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MEMORANDUM

TO: Superintendents, Principals, Headmasters and Special Education Directors
COPY: VSA, VPA, VCSEA, VT-NEA, VSBA
FROM: Rebecca Holcombe, Ed.D., Secretary of Education *RH*
SUBJECT: Guidance on Special Education Rules
DATE: August 21, 2017

In 2013, after extensive public input, the State Board of Education (SBE) approved revisions to the Vermont Special Education rules. These revisions were made to conform to newly-released federal requirements of the Individuals with Disabilities Education Act and to adopt best practices. The [Official Rules](#) are posted on the Agency of Education's website and are the official version of the rules.

Recently, the AOE discovered some discrepancies between the rules as approved by the SBE (rules with pink cover) and the Official Rules. The AOE immediately did a thorough comparison of the two versions to determine the extent of the discrepancies. Based on our review, we know that the version filed with the Secretary of State did not include all of the revisions made by the SBE after public comment. While most of the differences are typographical (e.g., incorrect numbering or in some cases citations) or in the formatting (placement of sections within rules), several are not.

The AOE also reviewed the rulemaking process to determine the cause of the errors. Staff who led the work on the 2013 revisions are no longer working at the AOE, so we are unable to verify exactly how the errors happened. However, they appear to be clerical and related to the number of versions produced at different stages.

Until this discovery, the AOE was training from the SBE-approved version of the rules, assuming they were the official rules. The AOE intends to correct the official version through rulemaking. However, given current Administrative and Legislative priorities and limited staff to complete those priorities, in addition to ongoing Agency mandates, the Agency will not be able to undertake another rulemaking project in the immediate future.

As an interim measure, the AOE is issuing guidance to Supervisory Unions and School Districts. The guidance identifies the major differences between the Official Rules and the SBE-approved version of the rules, and how to proceed in light of those differences. Although there are a number of technical and typographical errors in the Official Rules that were corrected in the SBE-approved version, the principal difference is in the area of eligibility measures for early childhood special education services.

We regret any confusion caused by the discrepancies and AOE's reliance on an incorrect version of the rule for training. The AOE is putting new rulemaking review procedures in place to prevent this from happening again.

Please share this guidance with your relevant staff, discard the SBE-approved version of the rules (pink cover), and make sure your staff refers to the Official Rules. Thank you.

Guidance on Special Education Rules

While updating its website, the Agency of Education discovered a number of discrepancies between the version of Special Education rules it has been using for training (rules with pink cover) and the official version that was filed with the Secretary of State in 2013. These [Official Rules](#) are on the Agency's website. Please use this version from this point forward. Most of the discrepancies are typographical and technical, but several are significant enough that we want to bring them to your attention and issue guidance on applying the official version until such time as the rules are updated. These are:

(1) Out-of-Date Rule Reference in Rule 2361.2(a)

Rule 2361.2 in the Official Rules regarding eligibility of children ages 3 to 6 for essential early education services incorrectly references Rule 2360.5.5 instead of Rules 2360.5.7 – 2360.5.10. The 2360.5.5 reference should have been changed in 2013 when Rules 2360.5.7 – 2360.10 were adopted. Rules 2360.5.7 – 2360.5.10 replaced the prior process, which automatically qualified these children for Part B services without further assessment. Rules 2360.5.7 – 2360.5.10 are a federal requirement of the state's Part C interagency Agreement. We advise that the best practice is to continue to use the Part C to B transition assessment process described in 2360.5.7 – 2360.5.10 of the Official Rule (which is the same as in the SBE-approved version). The process aligns with the federal IDEA requirement for transitioning children from Part C to Part B found at 34 CFR 303.209.

Rules 2360.5.7 (Notifications of Transition at Age Three), 2360.5.8 (Late Referral Procedures), 2360.5.9 (Transition Conference) and 2360.5.10 (Eligibility for EEE Services at Age Three) prescribe a process for transitioning children from IDEA Part C services to Part B services at age 3 as follows:

- (a) Between six months and 90 days of a child's birthday, the transition process requires regional Children's Integration Services/Early Intervention (CIS/EI) program to notify local educational agencies (LEAs) of children who may be potentially eligible to receive Part B services at age 3.
- (b) Within six months of the child's third birthday, the CIS/EI team determines potential eligibility. Evidence of potential eligibility is based on ongoing assessment measures and use of a state approved diagnostic instrument. A child shall be considered potentially eligible to receive EEE services if the child demonstrates at least a 25% delay in one or more of the following developmental domains: speech and language; adaption; social or emotional; physical development including gross or fine motor skills; and/or cognitive skills. In addition, under state Rule 2460.5.10(c) a child shall be eligible for EEE services at age 3 if the child received consistent specialized instruction, developmental therapy services or speech and language services through an IFSP/One Plan.
- (c) CIS/EI provides evidence to the LEA that the child demonstrates a 25% delay as measured by ongoing use of a state approved diagnostic instrument in one or more areas as stated above and that the child has received consistent instruction.
- (d) The LEA make the eligibility determination for Part B services.

(2) Use of Age 6 to 22 Eligibility Criteria for Young Children in 2361.2(a)(4)

AOE training has advised LEAs to limit the use of school age (6 -22) eligibility criteria for children enrolled in kindergarten. The official version of 2361.2(a)(4) does not contain this limitation so an evaluation planning team (EPT) may include the use of school age criteria to determine eligibility for special education services for children 3, 4 and 5 years old. With this stated, an EPT may determine that additional or different criteria is more useful for determining eligibility of young children. Assessments should be developmentally and individually appropriate and educationally significant. Assessments that are developmentally and individually appropriate include the use of authentic and multiple measures and sources to assess child status, progress, and program impact and outcomes. Therefore, in planning and conducting an initial evaluation or re-evaluation to determine the need for special education services for a younger child, we advise that EPT use the most relevant age measures and procedures as set out in Rule 2361(a)(1) – (3).

(3) Developmental Delay Evaluations

Rule 2361.2(c) recognizes three measures for demonstrating developmental delay that meet the requirement for a norm referenced assessment: (1) where the child demonstrates at least a 40% delay in one of the developmental areas; (2) the child exhibits a 2.0 standard deviation at, or below the mean (2nd percentile) in one of the developmental areas; or (3) the child exhibits a 1.5 standard deviation at, or below the mean (7th percentile) in two or more of the developmental areas. AOE training has included a fourth method – which is where the child demonstrates a 25% delay in 2 or more developmental areas - as a way to demonstrate developmental delay. That criteria is not included in the official rule.

Eligibility for early childhood special education services may be determined based on standard scores and developmental age (DA) scores. Most states use quantitative criteria for developmental delay, typically 2.0 standard deviations (SD) at or below the mean in one developmental area or 1.5 SD at or below the mean in two developmental areas on norm-referenced instruments. Some states use instruments that yield a developmental age score to specify a delay (typically 25% to 40%) in one or more developmental areas. In Vermont, the official rule allows for both testing methods – quantitative criteria and norm-referenced developmental delay - to inform an eligibility determination. As noted above, the official rule does not include language that enables the EPT to determine that a child is eligible based on a 25% delay in two or more developmental areas. However, the official rule expressly does allow use of a norm-referenced, standardized measure in order to determine a 1.5 SD (percentile rank of 7%) in two or more developmental areas. Moreover, testing results should not be used in isolation. The EPT must base eligibility determinations on evidence of testing results supported by other evidence such as classroom data, observations, medical records, criterion-referenced measures such as curriculum-based assessments, developmental scales, and sensory profiles.

(4) IEP Requirements in 2361.2

AOE training had included two federal requirements as part of the EEE eligibility training: (1) IEPs must be written within 30 days of eligibility determination (34 CFR 300.323(c)(1)) and (2) IEPs must address how the child’s disability affects his/her access to and participation in age appropriate

activities (34 CFR 300.320(a)(iii)). In fact, these requirements are part of the general IEP provisions (Rule 2363), not the EEE provision in 2361.2. Regardless, they are part of both the official rule and the training and should require no changes by school officials.

(5) Initiation of Evaluation

AOE training has included the requirement that school districts act within 15 calendar days of a request for an evaluation by requesting parent consent, convening an EPT team or providing written reasons for denying the request. The official rule requires only that the initial evaluation be completed and issued within 60 days. While not required, the 15-day rule represents best practice among states and the Secretary strongly encourages schools to incorporate it into their processes.

If you have questions regarding early childhood special education, call Katie McCarthy at 479-1401. If you have questions about special education, call Cindy Moran at 479-1432.