR Part 99.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

### 2365.2.13 Destruction of Information

(a) The LEA shall retain copies of the child's IEPs and special education eligibility evaluations, for a minimum of five years from the end of the school year in which the document was in effect.

(b) The participating agency shall inform parents when personally identifiable information collected, maintained, or used under the IDEA is no longer needed to provide educational services to the child. The information shall be destroyed at the request of the parents. However, a permanent record of a child's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

### 2365.2.14 Children's Rights

The Vermont Department of Education's policy shall be to protect the privacy rights of children with disabilities:

(a) When a child's educational records are transmitted, stored, accessed or destroyed, a responsible participating agency shall conform to the standards issued by the Vermont Department of Education.

(b) Under the regulations for FERPA at 34 CFR §99.5(a), the rights of parents regarding education records transfer to the youth at age 18.

(c) If the rights accorded to parents under these Rules are transferred to a youth who reaches the age of majority, consistent with Rule2365.1.13, the rights regarding educational records in Rule 2365 shall also be transferred to the youth. However, the participating agency shall provide any notice required under the procedural safeguards provisions of the IDEA to the youth and the parents.

### 2365.2.15 Disciplinary Information in Student Records

(a) A participating agency shall include in the records of a child receiving special education services a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of children not receiving special education services.

(b) The statement shall include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

(c) If the child transfers from one school to another, the transmission of any of the child's records shall include both the child's current individualized education program and any statement of current or previous disciplinary action that has been taken against the child as consistent with subsection (a) of this section.

## 2366 State Funding for Special Education

### 2366.1 Special Education Service Plan

(a) On or before October 15th of each year, each superintendent shall file a Special Education Service Plan with the Commissioner of Education, as required by 16 V.S.A. §2964.

(b) The special education service plan shall be submitted in a form and manner prescribed by the Commissioner, and at minimum, shall contain the following:

(1) Anticipated services to be provided to children with disabilities which will be made available;

(2) Anticipated extraordinary special education expenditures in the next fiscal year; and

(3) Anticipated total special education expenditures in the next fiscal year for each supervisory union and member districts.

### 2366.2 Allowable Special Education Expenditures for State Formula Reimbursement

These rules define expenditures eligible for state reimbursement for special education provided to kindergarten through 12th grade resident students and for the extraordinary cost for essential early education children under the following funding provisions:

(a) Mainstream Block Grant and matching funds pursuant to 16 V.S.A §2961;

(b) Extraordinary Services Reimbursement and the matching local funds pursuant to 16 V.S.A. §2962; and

(c) Special Education Expenditures Reimbursement pursuant to 16 V.S.A. §2963.

The cost of providing special education services for Vermont state-placed students that is not covered by State-Placed Student reimbursement pursuant to 16 V.S.A. §2950(a) can be claimed as long as the cost is an eligible cost based on the following definitions.

#### 2366.2.1 Instructional Services (To be effective: July 1, 2010)

Except as provided under (1) and (2) in (a) below, expenditures for instructional services shall be allowable if required by a child's IEP or pursuant to a settlement agreement. The allowable special education costs include:

(a) Salaries and benefits of licensed special education teachers including vocational special needs teachers, and instructional aides for the time they carry out special education responsibilities.

(1) The allowable cost that may be claimed includes a school period or service block during which the above staff member is providing special education services as defined in Rule 2360.3.1 to a group of eight or fewer children, and the majority of the children are receiving the special education services, in accordance with their IEPs.

(2) In addition to the time for carrying out special education responsibilities, up to 20% of a special education staff member's time may be claimed, if that staff spends the additional time performing consultation to assist with the development of and providing instructional services required by:

(i) A plan pursuant to Section 504 of the Rehabilitation Act; or

(ii) A plan for children who require additional assistance in order to succeed in the general education environment as determined by the Educational Support Team;

(b) Salaries and benefits for services of individual aides for the portion of time they carry out special education responsibilities;

(c) Contracted services to provide special education instruction to children with disabilities;

(d) Student transportation which is required to implement a part of the instructional program for children with disabilities;

(e) The portion of non-collaborative tuition of special education programs and excess costs charged by public schools which relate to allowable costs;

(f) The collaborative tuition for special education programs charged by public LEAs;

(g) Tuition and all reasonable and necessary costs of placement, as defined in Rule 2366.2.5, excluding any general education tuition in an independent school approved for the purpose of providing special education in accordance with 16 V.S.A. §2958(e) and Rule 2228, et seq.;

(h) Travel of special education personnel relating to educating children with disabilities as allowed by their local contractual agreement;

(i) Special textbooks, workbooks, other classroom supplies and other instructional materials for a child with disabilities to the extent required by a child's IEP; and

(j) The reasonable cost of rental, purchase and maintenance of specialized equipment for a child with disabilities required by the IEP and not otherwise available at no cost to the parent through any other sources.

**2366.2.2 Related Services**

(a) Expenditures for related services are allowable if:

(1) They are for services defined as related services in federal and state law;

(2) The expenditure is for a related service required by the child's IEP or pursuant to a settlement agreement, including transportation to and from home for children with disabilities who cannot be accommodated by general school bus service;

(3) The expenditure is for services provided by personnel beyond those required by the non-special education School Quality Standards (e.g. counseling, nursing); and

(4) The expenditure is not reimbursed by another source.

### 2366.2.3 Special Education Administration

(a) Allowable expenditures for special education administration are as follows:

(1) Salary and benefits of special education administrators and support staff for time dedicated to administration of the educational program for children with disabilities. However, if a supervisory union elects not to hire a special education administrator and is implementing an alternative organizational plan for the provision of special education administration for a given school year, in order for the cost to be considered an allowable expenditure, the plan shall be approved by the Department of Education. The plan shall include a description of the functions and the responsibilities of the staff assigned to special education administration; the time spent on these functions; and the estimated costs to be allocated to special education administration;

(2) Supplies, office expenses and equipment for special education administration;

(3) Cost of inservice activities relating to special education up to a maximum amount per year established by the Commissioner;

(4) Expense of a telephone in a special education classroom; and

(5) Advertising expenses in an amount not to exceed $3,000 annually per supervisory union.

### 2366.2.4 Evaluation Costs

Reasonable and necessary expenditures are allowable for diagnostic medical services, other tests, and associated costs when part of a comprehensive evaluation, re-evaluation, or independent evaluation.

### 2366.2.5 Costs of Placement in Approved Independent Schools

(a) Subject to (b), reasonable and necessary costs, required by a child's IEP, excluding general education tuition, of a placement in an independent school are allowable if either:

(1) The independent school is approved by the State Board of Education for purposes of providing special education pursuant to Rule 2228 for the category of disability under which the child was determined to be eligible for special education and has been reviewed and received reimbursement approval through the residential review process;

(2) The child's placement has been recommended for reimbursement either through the residential review process or as an exception by the Commissioner pursuant to Rule 2228.2.(2) of a high cost day or residential placement; or

(3) The child's placement is required by a due process hearing order issued following a hearing on the merits or a court order.

(b) Costs approved by the State Board of Education at an independent school are only allowable if covered by a written agreement pursuant to Rule 2228.4.1 and at a rate approved under Rule 2228.8 or for an out of state placement, the rates approved under that state's approval system.

(c) If the costs relating to a child's attendance at an independent school or program are pursuant to a legally binding settlement agreement, the parties shall, at a minimum, make reference in the IEP to the settlement agreement as the means by which the parties have agreed to resolve placement differences. The agreement shall provide for annual review by the parties of any resolution of placement issues.

**2366.2.6 Unallowable Expenditures**

(a) The following are not allowable for reimbursement under the State of Vermont special education funding formula:

(1) Attorney's fees and other legal costs;

(2) Overhead costs including building operations, general administration, and business services except that are part of a collaborative tuition attributable to overhead costs, and then only to the extent that overhead costs do not exceed 20% of the total program costs;

(3) Funds paid to union schools or supervisory unions by member school districts as assessments for special education;

(4) Any costs not allowable under Rules 2366.2.1 through 2366.6;

(5) Any costs for financial accounting and auditing;

(6) Technical Education tuition established under 16 V.S.A. §1552(a);

(7) Any costs related to the provision of special education to a youth that has reached age 22 unless the commissioner has granted an extension under 16 V.S.A. §2944(e); and

(8) Any costs related to parentally placed independent school children in excess of the proportionate share required by the IDEA except if pursuant to a hearing officer order reached on the merits or a court order.

**2366.2.7 Transition from Residential Placement**

(a) Expenditures for certain transitional services which otherwise would not be reimbursed as allowable costs pursuant to Rule 2366 et seq. may be reimbursed for children who are being returned from residential placement under the following conditions:

(1) A plan for transitional and educational services shall be submitted to the Commissioner of Education within a reasonable time prior to the change in placement and shall contain a description of the services to be provided and the estimated costs of those services. The contents of the plan shall be consistent with those prescribed by the Commissioner. The plan for transitional services, including estimated costs, shall receive approval from the Commissioner in order for reimbursement of the otherwise non-allowable costs to occur.

(2) The Commissioner's approval of a plan for transitional and educational services shall specify the limit as to the amount that will be reimbursed and the period during which such reimbursement will be made.

### 2366.2.8 Special Education Administration Costs

Special Education administration costs shall not be included as a cost of an individual child when reporting and calculating extraordinary special education expenditures.

### 2366.3 Special Education Expenditures Defined

(a) "Special education expenditures" under 16 V.S.A. §2963 shall mean a sum of money equaling all allowable expenditures for special education as defined under Rule 2366.2 less the following:

(1) Revenue from federal aid for special education.

(2) Mainstream service costs, as defined in 16.V.S.A. §2961(c)(1);

(3) Extraordinary special education expenditures, as defined in 16 V.S.A. §2962;

(4) Revenue from excess costs and special education tuitions received;

(5) All other state and federal funds used for special education costs. In this section, the term "other state funds" shall mean any state grant source except mainstream block grant, extraordinary services reimbursement, and special education expenditures reimbursement to which allowable special education expenditures are charged. The other state funds may include, but are not limited to the following:

(i) Regional interdisciplinary team grants pursuant to 16 V.S.A. §2967(b)(3),

(ii) Regional multi-handicapped specialist grants pursuant to 16 V.S.A. §2967(b)(4),

(iii) Grants for building effective strategies for teaching children (BEST) pursuant to 16 V.S.A. §2969(c),

(iv) Training grants pursuant to 16 V.S.A. §2969(d), and

(v) LEA reimbursement for state-placed students under 16 V.S.A. §2950(a).

### 2366.4 Financial Expenditure Report

(a) Each supervisory union shall submit a financial report as required by 16 V.S.A. §2968(a) for the supervisory union and each member school district that expended funds for special education or received block grant funds. The report shall be completed as prescribed by the Commissioner and signed by the superintendent or a person designated by the superintendent. Pursuant to 16 V.S.A. §2968(b), a late fee of $100 per business day shall be assessed to each supervisory union which does not file a complete final Special Education Expenditure Report for the preceding fiscal year by the deadline established in statute.

(b) A supervisory union may appeal the late fee to the Commissioner of Education. The appeal shall be received within 30 days of the due date of the report. The appeal shall be in writing and include:

(1) A statement of the reasons why the supervisory union was unable to file the complete report by the statutory deadline and

(2) The action to be taken by the supervisory union to ensure that future reports will be completed and filed by the due date.

(c) The appeal shall only be granted if the report is filed by the time of the appeal.

(1) The Commissioner shall either grant the appeal of the penalty in whole or in part or deny the appeal in writing within 60 days of the due date of the report.

(2) The Commissioner shall not grant an appeal of a late filing fee for the same supervisory union for two consecutive fiscal years.

(d) Any late penalty not forgiven on appeal shall be deducted from any payments due under any funding category covered under Title 16 of the Vermont Statutes Annotated. The penalty incurred by a supervisory union shall be divided among its member school district(s).

(1) The proration of the penalty shall depend on which reporting entities within the supervisory union failed to submit final reports by the due date.

(2) If two or more reporting entities failed to meet the deadline, the penalty shall be divided equally among the late reporting entities.

(3) The penalty due to late reports from a supervisory union or joint contract district shall be divided to the member school districts by the same proportion that the total net cost is divided to the member towns.

(4) Any penalty attributed to the member towns of a unified union school district shall be assessed against the unified union school district.

### 2366.5 Corrections Education

With respect to youth in the custody of the Department of Corrections, the commissioner of education shall pay for the costs of special education in accordance with the provisions of 28 V.S.A. §120.

### 2366.6 Collaborative Programs

#### 2366.6.1 Collaborative Program Definition; Tuition

A “collaborative program” is a program created pursuant to an agreement between two or more supervisory unions in accordance with 16 V.S.A. §267, for the purpose of cooperatively providing special education services. A collaborative program may offer one or more component programs (e.g. multi-handicapped, emotionally disturbed, diversified occupations). A collaborative program may charge a tuition pursuant to 16 V.S.A. §826(b).

#### 2366.6.2 Collaborative Program Accounting

The accounting for each collaborative program shall be in accordance with the Handbook for Financial Accounting of Vermont School Systems accounting procedures and:

(a) An enterprise fund as defined in the Handbook shall be established to account for the funds for each collaborative program;

(b) Notice of tuition shall be provided by the collaborative program to the appropriate school board(s) as set forth in 16 V.S.A. §826(a);

(c) Such tuition notice shall include a description of services to be provided, and the amount of the tuition for each component program;

(d) Tuition shall be proportionately calculated for students who are part-time; and

(e) Final tuition charged shall be calculated based on the actual cost of the program.

**2366.6.3 Non-collaborative Tuition**

(a) A school district or supervisory union may charge a special education tuition under 16 V.S.A. §826(b) for providing special education services. However, any such bill for tuition shall state the amount of the bill eligible for reimbursement under the state special education funding formula. In the case of a school district, special education tuition shall not be charged for a child whose district of residence is the school district. In the case of a supervisory union, special education tuition shall not be charged for a child from within the supervisory union unless otherwise agreed pursuant to 16 V.S.A. §301.

(b) All the provisions of Rule 2366.6.2 apply to tuition under subsection (a) above, except that:

(1) It is permissible but not required that an enterprise fund be established and

(2) The notice of tuition establishes the maximum tuition which can be charged.

**2366.6.4 Excess Costs Procedure**

Excess costs which may be charged under 16 V.S.A. §826(c) are limited to allowable special education costs for services not covered by a general education tuition or a special education tuition. Allowable special education costs for this purpose are defined in Rules §2366.2.1, 2366.2.2 and 2366.2.4. The following procedures shall apply to excess costs:

(a) The district of residence or agency responsible shall be given prior notice by the billing district that an excess cost will be charged;

(b) Notice shall indicate the child's name, type, frequency of service to be provided, fee for services to be provided, and billing schedule;

(c) Excess cost shall be calculated based on the actual costs attributable to the child or proportionate costs in accordance with the Handbook for Financial Accounting of Vermont School Systems accounting and cost allocation procedures; and

(d) Excess costs shall be billed quarterly and final billings for any fiscal year shall be submitted to the sending districts prior to June 15th of that fiscal year.

**2366.6.5 Allowable Costs Reporting**

For financial and statistical reporting to the Commissioner, the cost reported for all allowable special education services shall be the actual cost of services provided minus the revenue received or due for excess costs.

**2366.6.6 (Reserved)**

**2366.6.7 Allocation of Attorney's Fees**

All awards, costs and fees associated with a legal proceeding in which a collaborative program is a party shall be borne by the school district of the child's residence unless otherwise agreed upon by the collaborative's members. However, the foregoing shall not be construed to mean that a collaborative or school district shall be responsible for the legal fees of a parent unless ordered by a court or agreed to in mediation.

**2366.6.8 Schedule of Special Education Payment and Reporting**

(a) Payments due under 16 V.S.A. §§2961 through 2963, shall be calculated and distributed pursuant to 16 V.S.A. §2969 as follows during each fiscal year:

(1) Mainstream Block Grants, pursuant to 16 V.S.A. §2961, shall be distributed on August 15th and December 15th. On each of these dates one-half of the state grant amount shall be forwarded.

(2) Special Education Expenditures Reimbursement payments shall be made, pursuant to 16 V.S.A. §2969, on the following schedule and in the amounts as indicated below:

(i) By August 15th, 15% of the estimated reimbursement shall be forwarded. The amount shall be based on the recipient's Service Plan pursuant to 16 V.S.A. §2964.

(ii) By December 15th, an additional 35% of the estimated reimbursement shall be forwarded. The amount shall be based on the recipient's Service Plan, pursuant to 16 V.S.A. §2964, and adjusted according to the Special Education Expenditure Report, due on November 15th, pursuant to 16 V.S.A. §2968.

(iii) By April 15th, an additional 40% of the reimbursement shall be forwarded, based on the recipient's Service Plan, pursuant to 16 V.S.A. §2964, and adjusted according to the second Special Education Expenditure Report, due March 15th, pursuant to 16 V.S.A. §2968.

(iv) After the close of the fiscal year, the final balance of the reimbursement shall be forwarded, based on the recipient's final Special Education Expenditure Report due on August 1st, pursuant to 16 V.S.A. §2968.

(3) Extraordinary Services Reimbursement, pursuant to 16 V.S.A. §2962, shall be calculated as the amount due based on the recipient's previous Special Education Expenditure Report, pursuant to 16 V.S.A. §2968. Funds may be advanced in June based on estimated reports of extraordinary service costs.

## 2366.7 Reimbursement for the Costs of Educating State-Placed Students

### 2366.7.1 "State-placed Student" is defined in 16 V.S.A. §11(a)(28).

### 2366.7.2 LEA reimbursement for special education costs

(a) For the costs of educating a state placed student, the school district serving the child shall claim and the commissioner shall reimburse the allowable special education costs pursuant to 16 V.S.A. §2950(a).

(b) Allowable special education costs for elementary and secondary children are as defined under Rule 2366.2, except that the ineligible portion of a non-collaborative tuition for a special education program is allowable under this section. For EEE children, allowable special education costs are the costs of providing the services specified in the child's IEP. Special education costs funded through federal funds or any grant are not eligible for state-placed student reimbursement.

### 2366.7.3 Payments for State-Placed Students in Residential Placements and Out-of-State Public Schools.

Payments for state placed students in residential placements and out-of-state public schools shall be in accordance with 16 V.S.A. §2950(a) & (b).

## 2366.8 State Funding for Essential Early Education

Essential Early Education programs shall be funded in accordance with 16 V.S.A. §2948(c) and extraordinary costs allowable pursuant to 16 V.S.A. §2962 and Rule 2366.2(b).

(a) Each school district shall receive an Essential Early Education grant each year. Grants shall be calculated according to the estimated number of children from 3 through 5 years of age in the school district. The estimated number of children who are 3 through 5 years of age shall be based on the last verified average daily membership of all students enrolled within the district in grades 1 through 3. The Commissioner shall announce the estimated number of children three through five years of age in each school district and the proposed grant allocation amounts by December 15th.

(b) Essential Early Education grant funds shall be used to provide a free, appropriate, public education to all children within the school district who are three through five years of age and are eligible for special education.

(c) Once a school district has fulfilled its obligations under subsection (1) of this rule, Essential Early Education grant funds may be used:

(1) To provide child find activities to determine Part C eligibility of a child who is younger than three years of age as specified by the 2007 Part C Interagency Agreement; or

(2) To provide services to preschool children who are younger than six years of age who have been identified as being at risk of school failure.

(d) Extraordinary services reimbursement will be available for services which are required by an IEP for a child who is 3 through 5 years of age or who will be three years of age before the end of the school year.

(e) As a condition for receiving Essential Early Education grant funds, a school district shall make reasonable efforts to coordinate services with local public and private agencies that provide services to children of three through five years of age.

### 2366.9 Residential Placements

#### 2366.9.1 State-Operated Residential Schools and Day Programs

Funding for state-operated residential schools and day programs shall be in accordance with 16 V.S.A. §2948(f).

#### 2366.9.2 Individual Residential Placements

Funding of individual residential placements shall be in accordance with 16 V.S.A. Chapter 101, subchapter 2 and 16 V.S.A. §2958(c)(2). Applications for funding of individual residential placements shall undergo the residential review process as set forth in this Rule.

##### 2366.9.2.1 Residential Placement Review Team

As needed, the Commissioner may appoint Department of Education employees and others to a residential placement review team. Members of the team shall be subject to the confidentiality provisions of state and federal law. The team shall have those responsibilities set forth in 16 V.S.A. §2958(b). The team shall be composed of at least two members: (1) one who has knowledge about the child's area of disability and (2) the other who has knowledge of available resources and services in the LEA's region of the state, and, where relevant to the provision of a continuum addressing the child's disability, elsewhere in the State and in their region of the United States.

##### 2366.9.2.2 Early Notification to the Commissioner

(a) Each LEA shall provide timely notification to the Commissioner, in writing, with a copy sent to the child's parents, that residential placement is being considered as a possible option for inclusion in the child's IEP when there has been:

(1) A recommendation by the Evaluation and Planning Team for residential placement;

(2) A unilateral residential placement by the parents or by another state agency, pursuant to 16 V.S.A. §2942(7);

(3) An annual review for a child already in residential placement; or

(4) When any circumstance warrants consideration by the LEA that residential placement is a possible option for inclusion in a child's IEP.

Nothing herein shall be construed to mean that a child who falls within one of the above four categories necessarily requires residential placement. Additionally, nothing herein shall be construed to mean that notice to the Commissioner represents a decision of the IEP participants.

(b) Reimbursement for residential placements shall be for placements from the date the Department receives the notification in accord with this section. This requirement shall not apply to emergency placements made due to life-threatening events to a child or to other exceptional circumstances approved by the Commissioner or designee after request by a LEA and recommendation of the residential review team.

**2366.9.2.3 Timelines**

Unless extraordinary circumstances are presented, each LEA shall notify the Commissioner at least 30 days prior to a change of placement to a residential placement, or other program, or 30 days prior to the IEP meeting where continuation at a residential placement or program is being considered. Such notice shall be given as soon as possible so that the involvement of the review team, if deemed necessary by the Commissioner, does not interfere with the timelines for the placement decision.

**2366.9.2.4 Receipt of IEP**

Prior to an IEP team's determination that a child requires residential placement, the LEA shall forward the following documents to the Commissioner:

(a) The child's most recent Evaluation Plan and Report;

(b) Current IEP;

(c) Residential placement application form; and

(d) Any other relevant information.

**2366.9.2.5 Residential Review Team Procedures**

(a) Upon receiving notice under Rule 2366.9.2.2 or the IEP under Rule 2366.9.2.4, or upon request by a parent to establish a residential placement review team to review his or her child's case, whichever comes earlier, the Commissioner may establish a review team. Within ten working days of receipt of the notice, the IEP or the parental request, the Commissioner or his designee shall notify the LEA and the parents whether or not a review team has been constituted or reconvened.

(b) The review team or any designated member thereof shall promptly investigate the need for residential placement of a child and provide technical assistance to the LEA concerning the need for residential placement, alternatives to residential placement, and alternative cost-effective residential facilities.

(c) Within 30 days or less, of its establishment, the team, after investigation, may take any of the following actions, depending on the circumstances associated with the request for residential placement:

(1) Advise the LEA and parents on alternatives to residential placement;

(2) Review the individualized education program calling for residential placement of a child to consider whether the child can be educated in a less restrictive environment;

(3) Assist the LEA in locating cost effective and appropriate residential facilities where necessary;

(4) Request, but not require, a new individualized education program when it believes that appropriate alternatives to residential placement are available; or

(5) Offer mediation as a means of resolving disputes relating to the need for residential placement, the particular residential facility recommended for a child with a disability or the associated costs.

(6) The residential review team shall provide notice in writing to the LEA's IEP team if and when it determines, as a result of its review, that residential placement, or that a particular residential placement, is not appropriate. The notice shall set forth the reasons(s) for the team's conclusions.

(d) The Commissioner may waive any provision of Rule 2366.9.2.5, not otherwise inconsistent with law for emergency placements or administrative efficiency.

(e) Where the team or its designee finds that the placement practices or policies of a LEA are substantially inconsistent with least restrictive environment provisions of state or federal law, it may require the agency to submit a plan of correction.

(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 Commissioner to the State Board of Education in accordance with Rule 1230.

(g) Where the recommendation of the residential review team to IEP team is for a residential program or facility operated or developed by, or funded directly or indirectly through, another State agency, it shall be the responsibility of the residential review team, the LEA and the IEP team to work with the State agency in a timely manner and in accordance with the Part B Interagency Agreement, as amended.

(h) 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, shall be at no cost to the parents of the child. (34 CFR 300.104)

(i) The Commissioner, or his designee, shall establish a system whereby the Department of Education identifies and maintains current information on residential facilities, or other programs in Vermont and elsewhere, that provide educational programs to children with a variety of disabilities. Information about such facilities or programs may include, but not be limited to, the categories of disabilities served by the facility or program; the state's approval status; the costs associated with tuition and services for which the facility or program charges a fee; and any other pertinent information. Any information system created by the Department shall include a description of procedures for gathering updated information.

### 2366.9.2.6 Due Process Hearing

When the residential review team recommends that a child does not require residential placement, the Commissioner may initiate a special education due process hearing under Rule 2365.1.6 to determine the appropriate placement for the child.

### 2366.10 Local Educational Agency Plan (LEAP)

Each supervisory union, which receives IDEA-B federal funds, shall submit a local education agency plan as required by the Vermont Department of Education.

## 2367 (Reserved)

## 2368 Children with Disabilities Enrolled in Independent Schools and in Home Study

### 2368.1 Children with Disabilities Enrolled by their Parents in Independent Schools and in Home Study

Independent school children means children who are enrolled by their parents in kindergarten through grade twelve in recognized or approved independent schools, as defined in 16 V.S.A §166, including religious elementary and secondary schools. Home study children means children enrolled with the Vermont Department of Education in a home study program pursuant to 16 V.S.A § 166b. For the purposes of this section, home study children shall be deemed the same as children enrolled by their parents in an independent school.

This section does not apply to children who are either:

(a) Placed in independent schools by the LEA based on an IEP team's determination that the independent school, rather than the public school, is the appropriate placement and least restrictive environment for the child, or

(b) Attend an independent school because the child's local school district does not maintain a public school.

### 2368.1.1 Child-Find (34 CFR §300.131)

(a) Each LEA shall locate, identify, and evaluate all independent school and home study children with disabilities who are enrolled by their parents in independent, including religious, elementary and secondary schools and home study programs located in the LEA.

(b) Child find design. The LEA's child find process shall be designed to ensure--

(1) The equitable participation of independent school and home study children; and

(2) An accurate count of those children.

(c) Activities. In carrying out the requirements of this section, the LEA shall undertake activities similar to the activities undertaken for the LEA's public school children.

(d) Cost. The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if the LEA has met its proportionate share expenditures obligation.

(e) Completion period. The child find process shall be completed in a time period comparable to that for other children attending public schools in the supervisory including completion of the initial evaluations within a 60 day time period, consistent with the evaluation process described in Rules 2362.2.3(b), 2362.2.4, and 2362.2.5.

**2368.1.2 Child-Count (34 CFR §300.133(c))**

(a) Each supervisory union shall--

(1) Conduct the consultation required by Rule 2368.1.5.1; and

(2) Ensure that the count is conducted on December 1 of each year.

(b) The child count shall be used to determine the amount that the supervisory union shall spend on providing special education and related services to independent school and home study children with disabilities in the subsequent fiscal year.

(c) Supplement, not supplant. Local funds may supplement and in no case supplant the proportionate amount of IDEA-B flow through funds required to be expended for independent school and home study children who are eligible for special education.

**2368.1.3 Proportionate Share of IDEA-B Funds (34 CFR §300.133(b))**

The child count conducted on December 1 of each year shall be used to determine the amount of IDEA-B flow-through funds that the supervisory union shall reserve for providing special education and related services to independent school and home study children with disabilities in grades kindergarten through grade 12 for the upcoming fiscal year.

(a) Formula. Each supervisory union shall spend the amount calculated as the proportionate share amount on providing special education and related services (including direct services) to elementary and secondary children with disabilities who are enrolled by their parents in independent school and home study programs located within the supervisory union. The proportionate share amount for each supervisory union is calculated as follows:

(1) For the IDEA-B Basic Flow Through grant, the proportionate share amount is calculated as the allocation for the upcoming fiscal year divided by the count of all eligible children ages 3 through 21 multiplied by the number of elementary and secondary children eligible for special education who are enrolled by their parents in independent schools or home study programs located in the supervisory union.

(2) For the IDEA-B PreSchool Flow Through grant, the proportionate share amount is calculated as the allocation for the upcoming fiscal year divided by the count of all eligible children ages 3 through 5 multiplied by the number of elementary children eligible for special education who are enrolled by their parents in independent schools or home study programs located in the supervisory union.

(b) If the supervisory union does not expend all of the amount calculated as proportionate share funds by the end of the fiscal year for which the funds were generated, the supervisory union must obligate the remaining funds for special education and related services (including direct services) for elementary and secondary student eligible for special

education enrolled by their parents in independent schools or home study programs located in the supervisory union for one additional year.

**2368.1.4 No Right to FAPE for Children with Disabilities Placed by Their Parents at Independent Schools or in Home Study (34 CFR §300.137(a))**

No parentally-placed child has an entitlement to a FAPE in an independent school or home study program.

(a) Where services are provided, they shall be provided at the discretion of the LEA in which the independent school or home study program is located.

(b) The LEA of the parent's residence shall offer to make a FAPE available in the event the child's parent seeks enrollment in public school. Additionally, the LEA of residence shall be prepared to develop an IEP for such eligible child if he or she enrolls in public school.

**2368.1.5 Services Determined**

**2368.1.5.1 Consultation (34 CFR §300.134)**

To ensure timely and meaningful consultation, a LEA representative shall consult with independent school representatives and representatives of parents of independent school and home study children with disabilities during the design and development of special education and related services for the children regarding the following:

(a) Child find. The child find process, including--

(1) How parentally-placed independent school and home study children suspected of having a disability can participate equitably; and

(2) How parents, teachers, and independent school officials will be informed of the process.

(b) Proportionate share of funds. The determination of the proportionate share of federal funds available to serve independent school and home study children with disabilities under Rule 2368.1.3(b), including the determination of how the proportionate share of those funds was calculated.

(c) Consultation process. The consultation process among the LEA representative, independent school officials, and representatives of parents of independent school and home study children with disabilities, including how the process will operate throughout the school year to ensure that independent school and home study children identified through the child find process as children eligible for special education, can meaningfully participate in special education and related services.

(d) Provision of special education and related services. How, where, and by whom special education and related services will be provided for independent school and home study children with disabilities, including a discussion of--

(1) The types of services, including direct services and alternate service delivery mechanisms; and

(2) How special education and related services will be apportioned if funds are insufficient to serve all independent school and home study children; and

(3) How and when those decisions will be made;

(e) Written explanation by the LEA regarding services. How, if the LEA disagrees with the views of the independent school officials or parents of a home study child on the provision of services or the types of services (whether provided directly or through a contract) the LEA will provide to the independent school officials or home study parents a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

**2368.1.5.2 Written Affirmation (34 CFR §300.135)**

(a) When timely and meaningful consultation, as required by Rule 2368.1.5.1, has occurred, the LEA representative shall obtain a written affirmation signed by the representatives of participating independent schools and home study programs.

(b) If the representatives do not provide the affirmation within a reasonable period of time, the LEA representative shall forward documentation of the consultation process to the Department.

**2368.1.5.3 Compliance (34 CFR §300.136)**

(a) General. An independent school official or home study parent has the right to submit an administrative complaint to the Department that the LEA--

(1) Did not engage in consultation that was meaningful and timely; or

(2) Did not give due consideration to the views of the independent school official or home study parent.

(b) Procedure.

(1) If the independent school official or home study parent wishes to submit a complaint, the official or parent shall provide the Department the basis of the noncompliance by the LEA with the applicable independent school provisions in these rules; and

(2) The LEA shall forward the appropriate documentation to the Department.

(3) (i) If the independent school official or home study parent is dissatisfied with the decision of the Department, the official or parent may submit a complaint to the Secretary of the U.S. Office of Education by providing the information on noncompliance described in paragraph (b)(1) of this section; and

(ii) The Department shall forward the appropriate documentation to the Secretary.

**2368.1.6 Services Plan & Record Keeping (34 CFR §300.132)**

(a) Consistent with Rule 2368.1.3 and 2368.1.4, a services plan shall be developed and implemented for each child with a disability who has been designated by the LEA in which

the independent school or home study program is located to receive special education and related services.

(b) Record keeping. Each LEA shall maintain in its records, and provide to the Department, the following information related to independent school and home study children:

(1) The number of children evaluated;

(2) The number of children determined to be children with disabilities; and

(3) The number of children served.

**2368.1.7 Equitable Services Determined (34 CFR §300.137)**

(a) No independent school or home study child who is eligible for special education and related services has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(b) Decisions.

(1) Decisions about the services that will be provided to independent school and home study children who are eligible for special education and related services shall be made in accordance with paragraph (c) of this section and Rule 2368.1.5.1(c).

(2) The LEA where the independent school or home study program is located shall make the final decisions with respect to the services to be provided to eligible independent school or home study children.

(c) Services plan for each child served under this section. If an eligible child is enrolled in an independent school or home study program by the child's parents and will receive special education or related services from a LEA, the LEA shall--

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with Rule 2368.1.7.1 (b); and

(2) Ensure that a representative of the independent school or home study program attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the independent school or home study program, including individual or conference telephone calls.

**2368.1.7.1 Equitable Services Provided (34 CFR §300.138)**

(a) General.

(1) The services provided to independent school and home study children who will be receiving services through a services plan shall be provided by personnel meeting the same standards as personnel providing services in the public schools.

(2) Independent school and home study children who are eligible for special education and related services and will be receiving services through a services plan may receive a different amount of services than children with disabilities in public schools.

(b) Services provided in accordance with a services plan.

(1) Each independent school or home study child who has been found eligible and who has been designated to receive services shall have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in Rules 2368.1.5.1 and 2368.1.6.1, it will make available to independent school and home study children who are found eligible for services.

(2) The services plan shall, to the extent appropriate--

(i) Meet the requirements of an IEP with respect to the services provided; and

(ii) Be developed, reviewed, and revised consistent with the requirements for either plan.

**2368.1.8 Location of Services; Transportation (34 CFR §300.139)**

(a) Services on independent school or home study premises. Services to independent school and home study children on a services plan may be provided on the premises of independent, including religious, schools or home study program, to the extent consistent with law.

(b) Transportation.

(1) General.

(i) If necessary for the child to benefit from or participate in the services provided under this part, an independent school or home study child with a disability shall be provided transportation--

(A) From the child's school or the child's home to a site other than the independent school or home study location; and

(B) From the service site to the independent school, or to the child's home, depending on the timing of the services.

(ii) LEAs are not required to provide transportation from the child's home to the independent school.

(2) Cost of transportation. The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the minimum proportionate share requirement.

**2368.1.9 Funds May Not Benefit an Independent School or Home Study Program (34 CFR §300.141)**

(a) A LEA may not use funds provided under Part B of the IDEA to finance the existing level of instruction in an independent school or home study program or to otherwise benefit the independent school or home study program.

(b) The LEA shall use funds provided under Part B of the IDEA to meet the special education and related services needs of independent school and home study children with disabilities, but not for--

(1) The needs of an independent school or home study program; or

(2) The general needs of the children enrolled in the independent school or home study program.

**2368.1.10 Use of Public and Independent School Personnel to Provide Services (34 CFR §300.142)**

(a) Provision of equitable services. The provision of services shall be provided:

(1) By employees of a LEA; or

(2) Through contract by the LEA with an individual, association, agency, organization, or other entity.

(b) Special education and related services provided to independent school and home study children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(c) Use of public school personnel. An LEA may use IDEA-B flow-through grant funds to make public school personnel available in other than public facilities--

(1) To the extent necessary to provide services under a services plan for independent school and home study children with disabilities; and

(2) If those services are not normally provided by the independent school.

(d) Use of independent school personnel. A LEA may use IDEA-B flow-through grant funds to pay for the services of an employee of an independent school to provide services under a services plan if--

(1) The employee performs the services outside of his or her regular hours of duty; and

(2) The employee performs the services under public supervision and control.

**2368.1.11 Property, Equipment and Supplies (34 CFR §300.144)**

(a) An LEA shall control and administer the funds used to provide special education and related services under Rules 2368.1.7and 2368.1.8, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the IDEA-B.

(b) The LEA may place equipment and supplies in an independent school or home study program for the period of time needed for the Part B program.

(c) The LEA shall ensure that the equipment and supplies placed in an independent school or home study program--

(1) Are used only for Part B purposes; and

(2) Can be removed from the independent school or home study program without remodeling the independent school or home study facility.

(d) The LEA shall remove equipment and supplies from an independent school or home study program if:

(1) The equipment and supplies are no longer needed for Part B purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes.

(e) No IDEA-B funds may be used for repairs, minor remodeling, or construction of independent school or home study facilities.

### 2368.1.12 Complaints (34 CFR §300.140)

Independent school and home study children with disabilities have the right to file a complaint for due process under Rule 2365.1.6 only for the purpose of pursuing complaints that a LEA has failed to meet its responsibilities with regard to child-find, including following procedures for evaluation and determination of eligibility. All other complaints may be pursued by way of the Department of Education's administrative complaint procedure.

### 2368.2 School Districts without a Public School

A school district that does not maintain a public school or has not designated, in accordance with applicable law, an approved independent school at the grade level needed by a resident child eligible for special education, shall provide the child a free appropriate public education. All special education evaluations, planning and due process procedures, as required by these rules and by federal law, shall be made available to children who are referred for a special education evaluation or who are eligible for special education and to their parents. The location for IEP services shall be determined in the following manner:

(a) The choice of a specific school(s) appropriate to fulfill the IEP, including the requirements to educate the child in the least restrictive environment, shall be determined by a child's IEP team after the IEP is developed. If the IEP team does not reach consensus about the location of services, the LEA representative shall determine the location of services. This shall be communicated to the parents within five working days of this determination.

(b) If the parents choose to have their child served, pursuant to his or her IEP, at a school other than that selected by the IEP team or by the LEA representative, and the IEP team agrees that the IEP can be adequately implemented at the school chosen by the parents, the following shall be applicable:

(1) Public School: If the parents select a public school, the LEA shall pay any special education tuition or excess costs allowed by law.

(2) Independent School:

(i) If the parents select an independent school approved for special education purposes that is generally attended by general education children that a non-special education child from the LEA could choose to attend, the LEA shall fund the actual costs associated with the parents' placement minus any costs that would accrue to the parents of a non-special education child placed at the same school.

(ii) If the parents select an independent school not generally attended by general education children, the LEA shall pay the actual educational costs associated with the parents' placement to the amount that would have been spent on the school

chosen by the IEP team provided the school selected by the parents is approved for special education in the area of the child's disability.

**2368.3 Placement of Children by Parents if FAPE is at Issue**

(a) LEAs are not required to pay for the cost of education, including special education and related services, of a child eligible for special education at an independent school or facility, if the LEA has offered to make a FAPE available to the child and the parents elected to place the child in an independent school or facility. However, the LEA shall include that child in the population whose needs are addressed consistent with Rules 2368.1.1 through 2368.1.11.

(b) Reimbursement for independent school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a LEA, enroll the child in an independent elementary school, or secondary school without the consent of or referral by the LEA, a court or a hearing officer may require the LEA to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the LEA had not made FAPE available to the child in a timely manner prior to that enrollment and that the independent placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the Department and LEAs.

(c) Limitation on reimbursement. The cost of reimbursement described in paragraph (b) of this section may be reduced or denied--

(1) If--

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the LEA to provide FAPE to their child, including stating their concerns and their intent to enroll their child in an independent school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the LEA of the information described in paragraph (c)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the LEA informed the parents, through the notice requirements described in Rule 2365.1.1 of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(d) Exception. Notwithstanding the notice requirement in paragraph (c)(1) of this section, the cost of reimbursement:

(1) Shall not be reduced or denied for failure to provide the notice if:

(i) The school prevented the parent from providing the notice;

(ii) The parents had not been informed about the requirements placed on them in paragraph (c)(1) of this rule before they took action to place their child; or

(iii) Compliance with paragraph (c)(1) of this section would likely result in physical harm to the child; and

(2) May, at the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if:

(i) The parent is not literate or cannot write in English; or

(ii) Compliance with paragraph (c)(1) of this section would likely result in serious emotional harm to the child.

## 2369 Educational Surrogate Parents

(a) To ensure that the educational rights of an infant, toddler, or child are protected, an educational surrogate parent shall be assigned whenever the individual is eligible for special education or is being evaluated for special education eligibility, and one of the following applies:

(1) The parents of the child are not known or cannot be located after reasonable efforts;

(2) The child is a child in state custody through the Department of Children and Families or has a public guardian appointed by a Vermont court (18 VSA §§9301-9316); or

(3) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)) (34 CFR 300.519(a)(4).

(b) The Commissioner of Education or a designee shall assign an individual to act as an educational surrogate parent. The educational surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placements of the child; and

(2) The provision of FAPE to the child.

(c) The Educational Surrogate Parent Program shall make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a LEA or other responsible agency determines that the child needs a surrogate.

(d) Before making the appointment, the Commissioner or designee shall assure that the person appointed as an educational surrogate parent:

(1) Has no personal or professional interest that conflicts with the interests of the child to whom he or she is assigned;

(2) Has knowledge and skills that ensure adequate representation of the child; and

(3) Is not an employee of the State Department of Education, the child's LEA, or any other agency that is involved in the education or care of the child.

(e) In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogates without regard to paragraph (d)(3).

(f) A foster parent or developmental home provider shall not automatically have the rights of a parent, but may be appointed by the Commissioner of Education or his or her designee to serve as an educational surrogate parent for the child, pursuant to subsections (a), (b), and (d) above.

(g) Nothing in this section shall be interpreted to diminish, or otherwise alter, any authority or responsibility of a state agency regarding general education decisions for a child in state custody pursuant to Chapters 49 and 55 of Title 33 or a vulnerable adult in state custody pursuant to Chapter 215 of Title 18.