

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4722

BY DELEGATE LANE

[Introduced February 23, 2016; Referred
to the Committee on Education then the Judiciary.]

1 A BILL to amend and reenact the Code of West Virginia, 1931, as amended, by adding thereto a
 2 new article, designated §18-20A-100, §18-20A-101, §18-20A-102, §18-20A-103, §18-
 3 20A-104, §18-20A-105, §18-20A-201, §18-20A-202, §18-20A-203, §18-20A-301, §18-
 4 20A-302, §18-20A-303, §18-20A-304, §18-20A-401, §18-20A-402, §18-20A-403, §18-
 5 20A-404, §18-20A-500, §18-20A-501, §18-20A-502, §18-20A-503, §18-20A-504, §18-
 6 20A-505, §18-20A-506, §18-20A-600, §18-20A-601, §18-20A-602, §18-20A-603, §18-
 7 20A-604, §18-20A-700, §18-20A-701, §18-20A-702, §18-20A-703, §18-20A-801, §18-
 8 20A-802, §18-20A-803, §18-20A-804, §18-20A-901, §18-20A-902, §18-20A-903, §18-
 9 20A-1001, §18-20A-1002, §18-20A-1003, §18-20A-1004, §18-20A-1005, §18-20A-1006,
 10 §18-20A-1007, §18-20A-1008, §18-20A-1009, §18-20A-1010, §18-20A-1100, §18-20A-
 11 1101, §18-20A-1102, §18-20A-1103 and §18-20A-1104, all relating to codification of the
 12 West Virginia Procedures Manual for the Education of Students with Exceptionalities.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
 2 article, designated §18-20A-100, §18-20A-101, §18-20A-102, §18-20A-103, §18-20A-104, §18-
 3 20A-105, §18-20A-201, §18-20A-202, §18-20A-203, §18-20A-301, §18-20A-302, §18-20A-303,
 4 §18-20A-304, §18-20A-401, §18-20A-402, §18-20A-403, 18-20A-404, §18-20A-500, §18-20A-
 5 501, §18-20A-502, §18-20A-503, §18-20A-504, §18-20A-505, §18-20A-506, §18-20A-600, §18-
 6 20A-601, §18-20A-602, §18-20A-603, §18-20A-604, §18-20A-700, §18-20A-701, §18-20A-702,
 7 §18-20A-703, §18-20A-801, §18-20A-802, §18-20A-803, §18-20A-804, §18-20A-901, §18-20A-
 8 902, §18-20A-903, §18-20A-1001, §18-20A-1002, §18-20A-1003, §18-20A-1004, §18-20A-1005,
 9 §18-20A-1006, §18-20A-1007, §18-20A-1008, §18-20A-1009, §18-20A-1010, §18-20A-1100,
 10 §18-20A-1101, §18-20A-1102, §18-20A-1103 and §18-20A-1104, all to read as follows:

**ARTICLE 20A. DUTIES AND PROCEDURES FOR THE EDUCATION OF STUDENTS
 WITH EXCEPTIONALITIES.**

PART I. FREE APPROPRIATE PUBLIC EDUCATION

§18-20A-100. Requirement of free appropriate public education.

1 Every county board of education shall ensure that, except as noted below, a free
2 appropriate public education is available to all students residing within the county who are eligible
3 for special education services and who are between the ages of three and twenty-three. The
4 determination of an appropriate education shall be made on an individual basis for each student.
5 The county board of education shall ensure that eligible students shall also have available to them
6 the variety of education programs and services available to students without exceptionalities
7 including art, music, industrial arts, consumer and homemaking education and vocational
8 education.

§18-20A-101. Criteria for services.

1 The special education and related services that shall be included within a free appropriate
2 public education shall conform to the following criteria:

3 (1) They are provided without charge at public expense;

4 (2) They are provided in conformity with an appropriate individualized education program
5 developed in adequate compliance with the procedures outlined in this manual and reasonably
6 calculated to enable the student to receive educational benefit;

7 (3) They are provided under public supervision and direction; and

8 (4) They comprise an appropriate preschool, elementary or secondary education that
9 meets the education standards, regulations, and administrative policies and procedures issued
10 by the West Virginia Department of Education, including the requirements of the Individuals with
11 Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

§18-20A-102. Eligible students; inclusion within the provision of services.

1 (a) The county board of education shall make free appropriate public education available
2 to each eligible student in the county including all of the following:

3 (1) Students who are at least three years old and are eligible for special education services

4 unless the parent or adult student has refused special education services;

5 (2) Students who have not yet turned twenty-one years of age prior to September 1 of the
6 current year and have not graduated with a standard high school diploma;

7 (3) As specified in section one, article twenty of this chapter, students with disabilities
8 whose individualized education programs provide for a modified diploma shall be allowed to
9 participate in graduation ceremonies with their same grade classmates when requested by
10 parents in writing and shall be allowed to continue to receive services until twenty-one years of
11 age;

12 (4) Students with disabilities whose suspension(s) or expulsion(s) results in a change of
13 placement;

14 (5) Students with disabilities who have been suspended or expelled from school as
15 provided for in part VII of this article;

16 (6) Students determined in need of special education and related services, even though
17 the student has not failed or been retained in a course or grade, and is advancing grade to grade.

18 (b) The provision of a free appropriate public education includes students who reside in
19 group, personal care, or foster homes, as well as state operated facilities and students who are
20 migratory or homeless.

21 (c) Eligible students with disabilities who are in state correctional institutions shall be
22 afforded special education and related services that are in accordance with applicable state and
23 federal laws and regulations. This includes students who had received services in accordance
24 with an individualized education program, but who had left school prior to their incarceration, as
25 well as students who did not have an individualized education program in their last educational
26 setting, but who had actually been identified as a student with a disability for services under Part
27 B of the Individuals with Disabilities Education Improvement Act of 2004.

28 (d) Students with exceptionalities shall be provided an instructional day, a school day and
29 school calendar at least equivalent to that established for students without exceptionalities of the

30 same chronological age in the same setting.

31 (f) The county board of education shall ensure that extended school year services are
32 available as necessary to provide free appropriate public education as determined by the
33 individualized education program team for all students with disabilities, including children aged
34 three through five.

35 The county board of education shall ensure that students with exceptionalities are afforded
36 an equal opportunity to participate in nonacademic and extracurricular services and activities by
37 providing the supplementary aids and services determined appropriate and necessary by the
38 student's individualized education program team.

39 In addition, physical education services, specially designed if necessary, shall be made
40 available to every student receiving a free appropriate public education in accordance with West
41 Virginia Board of Education policies.

42 (g) The county board's requirement to provide special education services does not relieve
43 an insurer or similar third party from a valid obligation to provide or pay for services for an eligible
44 student. In cases where the payment source for services is being determined, the county board
45 of education shall ensure there is no delay in implementing the student's individualized education
46 program consistent with the provisions of part V of this article.

§18-20A-103. Exceptions to free appropriate public education.

1 The obligation to provide free appropriate public education does not apply to the following
2 persons:

3 (1) Students ages eighteen through twenty-one who, in the last educational placement
4 prior to their incarceration in an adult correctional facility, were not actually identified as being a
5 student with a disability and did not have an individualized education program; however, this
6 exception shall not apply to a student who had been identified as a student with a disability and
7 had received services in accordance with an individualized education program, but left school
8 prior to incarceration or did not have an individualized education program in their last educational

- 9 setting, but who had actually been identified as a student with a disability;
10 (2) Students who have graduated high school with a standard high school diploma;
11 (3) Students ages three through five who are eligible under developmental delay, but who
12 receive early intervention services from the West Virginia Birth to Three program; and
13 (4) Students removed from school for disciplinary reasons for less than eleven cumulative
14 school days in a school year.

§18-20A-104. Providers of programs and services.

- 1 Special education programs and services may be provided by any one or more of the
2 following:
3 (1) A single local educational agency;
4 (2) Two or more local educational agencies cooperatively;
5 (3) A regional educational service agency; or
6 (4) Other public or private agencies or individuals.
7 If placement of the student in a public or private residential program is necessary, the program
8 shall be at no cost to the parents of the student.

§18-20A-105. Using private and public funds to provide services.

- 1 (a) If a student is covered by a parent's private insurance, the county board of education
2 may access this insurance only if the parent provides informed consent. Each time the county
3 board of education proposes to access the private insurance, the county board of education shall
4 obtain written parental consent and inform the parent that his or her refusal to permit the county
5 board of education to access the private insurance does not relieve the county board of education
6 of its responsibility to ensure that all required services are provided at no cost.
7 (b) The financial responsibility of public agencies, including Medicaid and other public
8 insurers obligated under Federal or State law or assigned responsibility under State policy, shall
9 precede financial responsibility of the county board of education. However, if the public agency
10 other than the educational agency fails to provide or pay for special education or related services,

11 the county board of education responsible for developing the student's individualized education
12 program shall provide or pay for these services to the student in a timely manner. Students with
13 disabilities who are covered by public benefits or insurance may not be disqualified from an
14 eligible service for Medicaid reimbursement because that service is provided in a school context.

15 (1) The public agency is required to provide written notification to the child's parents prior
16 to accessing a child's public benefits or insurance for the first time and annually thereafter. The
17 notice shall inform the child's parents of the following:

18 (A) Prior written parental consent to release personal information from a child's education
19 records or information about the services that may be provided for the purpose of billing Medicaid
20 or another specific agency for individualized education program services will be requested.

21 (B) The consent form will state the student's personal education records and information
22 that will be disclosed, the purpose of the disclosure (e.g. Medicaid billing) and the agency to which
23 the records will be released. Parents will state they understand and agree that their or their child's
24 public benefits or insurance will be accessed to reimburse the cost of services.

25 (C) Parents cannot be required to sign up for or enroll in public benefits or insurance
26 programs for their child to receive free appropriate public education, that is, individualized
27 education program services.

28 (D) Parents are not required to pay out-of-pocket expense such as a deductible or co-pay
29 amount resulting from filing a claim, but may pay the cost that otherwise would be paid by parents.

30 (E) Parents shall be informed that their public insurance (e.g., Medicaid) will not be billed
31 if it would:

32 (i) Result in a decrease in lifetime benefits;

33 (ii) Result in the child's parents paying for services that would otherwise be covered and
34 that are needed for the child outside of the time the child is in school;

35 (iii) Result in an increase in premiums or discontinuation of public benefits or insurance;

36 or

37 (iv) Risk loss of eligibility for home and community-based waivers based on the total
38 aggregated health-related expenditures for the child or the child's parents.

39 (F) Parents have the right to withdraw consent to disclose their child's personal information
40 for billing purposes at any time.

41 (G) Parents' withdrawal of consent, or refusal to provide consent, to release their child's
42 personal information for purposes of accessing their public benefits or insurance (e.g., for
43 Medicaid billing) does not relieve the county board of education of its responsibility to ensure that
44 all required services are provided at no cost to parents.

45 (2) To access a student's public insurance (e.g., Medicaid reimbursement), the county
46 board of education shall obtain and maintain documentation of parent or adult student one-time
47 prior consent specifying:

48 (A) The personally identifiable information that may be disclosed (e.g., records or
49 information about the services that may be provided to the child);

50 (B) The purpose of the disclosure of educational records;

51 (C) The agency to which the disclosure may be made; and

52 (D) That the parent understands and agrees that the public agency may access the
53 parent's or the child's public benefits or insurance to pay for services.

54 (3) If a child moves to a new public agency, the new public agency shall obtain a new one-
55 time prior consent consistent with the services the new public agency is providing to the child.

56 (4) At any time a parent withdraws consent to disclose their child's personal information
57 for billing purposes, the withdrawal shall be submitted in writing, and the public agency may no
58 longer bill the child's public insurance.

59 (c) If it is unable to obtain parental consent to use the parents' private insurance, or public
60 benefits or insurance when the parents would incur a cost for a service specified on their child's
61 individualized education program, the county board of education may use Part B funds to pay for
62 services to ensure free appropriate public education. To avoid financial cost to parents who

63 otherwise would consent to use private insurance, or public benefits or insurance if the parent
64 would incur a cost, the county board of education may use its Part B funds to pay the amount the
65 parents otherwise would have to pay, such as a deductible or co-pay amount, to use the parents'
66 benefits or insurance.

67 (d) Proceeds from public or private insurance will not be treated as program income for
68 purposes of 34 CFR §80.25. If a county board of education spends reimbursements from federal
69 funds for services under this part, those funds will not be considered "state or local" funds for the
70 purpose of the maintenance of effort provisions of Part B of the Individuals with Disabilities
71 Education Improvement Act of 2004.

PART II. IDENTIFICATION OF ELIGIBLE STUDENTS – THE CHILD FIND SYSTEM

§18-20A-201. Duty to identify eligible students; scope of inclusion.

1 The county board of education is responsible for establishing and implementing an
2 ongoing "Child Find" system to locate, identify, and evaluate students with disabilities residing in
3 the county, between the ages of three and twenty-one, inclusive, regardless of the severity of the
4 disability, gifted students from first through eighth grades and exceptional gifted students in
5 grades nine through twelve who may need special education. The county board of education is
6 also responsible for coordinating with the West Virginia Department of Health and Human
7 Resources regarding the Child Find system for children ages birth to three years.

8 The Child Find system shall include all students suspected of needing special education
9 and related services within the county's geographic boundaries who are:

10 (1) Enrolled in public school;

11 (2) Home schooled;

12 (3) Enrolled in private schools, including religious schools, located in the county;

13 (4) Not enrolled in school, including children ages birth through five;

14 (5) Highly mobile students including migrant students;

15 (6) Homeless students;

16 (7) Wards of the state; or

17 (8) Suspected of having a disability even though the student has not failed or been retained

18 in a course or grade and is advancing from grade to grade.

§18-20A-202. Identification of eligible children ages three and under; dissemination of information.

1 (a) The West Virginia Department of Health and Human Resources WV Birth to Three
2 program is responsible for implementation and operation of the Child Find system for infants and
3 toddlers, birth to three years of age. In order to fulfill these duties the department of health and
4 human resources is authorized to enter into state and local interagency agreements to provide
5 for collaboration and coordination of services. The county board of education shall develop local
6 interagency agreements and procedures to maximize resources and services for students and
7 families and ensure a smooth and effective transition from early childhood programs to public
8 school.

9 (b) The county board of education shall annually take the ongoing steps necessary to
10 ensure that parents, county board of education staff, private school representatives and the
11 general public are informed of the following:

12 (1) The nature of students with exceptionalities;

13 (2) The availability of special education and related services;

14 (3) A student's right to free appropriate public education;

15 (4) Confidentiality protections; and

16 (5) The referral process, including the person to contact for initiating a referral.

17 This information may be provided through a variety of methods such as distributing
18 brochures or flyers, including providing information in school or district publications, disseminating
19 articles and announcements to newspapers, and/or arranging for radio and television messages
20 and presentations.

§18-20A-203. Referrals.

1 (a) A parent or any other interested person or agency may refer a student who is
2 suspected of needing special education and related services. Referrals received from an outside
3 source shall be forwarded to the student assistance team at the student's school for consideration.
4 For preschool age children or home-schooled students, the referral shall be received and
5 processed directly by the special education director or designee.

6 Each county board of education shall locate, identify and evaluate all students suspected
7 of needing special education services who are enrolled by their parents in private, including
8 religious, elementary and secondary schools located in the school district in accordance.
9 Referrals for private school students shall be directed to, and processed directly by, the county
10 special education director or designee.

11 (b) The general education process conducted to determine whether there are problems or
12 potential problems in the areas of vision, hearing, speech and language shall be conducted
13 annually for all students entering kindergarten or preschool and all students entering public and
14 private schools for the first time.

15 Additionally, the county board of education shall conduct developmental screening for
16 children under the compulsory school attendance age upon the request of a parent or guardian
17 of a child residing in the district or attending a private school within the district. This developmental
18 screening shall be conducted within thirty school days of the written request. The county board
19 of education is not required to provide such screening to the same child more than once in any
20 one school year. Children identified through the screening process shall be referred for further
21 evaluation.

22 At least ten days prior to initiation of screening activities, the county board of education
23 shall provide public notice of the screening program. Information released through media sources
24 should include the purpose, types and dates of screenings and the means for parents to request
25 that their child not participate.

26 (c) Each public school shall establish a student assistance team that consists of at least

27 three persons, including a school administrator or designee, who shall serve as the chairperson,
28 a current teacher and other appropriate professional staff. The student assistance team shall be
29 required to:

30 (1) Receive training in referral procedures for multidisciplinary evaluations, alternative
31 education placements, disciplinary procedures and other school processes as appropriate for
32 ensuring student progress and maintenance of a safe school environment;

33 (2) Collect and maintain data on the activities of the team, including dates of meetings and
34 the results of its recommendations;

35 (3) Conduct the problem-solving process that includes designing and monitoring
36 implementation of interventions and/or reviewing interventions designed by other school teams;

37 (4) Receive and process written referrals from outside sources suspecting a student may
38 need special education, including referrals and requests for initial evaluations made by parents;
39 and

40 (5) Initiate initial evaluation for special education and related services for students, when
41 warranted based on the outcome of interventions.

42 (d) When the student assistance team receives a written referral for a special education
43 multidisciplinary evaluation, or a written parent request for initial evaluation, the team must take
44 the following actions:

45 (1) Within five school days of receipt of a written referral for a multidisciplinary evaluation,
46 the team shall identify and notify appropriate persons of the date, time, location and specific
47 information needed for a meeting with the team.

48 (2) Within ten school days of receipt of the written referral, the student assistance team
49 shall conduct a review of the areas of concern, collect and analyze available educational data and
50 review previous interventions and make a determination regarding further action. This action may
51 include any of the following options:

52 (A) Conduct a student assistance problem-solving process to initiate, continue or modify

53 interventions within a timeline established for the student by the student assistance team; review
54 the effectiveness of the student assistance team's recommendations within the timeline
55 established for the student, but in no case may the review take place beyond forty-five school
56 days; ensure problem solving activities of the student assistance team are not used to delay
57 processing a request for initial evaluation where immediate action is warranted; and close the
58 problem-solving process when appropriate based on results of interventions; or

59 (B) Request an initial evaluation, in cases where warranted, for example, a sensory
60 impairment or other significant disability requiring immediate attention or when presented
61 evidence and documentation of previous interventions sufficient to make a decision; or

62 (C) When a written request for initial evaluation has been initiated by the parent, determine
63 whether the evaluation will be conducted, and provide written notice of the decision and a copy
64 of the procedural safeguards to the parent.

65 (3) The student assistance team shall invite parents to review recommendations made by
66 the student assistance team in regard to the student's program and to provide feedback to the
67 team about those recommendations.

68 (4) Within five days of the student assistance team decision to request an initial
69 multidisciplinary evaluation, or to conduct an evaluation requested by the parent, written notice
70 and a copy of the procedural safeguards disclosure shall be provided to the parent, and informed
71 parental consent is requested for conducting the evaluation. The request for parent consent shall
72 be completed by the multidisciplinary evaluation team at the direction of the special education
73 director or designee. The student assistance team may serve as the multidisciplinary evaluation
74 team to determine the evaluations to be requested, provided it has the required membership for
75 a multidisciplinary evaluation team.

76 (5) The principal, classroom teacher or other designated individual is responsible for
77 documenting the date written parental consent for initial evaluation is received and immediately
78 forwarding this request to the special education director or designee.

79 (6) Within five days of a student assistance team decision to refuse a written parent
80 request for initial evaluation, the county board of education shall provide written notice and a copy
81 of the procedural safeguards disclosure to the parent.

PART III. EVALUATION AND REEVALUATION.

§18-20A-301. Duty and composition of evaluation team; when meetings required.

1 Decisions regarding evaluations and assessments shall be made by an evaluation team.
2 This team includes the same membership as the individualized education program team and other
3 qualified professionals as appropriate. The parent or the adult student is a member of the
4 evaluation team and shall be provided an opportunity to provide input and participate in making
5 team decisions including what additional data, if any, are needed to fulfill the purposes of an initial
6 evaluation or reevaluation. The evaluation team may conduct its business with or without holding
7 a meeting; however, if requested by the parent or the adult student, a team meeting shall be held.

§18-20A-302. Definition of evaluation; procedures for conducting a multidisciplinary evaluation.

1 (a) For the purposes of this article, “evaluation” means procedures used in accordance
2 with the protection in evaluation requirements of the Individuals with Disabilities Education
3 Improvement Act of 2004 and section one, article twenty of this chapter to determine whether a
4 student has a disability or is gifted, and the nature and extent of the special education and related
5 services the student needs. The term means those procedures used selectively with an individual
6 student and does not include basic tests administered to or procedures used with all students in
7 a school, grade or class. Screening of a student by a teacher or specialist to determine the
8 appropriate instructional strategies for curriculum implementation is not considered to be an
9 evaluation for eligibility for special education and related services and does not require parental
10 consent. However, the evaluation team may consider the results of such screenings to assist in
11 determining areas to evaluate.

12 (b) The principal, classroom teacher or other designated individual is responsible for

13 documenting the date written parental consent for initial evaluation is received and immediately
14 forwarding this request to the special education director or designee. Within eighty days of the
15 documented date, the county board of education shall conduct a full, individual initial evaluation
16 and convene an eligibility committee to determine the student's eligibility for special education
17 before the provision of special education and related services to a student with an exceptionality.

18 The eighty-day time limit shall not apply if:

19 (1) The parent fails or refuses to produce the student;

20 (2) The student changes district of enrollment during evaluation process;

21 (3) School districts are closed due to circumstances resulting in a state of emergency
22 determined by the Governor of West Virginia, in which case time limit shall be extended in direct
23 proportion to the duration of the state of emergency;

24 (4) The school district is closed due to weather conditions determined by the county
25 superintendent, in which case the time limit shall be extended in direct proportion to the duration
26 of the adverse weather conditions and the county board missed shall be clearly document the
27 number of days missed in the student's file to accurately record the interruption; or

28 (5) Summer break.

29 (c) The purpose of an initial evaluation is to gather information to determine:

30 (1) Whether the student has a disability or is gifted;

31 (2) The educational needs of the student, including present levels of academic
32 achievement and related developmental needs of the student;

33 (3) The effects of the exceptionality on educational and functional performance;

34 (4) If the student needs specially designed instruction; and

35 (5) The nature and extent of the special education needed by the student.

36 (d) As part of an initial evaluation, the evaluation team shall review, where appropriate,
37 existing evaluation data on the student including:

38 (1) Evaluations and information provided by the parent or adult student; and

39 (2) Data regarding the student's response to scientific research-based general education
40 interventions using:

41 (A) Current classroom-based assessments and classroom-based observations;

42 (B) Observations by teachers and related service providers; and

43 (C) Results from statewide and district-wide testing.

44 Based on that review, and input from the parent or adult student, the team will decide what
45 additional data, if any, are needed to fulfill the purposes of an initial evaluation. If the team
46 determines that no additional data are needed, the county board of education shall notify the
47 parents/adult student of that determination and the reasons for the determination and the right of
48 the parents to request an assessment.

49 (d) Within three years of the date of the last eligibility committee meeting, or more
50 frequently if the parent or teacher requests or conditions warrant, the county board of education
51 shall conduct an individual multidisciplinary reevaluation to determine a student's educational
52 needs and continued eligibility for special education and related services and whether any
53 additions or modifications to the student's special education and related services are needed to
54 enable the student to meet their measurable annual individualized education program goals and
55 to participate, to the extent appropriate, in the general education curriculum. As part of the
56 reevaluation, the individualized education program team and other qualified professionals, as
57 appropriate, shall review existing evaluation data on the student, including:

58 (1) The current individualized education program and the student's progress toward
59 meeting the annual goals;

60 (2) Evaluations and information provided by the parent of the student;

61 (3) Current classroom-based, local or state assessments and classroom-based
62 observations; and

63 (4) Observations by teachers and related service providers.

64 This team may conduct its review with or without holding a meeting but shall document its

65 decisions on a form designated by the department.

66 If the individualized education program team decides that additional evaluations are
67 needed, the team shall obtain consent as described in section three hundred three of this article.
68 This evaluation shall be conducted prior to the established triennial review date. For students
69 with giftedness, a reevaluation shall be conducted during the eighth grade year to determine
70 eligibility for exceptional gifted.

71 If the individualized education program team decides that no additional assessments are
72 needed to determine the educational needs of the student and whether the student continues to
73 be a student in need of special education, the county board of education shall provide written
74 notice to the parent or adult student of that determination and the reasons for the determination
75 and of his or her right to request an assessment for this purpose. If the student's parent, teacher
76 or the adult student requests a reevaluation, this evaluation shall be conducted prior to the
77 established triennial review date.

78 Reevaluations may not occur more than once a year without the agreement of the county
79 board of education and parent.

80 (e) Before making a determination that a student is no longer eligible for special education,
81 the county board of education shall reevaluate a student with a disability, unless the student
82 graduates with a standard high school diploma or the student reaches the age of twenty-one.

83 For a student whose eligibility terminates under circumstances described above, the
84 county board of education shall provide the child with a summary of the child's academic
85 achievement and functional performance, including recommendations on how to assist the
86 student in meeting his/her postsecondary goals. PWN shall be provided to the parent or adult
87 student if the student is exiting special education due to graduation with a standard high school
88 diploma.

89 (f) Any additional evaluations requested by the eligibility committee or individualized
90 education program team shall be completed and a meeting of the committee or team shall be

91 held within sixty days of receipt of parental consent for the identified evaluations. Request for
92 parental consent for additional evaluations shall be sent within ten school days of the meeting at
93 which the request for evaluation is generated.

94 If the eligibility committee or individualized education program team determines that a
95 comprehensive multidisciplinary evaluation is required to determine whether a student meets the
96 criteria for a different exceptionality, the county board of education shall conduct the evaluation
97 within eighty days of the documented date of receipt of parental consent.

98 In those instances when an outside agency is requested to conduct an additional
99 evaluation but is unable to complete the evaluation within sixty days, the county board of
100 education shall document its efforts to obtain the additional evaluation within sixty days. Where
101 the county board of education has documented reasonable efforts to obtain the evaluation within
102 the sixty days, the county board of education is not considered to be in violation of the sixty day
103 timeline.

104 (g) Upon receipt of a written parental request for an additional evaluation, the
105 individualized education program team shall considers the request, with or without holding a
106 meeting, and within ten days of receipt shall provide prior written notice of its response. If the
107 parent or adult student requests an additional assessment for reasons other than the
108 determination of educational needs or eligibility, such as admission to college, the county board
109 of education is not obligated to conduct the evaluation but shall consider the request and provide
110 written notice of the county board of education's response to the request.

§18-20A-303. Written notice and consent for evaluation

1 (a) Within five days of the county board of education's decision to evaluate or reevaluate,
2 written notice requesting consent for evaluation or reevaluation shall be provided to the parent or
3 adult student. Written notice shall be in plain language, understandable to the general public. It
4 shall be provided in the native language or other mode of communication normally used by the
5 parent or adult student unless it is clearly not feasible to do so. If the native language or other

6 mode of communication is not a written language, the county board of education shall take steps
7 to ensure the parent or adult student understands the content of the notice. Any non-written notice
8 shall be documented with written evidence that the requirements of this section have been met.

9 (b) The written notice shall include the following information:

10 (1) A description of the evaluation or reevaluation proposed or refused by the county board
11 of education;

12 (2) An explanation of why the county board of education proposes to evaluate or
13 reevaluate the student;

14 (3) A description of other options the county board of education considered and the
15 reasons why those options were rejected;

16 (4) A description of each evaluation procedure, assessment, record, or report the county
17 board of education used as a basis for the proposed or refused evaluation or reevaluation;

18 (5) A description of any other factors relevant to the evaluation or reevaluation;

19 (6) A statement that the parent or adult student has protection under the procedural
20 safeguards, and a description of how to obtain a copy of the Procedural Safeguards Notice; and

21 (7) Sources to contact to obtain assistance in understanding the Procedural Safeguards
22 Notice.

23 In addition to this notice, the parent or adult student shall be provided with a Notice of
24 Individual Evaluation/Reevaluation Request form shall be provided. The date of receipt by the
25 school or the county board of the signed parental consent form shall be documented in the
26 student's individual West Virginia Education Information System (WVEIS) student record.

27 (c)(1) For the purposes of this part of this article, "consent" means that the parent or adult
28 student:

29 (A) Has been fully informed in his or her native language or other mode of communication
30 of all information relevant to the evaluation for which consent is sought;

31 (B) Understands and agrees in writing to the carrying out of the activity;

32 (C) Has been given enough information to make informed decisions about the county
33 board of education's request to conduct an evaluation, including information about the various
34 types of assessments for which consent is sought; and

35 (D) Understands that the granting of consent is voluntary on the part of the parent or adult
36 student and may be revoked at any time.

37 If consent is revoked, the revocation shall not be retroactive and does not negate an action
38 that has occurred after the consent was given and before the consent was revoked. Consent for
39 evaluation shall not be construed as consent for the initial provision of special education and
40 related services.

41 (2) Written consent shall be sought for every evaluation and reevaluation. The county
42 board of education shall seek consent to administer the needed assessments, based on
43 recommendations from the evaluation team, within five days of the decision to evaluate or
44 reevaluate. If the parent or adult student fails to respond within ten school days of the initial
45 request for consent, the county board of education shall mail or hand-deliver a second notice. If
46 the parent or adult student once again fails to respond, the county board of education shall
47 document reasonable measures taken to obtain consent, which may include:

48 (A) A record of telephone calls made or attempted and the results of those calls;

49 (B) Copies of correspondence sent to the parent or adult student and any response
50 received; and

51 (C) Detailed records of visits made to the parent's or the adult student's home or place of
52 employment and the results of those visits.

53 (d) If the parent or the adult student fails to respond after the county board of education
54 has taken reasonable measures to obtain consent for assessments and after the passage of thirty
55 school days from the initial request for consent, the county board of education may:

56 (A) As part of a reevaluation, provide written notice that the county board of education will
57 conduct the reevaluation; or

58 (B) As part of an initial evaluation, pursue the evaluation by using mediation or filing a due
59 process complaint.

60 (e) If the parent refuses consent, the county board of education may use mediation or due
61 process hearing procedures if the student is enrolled in or seeking enrollment in a public school.
62 However, the county board of education cannot pursue the evaluation if the student is in a parental
63 private placement or is home schooled.

64 (f) Neither written notice nor consent is required for:

65 (1) The review of existing data as part of an evaluation or reevaluation;

66 (2) The administration of a test or other assessment that is administered to all students
67 unless consent is required of the parents of all the students;

68 (3) Screening, including monitoring of progress by a teacher or specialist, to determine the
69 appropriate instructional strategies for curriculum implementation; and

70 (4) Initial evaluations, when the student is a ward of the state and is not residing with the
71 student's parent, if:

72 (A) Despite reasonable efforts, the county board of education cannot discover the
73 whereabouts of the parents;

74 (B) The rights of the parents have been terminated under state law; or

75 (C) The rights of the parents to make educational decisions have been subrogated by a
76 judge in accordance with state law and consent has been provided for the initial evaluation by an
77 individual appointed by the judge to represent the child.

78 (g) The county board of education is not required to obtain the consent of the parent or
79 the adult student in order for the county board to request information from other counties that the
80 student has attended or to send information to other public school districts, including schools
81 maintained by the Office of Institutional Education Programs or the West Virginia Schools for the
82 Deaf and Blind, in which the student enrolls or intends to enroll.

83 (h) Parental consent is required prior to the sharing of information between the district of

84 residence and the district where a private school is located if a student has been parentally-placed
85 in the private school.

86 (i) Before the county board of education seeks to obtain relevant information about a
87 student from other agencies, consent shall be obtained from the parents. A copy of the signed
88 consent form for release of information shall be included with each request for the information. A
89 copy of the signed consent form for release of information shall be maintained in the student's
90 confidential file.

§18-20A-304. Requirements for the evaluation process.

1 (a) For an initial evaluation, the student shall be evaluated in all areas related to the
2 suspected exceptionality including, if appropriate, health, vision, hearing, social and emotional
3 status, adaptive skills, behavioral performance, general intelligence, academic performance,
4 communicative status, motor abilities, assistive technology services or devices, post-secondary
5 interests and preferences and vocational aptitudes. The evaluation shall be sufficiently
6 comprehensive to identify all of the student's special education and related needs for services,
7 whether or not commonly linked to the suspected exceptionality.

8 (b) The county board of education shall ensure, at a minimum, that the evaluation or
9 reevaluation meets the following requirements:

10 (1) A variety of assessment tools and strategies shall be used to gather relevant,
11 functional, developmental and academic information about the student, including information
12 provided by the parent or the adult student. This information shall be used to determine:

13 (A) Whether the student is a student with an exceptionality; and

14 (B) The content of the student's individualized education program including information
15 related to enabling the student to be involved in and progress in the general education curriculum
16 should the student be determined to require special education and related services.

17 (2) No single measure or evaluation may be used as the sole criterion for determining
18 whether a student is a student with an exceptionality and for determining an appropriate

19 educational program for the student.

20 (3) The county board of education shall use technically sound instruments to assess the
21 relative contribution of cognitive and behavioral factors, in addition to physical or developmental
22 factors.

23 (4) Assessments and other evaluation materials shall be:

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

25 (B) Provided and administered in the student's native language and in the form most likely
26 to yield accurate information on what the student knows and can do academically,
27 developmentally and functionally unless it is not feasible to do so. The attempts to provide a
28 qualified examiner in the student's native language or mode of communication shall be
29 documented by the county board of education;

30 (C) Used for purposes for which they are valid and reliable; and

31 (D) Administered in accordance with any instructions provided by the producer of the
32 assessments.

33 (5) Tests and other assessment materials shall include those tailored to assess specific
34 areas of educational need and not merely those that are designed to provide a single general
35 intelligence quotient.

36 (6) Tests shall be selected and administered so as to best ensure that if a test is
37 administered to a student with impaired sensory, manual, or speaking skills, the test results
38 accurately reflect the student's aptitude or achievement level or whatever other factors the test
39 purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking
40 skills unless those are the factors that the test purports to measure. This includes the provision of
41 accommodations, such as assistive technology, Braille and interpreters.

42 (7) Assessments of students with exceptionalities who transfer from one district to another
43 district in the same academic year shall be coordinated with the student's prior and subsequent
44 schools, as necessary and as expeditiously as possible, to ensure prompt completion of full

45 evaluations.

46 (8). The county board of education shall provide and use assessment tools and strategies
47 that produce relevant information that directly assists persons in determining the educational
48 needs of the student.

49 (9) All services and assessments shall be provided at no expense to the parent or adult
50 student.

51 (c) Individuals conducting evaluations shall be:

52 (1) Appropriately certified, licensed or otherwise qualified to administer the evaluations for
53 which they are responsible;

54 (2) Trained in the use of the specific evaluation instruments or techniques for which they
55 are responsible;

56 (3) Knowledgeable in the area of concern; and

57 (4) Knowledgeable in the applicable state and federal regulations.

58 (d) Each evaluator, including the classroom teacher, shall write, sign and date an
59 individual evaluation report. Prior to the reevaluation date or within eighty days of initial parental
60 consent for evaluation, each evaluator shall make the written report available to the eligibility
61 committee and to the parent or adult student.

PART IV. ELIGIBILITY

§18-20A-401. Determination of eligibility.

1 (a) Within eighty days of receipt of consent for an initial evaluation or after the completion
2 of a reevaluation and prior to the established reevaluation date, the county board of education
3 shall convene an eligibility committee meeting to determine whether a student is or continues to
4 be a student in need of special education services. Eligibility committee members should be
5 selected in consideration of the presented evaluation information and shall consist of the parent
6 or adult student and qualified professionals as follows:

7 (1) District administrator of special education, principal or designee;

- 8 (2) Members of the multidisciplinary evaluation team;
9 (3) General or special educator;
10 (4) Additional individuals with specific expertise related to the student and the area(s) of
11 concern;
12 (6) For initial eligibility committees, the referring teacher; and
13 (7) For students suspected of having a specific learning disability, the student's general
14 education teacher and at least one person qualified to conduct individual diagnostic examinations
15 of students such as a school psychologist, speech language pathologist or remedial reading
16 teacher.
- 17 (b) The county board of education shall provide written notice to the parent and/or adult
18 student and other eligibility committee members of the meeting time, date, place, purpose and
19 invited members no less than eight days prior to the scheduled meeting date. If the parent is
20 unable to attend, the county board of education shall use other methods to ensure participation
21 such as videoconferences and conference calls.
- 22 (c) The eligibility committee will draw upon information from a variety of sources, including,
23 as appropriate, but not limited to, formative assessments, aptitude and achievement tests, parent
24 or adult student input, teacher observations, health, social or cultural background, adaptive
25 behavior, and functional assessments. The eligibility committee shall ensure that information
26 obtained from all of these sources is documented and carefully considered. The eligibility
27 committee will consider these evaluation or reevaluation findings and determine whether the
28 student meets or continues to meet eligibility criteria.
- 29 (d) Results of the multidisciplinary evaluation shall be utilized by the eligibility committee
30 as the primary source of information to determine the student's educational needs and whether
31 the student no longer meets the eligibility criteria or no longer needs specially designed instruction
32 or whether the student meets the eligibility criteria in one of the designated exceptionalities;
33 experiences an adverse effect on educational performance; and needs special education;

34 (e) A student cannot be identified as a student in need of special education services if the
35 primary reason for such a decision is a lack of appropriate instruction in reading, including the
36 essential components of reading instruction as defined by the Elementary and Secondary
37 Education Act (ESEA) – phonemic awareness, phonics, vocabulary development, reading
38 fluency, including oral reading skills, and reading comprehension strategies; a lack of appropriate
39 instruction in math; or limited English proficiency.

40 (f) Using the results of the multidisciplinary evaluation, the eligibility committee shall
41 determine the student’s primary exceptionality when more than one exceptionality condition is
42 present. The committee shall discuss how each exceptionality affects the student’s educational
43 and functional performance and determine and document which has the most adverse impact on
44 the student’s participation and progress in the general curriculum.

45 (g) If consensus upon the primary exceptionality cannot be reached, the district
46 administrator or designee shall make the decision and provide the parent or adult student with
47 written notice of the decision.

§18-20A-402. Report of eligibility committee.

1 Upon completing the review of the student’s multidisciplinary evaluation or reevaluation,
2 the eligibility committee shall prepare an eligibility committee report and provide a copy of the
3 report to the parent or adult student. The parent or adult student and other individualized
4 education program team participants shall have all the information they need to participate
5 meaningfully in the individualized education program team meeting. Copies of the evaluation
6 reports and documentation of eligibility determination shall be provided at no cost to the parent or
7 adult student.

8 The eligibility committee report shall include the following information:

9 (1) Signatures with dates and positions of all eligibility committee members;

10 (2) All data on the student as required in the state eligibility criteria established under
11 section four hundred three of this article for the area of suspected exceptionality;

- 12 (3) The specific exceptionality determined for state and federal reporting purposes;
13 (4) Information about how the student's exceptionality affects his or her educational
14 performance;
15 (5) The committee's decision regarding whether the student needs special education
16 services;
17 (6) Recommendations for those students deemed ineligible for special education to be
18 considered by the student assistance team or the instruction and intervention team; and
19 (7) The date of the eligibility determination.

20 Even if no new assessments have been conducted, the eligibility committee shall prepare
21 required to write a report detailing how the student meets eligibility requirements. The report shall
22 address each required eligibility component and include results of previous assessments if they
23 are being used to determine eligibility.

24 For students suspected of having a specific learning disability, the committee shall also
25 complete a specific learning disability team report pursuant to the provisions of section four
26 hundred three of this article. For students who are gifted, the eligibility committee report is
27 required to document compliance with reevaluation timelines.

28 If the eligibility committee report indicates that a student meets the criteria for blindness,
29 low vision, deafness, hard of hearing or deafblindness, the parents or guardians shall be provided
30 information pertaining to the West Virginia Schools for the Deaf and Blind to make them aware of
31 the options available and to help them make an informed decision regarding educational services
32 and programming for their child.

§18-20A-403. Consideration of reevaluation data.

1 School districts shall carefully consider the reevaluation of students initially found eligible
2 for special education. Districts shall consider the effect of exiting a student from special education
3 who has received special education for many years and how the removal of such supports will
4 affect the student's educational progress, particularly for a student who is in the final years of high

5 school.

§18-20A-404. State criteria for eligibility for special education and related services.

1 The county board of education shall use the following eligibility criteria and assessment
2 procedures when determining eligibility for special education.

3 (a) *Autism* -- “Autism” is a developmental disability, generally evident before age three,
4 significantly affecting verbal and nonverbal communication and social interaction and adversely
5 affecting educational performance; however, a student who manifests the characteristics of
6 autism after age three may be diagnosed as having autism if the criteria in this section are
7 satisfied. Other characteristics often associated with autism include, but are not limited to,
8 engagement in repetitive activities and stereotyped movements, resistance to environmental
9 change or change in daily routines, and unusual responses to sensory experiences.

10 A student is eligible for special education services as a student with autism when all of the
11 following American Psychiatric Association’s Diagnostic and Statistical Manual of Mental
12 Disorders, Fifth Edition criteria.

13 (b) *Blindness and low vision* – “Blindness and low vision” refers to an impairment in vision
14 that, even with correction, adversely affects a student’s educational performance. The term
15 includes both partial sight and blindness.

16 A student is eligible for special education services as a student with blindness and low
17 vision when the following criteria are met:

18 1. The student has a documented visual impairment, not primarily perceptual in nature,
19 as determined by an optometrist, ophthalmologist or neurologist as evidenced by at level one of
20 the following conditions:

21 (A) Measured acuity of 20/70 or less in the better eye with correction at distance or near;

22 (B) Visual field restriction of twenty degrees or less in the better eye;

23 (C) A deteriorating eye condition which will result in loss of visual;

24 (D) A visual loss caused by a disturbance of the posterior visual pathway and/or cortex

25 with the characteristic behaviors associated with cortical visual impairment; or

26 (E) Measured acuity of 20/70 or better in the better eye with correction at distance or near
27 and a functional vision evaluation conducted by a certified teacher of the visually impaired
28 determines the student:

29 (i) Has limited ability in visually accessing program-appropriate educational media and
30 materials including but not limited to textbooks, photocopies, chalkboards, computers or
31 environmental signs without modification;

32 (ii) Has limited ability to visually access the full range of program-appropriate educational
33 media and materials without accommodations including but not limited to changes in posture,
34 body movement focal distance or squinting;

35 (iii) Demonstrates variable visual ability due to environmental factors including but not
36 limited to contrast, weather, color or movement, that cannot be controlled, or

37 (iv) Experiences reduced or variable visual ability due to visual fatigue or factors common
38 to the eye condition;

39 (2) The student's physical eye condition, even with correction, adversely affects
40 educational performance; and

41 (3) The student needs special education.

42 (c) Deafblindness – “Deafblindness” means concomitant hearing and visual impairments,
43 the combination of which causes such severe communication and other developmental and
44 educational needs that they cannot be accommodated in special education programs designed
45 solely for students with deafness or blindness or students who are hard of hearing or partially
46 sighted.

47 A student is eligible for special education services as a student with deafblindness when
48 all of the following criteria are met:

49 (1) The student exhibits characteristics consistent with the definition.

50 (2) The student is diagnosed by an optometrist or ophthalmologist for vision loss and by

51 an otologist, otolaryngologist, or audiologist for hearing loss.

52 (3) The student's condition adversely affects educational performance.

53 (4) The student needs special education.

54 When a student meets these criteria, deafblindness shall be the primary basis for the
55 eligibility of the student.

56 (d) Deafness – "Deafness" is a hearing impairment that is so severe that the student is
57 impaired in processing linguistic information through hearing, with or without amplification, which
58 adversely affects a student's educational performance.

59 A student is eligible for special education services as a student who is deaf when all of the
60 following criteria are met:

61 (1) The student exhibits characteristics consistent with the definition and relies primarily
62 on vision to access spoken communication.

63 (2) The student has been diagnosed by an otologist, otolaryngologist, or audiologist as
64 having a hearing loss.

65 (3) The student's condition adversely affects educational performance.

66 (4) The student needs special education.

67 (e) Developmental Delay – "Developmental delays" occur in students, ages three through
68 five, who are functioning at, or lower than, seventy-five percent of the normal rate of development
69 in two or more of the following areas: cognition, physical development including gross motor
70 and/or fine motor skills, communication, social or emotional or affective development, or self-help
71 skills.

72 A student is eligible for special education services as a student with developmental delay
73 when all of the following criteria are met:

74 (1) The student exhibits characteristics consistent with the definition; and

75 (2) The student needs special education.

76

77 (f) Emotional or Behavioral Disorder -- An emotional or behavioral disorder means a
78 condition in which a student exhibits one or more of the following characteristics over a long period
79 of time and to a marked degree that adversely affects a student's educational performance: an
80 inability to learn that cannot be explained by intellectual, sensory, or health factors, an inability to
81 build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate
82 types of behavior or feelings under normal circumstances, a general pervasive mood of
83 unhappiness or depression, a tendency to develop physical symptoms or fears associated with
84 personal or school problems, or schizophrenia. The term does not include students who are
85 socially maladjusted unless it is determined they have an emotional/behavioral disorder.

86 A student is eligible for special education services as a student with an emotional or
87 behavioral disorder when all of the following criteria are met:

88 (1) The student continues to exhibit an emotional/behavioral disorder consistent with the
89 definition after targeted and intensive interventions have been implemented within the Support for
90 Personalized Learning framework;

91 (2) The student has been observed exhibiting one or more of the characteristics listed in
92 the definition of emotional or behavioral disorder and the characteristics have been observed and
93 documented:

94 (A) For a long period of time;

95 (B) By more than one knowledgeable observer trained in data gathering;

96 (C) In more than one setting; and

97 (D) At a level of frequency, duration, and/or intensity that is significantly different from the
98 student's peers in the same or similar circumstances;

99 (3) The student's condition adversely affects educational performance in the area of
100 academics, peer or teacher interaction, and participation in class and school activities;

101 (4) The student exhibits behaviors that are not primarily the result of physical, sensory or
102 intellectual deficits; and

103 (5) The student needs special education.

104 (g) Gifted – “Giftedness” is exceptional intellectual abilities and potential for achievement
105 that requires specially designed instruction or services beyond those normally provided in the
106 general classroom instruction.

107 (1) A student in grades one through eight is eligible for special education services as a
108 gifted student when the following criteria are met:

109 (A) General intellectual ability score at the 97th percentile rank or higher on a
110 comprehensive test of intellectual ability in consideration of 1.0 standard error of measurement;

111 (B) At least one of the four core curriculum areas of academic achievement at the 90th
112 percentile rank or higher as measured by an individual standardized achievement test, or at least
113 one of the four core curriculum areas of classroom performance demonstrating exceptional
114 functioning as determined during the multidisciplinary evaluation; and

115 (C) There is a need for specially designed, differentiated instruction or services beyond
116 those normally provided in the general classroom

117 (2) Before the end of the eighth grade year, the individualized education program team
118 shall:

119 (A) Conduct a reevaluation determination to review existing evaluation data which includes
120 evaluations and information provided by the parents of the student, current classroom-based
121 assessments and observations, and observations by teachers and related service providers; and

122 (B) On the basis of that review, identify what additional data, if any, are needed to
123 determine that a student is eligible for special education services as an exceptional gifted student
124 in grades nine through twelve using one or more of the following criteria:

125 (i) The eligibility criteria for one or more of the disabilities as defined in this section;

126 (ii) The definition for economically disadvantaged;

127 (iii) The definition for underachievement, which takes into consideration the student's
128 ability level, educational performance and achievement levels; or

129 (iv) The definition for psychological adjustment disorder as documented by a
130 comprehensive psychological evaluation.

131 (C) If the student is eligible as exceptional gifted, the county board of education shall
132 develop an individualized education program. If the student is not eligible as exceptional gifted,
133 the individualized education program team shall write a four-year plan that appropriately
134 addresses the student's educational needs. The four-year education plan replaces the
135 Personalized Education Plan (PEP) and, includes honors, advanced placement or International
136 Baccalaureate classes that shall be provided for the student in grades nine through twelve. The
137 county board of education shall implement and conduct an annual review of this plan. The review
138 team shall include the student, parent and school representative.

139 (h) *Hard of Hearing* – “Hard of hearing” is an impairment in hearing, whether permanent
140 or fluctuating, that adversely affects a student's educational performance but that is not included
141 under the definition of deafness.

142 A student is eligible for special education services as a student who is hard of hearing
143 when all of the following criteria are met:

144 (1) The student exhibits characteristics consistent with the definition and relies primarily
145 on hearing to access spoken communication.

146 (2) The student has been diagnosed by an otologist, otolaryngologist, or audiologist as
147 having a hearing loss.

148 (3) The student's condition adversely affects educational performance.

149 (4) The student needs special education.

150 (i) *Intellectual Disability* – “Intellectual disability” is defined as significantly sub-average
151 intellectual functioning that exists concurrently with deficits in adaptive skill areas. These deficits
152 are manifested during the developmental period and adversely affect the student's educational
153 performance.

154 A student is eligible for special education services as a student with an intellectual

155 disability when all of the following criteria are met:

156 (1) (A) The student with mild to moderate intellectual disability has general intellectual
157 functioning ranging from two to three standard deviations below the mean, in consideration of 1.0
158 standard error of measurement as determined by a qualified psychologist, using an individually
159 administered intelligence test; or

160 (B) The student with moderate to severe intellectual disability has general intellectual
161 functioning more than three standard deviations below the mean, in consideration of 1.0 standard
162 error of measurement as determined by a qualified psychologist, using an individually
163 administered intelligence test;

164 (2) The student exhibits concurrent deficits in adaptive functioning expected for his or her
165 age in at least two of the following areas: communication, self-care, home living, social or
166 interpersonal skills, use of community resources, self-direction, functional academic skills, work,
167 leisure, health, or safety;

168 (3) The age of onset is eighteen or below;

169 (4) The student's condition adversely affects educational performance;

170 (5) The student needs special education.

171 When determining eligibility, only those tests designed and normed for the population
172 being tested may be used. Tests measuring intellectual ability that are translated into another
173 language by the examiner or an interpreter shall not be used as the basis of the eligibility
174 determination. Evaluation teams shall consider using nonverbal tests of intellectual ability when
175 the student is culturally or linguistically diverse.

176 (i) *Orthopedic Impairment* – “Orthopedic impairment” means a severe physical limitation
177 that adversely affects a student's educational performance. The term includes impairments
178 caused by congenital anomaly, an impairment caused by disease, or an impairment from other
179 causes.

180 A student is eligible for special education services as a student with an orthopedic

181 impairment when documentation of all of the following criteria exists:

182 (1) The student exhibits characteristics consistent with the definition;

183 (2) The student has an orthopedic impairment diagnosed and described by a licensed
184 physician;

185 (3) There are particular educational needs as a result of the orthopedic impairment;

186 (4) The student's condition adversely affects educational performance; and

187 (5) The student needs special education.

188 (k) *Other Health Impairment* – “Other health impairment” means having limited strength,
189 vitality or alertness, including heightened alertness to environmental stimuli, that results in limited
190 alertness with respect to the educational environment that is due to chronic or acute health
191 problems. These health problems may include, but are not limited to, asthma, attention deficit
192 disorder (ADD), attention deficit hyperactivity disorder (ADHD), cancer, diabetes, epilepsy, a heart
193 condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia,
194 Tourette syndrome and stroke to such a degree that it adversely affects the student's educational
195 performance.

196 A student is eligible for special education services as a student with an “other health
197 impairment” when documentation of all of the following criteria exists:

198 (1) The student exhibits characteristics consistent with the definition;

199 (2) The student has a chronic or acute medical or health condition as diagnosed and
200 described by a licensed physician;

201 (3) The existence of educational needs as a result of the medical or health condition;

202 (4) The student's condition adversely affects educational performance; and

203 (5) The student needs special education.

204 (l)(1) *Specific Learning Disability* – “Specific learning disability” means a disorder in one
205 or more of the basic psychological processes involved in understanding or in using language,
206 spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write,

207 spell, or to do mathematical calculation, including conditions such as perceptual disabilities, brain
208 injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability
209 does not include learning problems that are primarily the result of visual, hearing, or motor
210 disabilities, intellectual disability, emotional/behavioral disorder or environmental, cultural, or
211 economic disadvantage.

212 A student shall not be determined to have a specific learning disability if the determinant
213 factor is a lack of appropriate instruction in reading including the essential components of reading
214 instruction (phonemic awareness, phonics, vocabulary, fluency or comprehension), lack of
215 appropriate instruction in math, or limited English proficiency.

216 (2) The determination of whether a student manifests a specific learning disability shall be
217 made by the student's parents and a team of qualified professionals, which shall include the
218 student's general education teacher, or if the student does not have a general education teacher,
219 a general education classroom teacher qualified to teach a student of his or her age, for a student
220 of less than school age, an individual qualified to teach a student of his or her age, and at least
221 one person qualified to conduct individual diagnostic examinations of the student, such as a
222 school psychologist, speech-language pathologist, or reading specialist.

223 Eligibility committees shall draw upon information from a variety of assessment tools and
224 strategies and as specified in section ten, article twenty of this chapter, ensure all students receive
225 necessary and appropriate screenings and early assessments for specific learning disabilities.
226 The eligibility committee may not rely on any single procedure for determining eligibility for special
227 education and related services. The eligibility committee shall also ensure that information
228 obtained from all of these sources is documented and carefully considered.

229 Using the support for personalized learning process and comprehensive assessment the
230 eligibility committee shall determine eligibility for specific learning disability based on the following
231 standards specified in this section. Each standard shall be discussed at the eligibility committee
232 meeting and corresponding documentation shall be on file for each student.

233 (A) Standard 1- Level of Learning

234 The first element in identifying a student with a specific learning disability is whether the
235 student does not achieve adequately for his or her age or does not meet state-approved grade
236 level standards in one or more of the following areas, when provided with learning experiences
237 and instruction appropriate for the student's age or state-approved grade-level standards:

238 (i) Oral expression;

239 (ii) Listening comprehension;

240 (iii) Written expression;

241 (iv) Basic reading skill;

242 (v) Reading fluency skills;

243 (vi) Reading comprehension;

244 (vii) Mathematics calculation; or

245 (viii) Mathematics problem solving.

246 The performance measure used to verify this standard shall be both representative of the
247 student's curriculum and useful for instructional planning. The student's response to customized
248 instruction shall be documented and include results of formative assessments administered pre-
249 and post-instruction, cumulative record reviews, student class work samples, anecdotal teacher
250 records, or standardized assessments.

251 (B) Standard 2- Rate of Learning or Pattern of Strengths and Weaknesses

252 The second element in identifying a student with a specific learning disability may be met
253 by determining insufficient rate of learning or a pattern of strengths and weaknesses in cognitive
254 and academic abilities.

255 (i) Rate of Learning -- The data gathered through ongoing progress monitoring of the
256 student's performance during an intervention period shall be used to determine if rate of learning
257 has been met. This standard is met when the student's learning rate or growth toward target skills
258 is substantially below grade-level peers and, based on progress monitoring data, a reasonable

259 rate of progress cannot be projected even when the student is provided supplemental intervention
260 instruction of reasonable intensity and duration.

261 (ii) Pattern of Strengths and Weaknesses -- In addition to not achieving adequately on age
262 or state-approved grade level achievement standards, a specific learning disability may be
263 confirmed if the student exhibits a pattern of strengths and weaknesses in performance,
264 achievement, or both, relative to age, State-approved grade-level standards, or intellectual
265 development, that is determined by the eligibility committee to be relevant to the identification of
266 a specific learning disability, using appropriate assessments.

267 (C)Standard 3- Exclusion Factors

268 The final standard by which the eligibility committee may determine eligibility based upon
269 a specific learning disability is the assurance that the student's underachievement is not primarily
270 the result of any of the following:

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

272 (ii) Intellectual disability;

273 (iii) Behavior or emotional disorder;

274 (iv) Cultural factors;

275 (v) Environmental or economic disadvantage; or

276 (vi) Limited English proficiency.

277 (3) The eligibility committee shall ensure that the underachievement of a student
278 suspected of having a specific learning disability is not due to lack of appropriate instruction in
279 reading and English language arts, written expression or mathematics, and the team shall
280 consider, as part of the evaluation described in section three hundred four of this article, the
281 following factors:

282 (A) Data that demonstrate that prior to or as part of the referral process, the student was
283 provided appropriate instruction in general education settings; and

284 (B) Data-based documentation of repeated assessments of achievement at reasonable

285 intervals, reflecting formal assessment of student progress during instruction, which was provided
286 to the student's parents.

287 (4) The student suspected of having a specific learning disability shall be observed in the
288 learning environment, including the general classroom setting, to document the student's
289 academic performance and behavior in the areas of difficulty. The eligibility committee shall
290 decide to:

291 (A) Use information from an observation in routine classroom instruction and monitoring
292 of the student's performance that was done before the student was referred for evaluation; or

293 (B) Have at least one member of the evaluation team conduct an observation of the
294 student's academic performance in the general classroom after the student has been referred for
295 an evaluation and parental consent is obtained.

296 In the case of a student of less than school age or out of school, a group member shall
297 observe the student in an environment appropriate for a student of that age. The purpose of the
298 observation is to document how the academic concern impacts the student's academic
299 performance. The observation shall also document the name and title of the observer and the
300 site, date and duration of the observation.

301 (5) The special eligibility committee report shall contain a statement of:

302 (A) Whether the student has a specific learning disability;

303 (B) The basis for making the determination, including an assurance that the determination
304 has been made in accordance with required evaluation procedures specified in section three
305 hundred four of this article;

306 (C) The relevant behavior, if any, noted during the observation of the student and the
307 relationship of that behavior to the student's academic functioning; and

308 (D) The educationally relevant medical findings, if any;

309 (E) Whether the student does not achieve adequately for the student's age or to meet
310 state-approved grade-level standards; and the student does not make sufficient progress to meet

311 age or state-approved grade-level standards, or the student exhibits a pattern of strengths and
312 weaknesses in performance, achievement, or both, relative to age, state-approved grade-level
313 standards or intellectual development;

314 (F) The determination of the group concerning the effects of a visual, hearing, or motor
315 disability; intellectual disability; emotional/behavioral disorder; cultural factors, environmental or
316 economic disadvantage; or limited English proficiency on the student's achievement level.

317 (G) If the student has been provided support for personalized pursuant to section four
318 hundred five of this article:

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

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

321 (I) The state's policies regarding the amount and nature of student performance data that
322 would be collected and the general education services that would be provided;

323 (II) Strategies for increasing the student's rate of learning; and

324 (III) The parent's right to request an evaluation at any time throughout the SPL process.

325 (6) The report shall be dated and evaluation team members shall certify in writing whether
326 the report reflects each team member's conclusions. If the report does not reflect an individual
327 team member's conclusions that team member shall submit a separate statement presenting the
328 member's conclusions.

329 (m)(1) *Speech or Language Impairment* -- A "speech or language impairment" as a
330 communication disorder, such as stuttering, impaired articulation, a language impairment, or a
331 voice impairment that adversely affects a child's educational performance.

332 (2) A student is eligible for special education and or related services as a student who has
333 a language disorder when the following criteria are met:

334 (A) Two or more procedures, at least one of which yields a standard score, are used to
335 assess both expressive and receptive modalities;

336 (B) The student exhibits:

337 (i) Language abilities which are substantially and quantifiably below those expected for
338 the students' chronological age and cognitive state of development, resulting in functional
339 limitation in effective communication, social participation, academic achievement, or occupational
340 performance, individually or in any combination;

341 (ii) Norm referenced language tests which yield two subtest or total test scores with the
342 following characteristics: one and one-half or more standard deviations below the mean, a
343 language quotient standard score of seventy-eight, a stanine of two or a percentile of eight;

344 (iii) Non-standardized or informal assessment indicates that the student has difficulty
345 understanding or expressing ideas or concepts to such a degree that it interferes with the
346 student's social and educational progress;

347 (iv) For a pre-school child to be considered for language intervention, the child's language
348 should be determined to have a negative impact on social-communicative interactions and one
349 or both of the following characteristics shall exist:

350 (I) Norm referenced language tests which yield two subtest or total test scores with the
351 following characteristics: one and one-half or more standard deviations below the mean, a
352 language quotient standard score of seventy-eight, a stanine of two or a percentile of eight;

353 (II) Non-standardized/informal assessment indicates that the student has difficulty
354 understanding and/or expressing ideas and/or concepts to such a degree that it interferes with
355 the student's social/educational progress;

356 (C) The student's disability adversely affects educational performance; and

357 (D). The student needs special education.

358 (3) A student is eligible for special education and related services as a student who has
359 an articulation/phonology disorder when the following criteria are met:

360 (A) At least two procedures are used to assess the student, one of which is a standardized
361 measure.

362 (B) The student's speech is determined to have a negative impact on academic, social

363 and/or vocational functioning, and one of the following characteristics exists:

364 (i) Two or more phonemic errors not expected at the student's current age or
365 developmental level are observed during direct testing and/or conversational speech;

366 (ii) Two or more phonological processes not expected at the student's current age or
367 developmental level are observed during direct testing and/or in conversational speech;

368 (C) For a preschool student to be considered for articulation/phonology therapy, the
369 student's speech should be determined to have a negative impact on social-communicative
370 interactions and one or both of the following characteristics shall exist:

371 (i) Multiple phonemic errors that significantly reduce the student's speech intelligibility and
372 are not expected at the student's current age or developmental level are observed during direct
373 testing and/or conversational speech; or

374 (ii) Two or more phonological processes that significantly reduce the student's speech
375 intelligibility and are not expected at the student's current age or developmental level are
376 observed during direct testing and/or in conversational speech;

377 (D) Application of developmental norms from diagnostic tests verifies that speech sounds
378 may not develop without intervention;

379 (E) The student's disability adversely affects educational performance; and

380 (F) The student needs special education.

381 (4) A student is eligible for special education and related services as a student who has a
382 fluency disorder when all of the following criteria are met:

383 (A) The student has a fluency rating of moderate or severe on the Fluency Rating Scale;

384 (B) The student's disability adversely affects educational performance;

385 (C) The student needs special education.

386 (5) A student is eligible for special education and related services as a student who has a
387 social communication disorder based on the following:

388 (A) Assessment measures that include norm referenced tests, multiple observations,

389 checklists and structured tasks;

390 (B) Assessment procedures that are contextually based and involve multiple settings and
391 communication partners;

392 (C) Assessment results indicate deficits in functional limitations in effective
393 communication, social participation, social relationships, academic achievement, and/or
394 occupational performance, individually or in combination;

395 (D) Social pragmatic communication disorder cannot be diagnosed in the presence of
396 restricted repetitive behaviors, interests, and other activities related to the diagnosis of autism;

397 (E) The student's disability adversely affects educational performance;

398 (F) The student needs special education.

399 (6) Voice disorders are the absence or abnormal production of voice quality, pitch,
400 intensity, or resonance. Voice disorders may be the result of a functional or an organic condition.
401 A voice disorder exists when the vocal characteristics of quality, pitch, intensity, or resonance
402 interfere with communication, draw unfavorable attention to the speaker, adversely affect the
403 speaker or listener, or are inappropriate to the age and gender of the speaker. A voice disorder
404 does not exist when the vocal characteristics of quality, pitch, intensity, or resonance are the result
405 of temporary physical factors such as allergies, colds, or abnormal tonsils or adenoids, are the
406 result of regional dialectic or cultural differences or economic disadvantage, or do not interfere
407 with educational or developmental performance.

408 A student is eligible for special education and/or related services as a student who has a
409 voice disorder when all of the following criteria are met:

410 (A) The student has a voice production rating of moderate or severe on the Voice Rating
411 Scale for students ages three through twenty-one years;

412 (B) The existence or absence of a structural or functional pathology is verified by an
413 otolaryngologist;

414 (C) The student's disability adversely affects educational performance, and

415 (D) The student needs special education.

416 (n) *Traumatic Brain Injury* – “Traumatic brain injury” means an acquired injury to the brain
417 caused by an external physical force, resulting in total or partial functional disability or
418 psychosocial impairment, or both, that adversely affects a student’s educational performance.
419 Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or
420 more areas, such as cognition, language, memory, attention, reasoning, abstract thinking,
421 judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior,
422 physical functions, information processing, and speech. The term does not apply to congenital or
423 degenerative brain injuries or to brain injuries induced by birth trauma.

424 A student is eligible for special education services as a student who has a traumatic brain
425 injury when all of the following criteria are met:

426 (1) The student has an acquired injury to the brain caused by an external physical force
427 resulting in a total or partial functional disability or psychosocial impairment, or both as diagnosed
428 by a licensed physician;

429 (2) The student’s condition adversely affects educational performance; and

430 (3) The student needs special education.

PART V. INDIVIDUALIZED EDUCATION PROGRAMS.

§18-20A-500. Definitions of special education and specially designed instruction; definition and purpose of individualized education program.

1 “Special education” is defined as specially designed instruction, provided at no cost to the
2 parent, based on peer-reviewed research to the extent practicable, to meet the unique needs of
3 a student with a disability or giftedness including instruction in the classroom, the home, hospitals,
4 institutions and other settings. The definition of special education also includes instruction in
5 physical education, speech and language therapy, transition services, travel training, assistive
6 technology services and vocational education.

7 “Specially designed instruction” means adapting the content, methodology or delivery of

8 instruction to address the unique needs of the student that result from his or her disability or
9 giftedness and ensure access to the general education curriculum so that the student with
10 disabilities can meet the education standards that apply to all students.

11 A standards-based “individualized education program” is a product of collaboration
12 between a parent or adult student and educators who, through full and equal participation, identify
13 the unique needs of a student with a disability or giftedness and plan the special education and
14 related services to meet those needs. It sets forth in writing a commitment of resources necessary
15 to enable the student to receive needed special education and related services. In addition, the
16 individualized education program is a management tool that is used to ensure that each eligible
17 student is provided special education and related services appropriate to the student’s special
18 learning needs. It serves as an evaluation device for use in determining the extent of the student’s
19 progress toward meeting the projected outcomes. The individualized education program is a
20 compliance and monitoring document that may be used by authorized monitoring personnel from
21 each governmental level to determine whether an eligible student is actually receiving the free
22 appropriate public education agreed to by the parents and the school.

§18-20A-501. Initiation of individualized education programs.

1 (a) The primary purpose of an individualized education program team meeting is to design
2 an individualized education program that will meet the unique needs of an eligible student. The
3 individualized education program team plans the special education and related services designed
4 to provide access to and progress in the general curriculum. The parent or adult student, county
5 board of education personnel and other individualized education program team members shall
6 participate in an open discussion regarding the student’s individual needs and how those needs
7 affect the student’s mastery of the content standards and objectives. Placement decisions shall
8 be considered after the necessary special education services are determined.

9 Informal or unscheduled conversations involving district personnel on various issues, such
10 as teaching methodology, lesson plans or coordination of service provisions, are not considered

11 to be a meeting as long as no decisions are made regarding issues addressed on the student's
12 individualized education program. A meeting does not include preparatory activities that district
13 personnel engage in to develop a proposal or a response to a parent or adult student proposal
14 that will be discussed at a later meeting.

15 (b) The individualized education program meeting shall serve as a communication vehicle
16 between the parent or adult student and school personnel that enables them to make joint,
17 informed decisions regarding the student's special education services. All members of the
18 individualized education program team shall work toward consensus regarding the content of the
19 student's individualized education program to ensure that he or she receives free appropriate
20 public education. Consensus means that all members are in general agreement regarding the
21 individualized education program content.

22 If the parent or adult student and other individualized education program team members
23 cannot reach consensus regarding an individualized education program decision, then the county
24 board of education representative on the individualized education program team shall make the
25 decision and provide written notice of the decision to the parent or adult student at the conclusion
26 of the meeting and prior to implementing the individualized education program. The parent or
27 adult student may exercise his or her right to mediation or a due process hearing regarding the
28 decision.

29 (c) An individualized education program meeting shall be convened for each of the
30 purposes and under the specific circumstances specified as follows:

31 (1) To develop an individualized education program within thirty days of eligibility
32 determination and prior to the initiation of services;

33 (2) To review the individualized education program periodically, but no longer than three
34 hundred sixty-five days from the date of development of the current individualized education
35 program;

36 (3) When another agency fails to deliver transition or other services outlined in the

37 individualized education program, the individualized education program team shall reconvene to
38 identify alternative strategies to meet the transition objectives for the child set out in the
39 individualized education program;

40 (4) Within twenty-one days of a written request by any member including the parent or
41 adult student; however, the county board of education may refuse a parent's or adult student's
42 request to convene a meeting by responding to the parent or adult student within five days of
43 receipt of the request in writing;

44 (5) Within twenty-one days of receipt of written request by a general education teacher
45 who has responsibility for implementing the individualized education program in accordance with
46 section one-c, article twenty of this chapter; and

47 (6) Within ten school days of any disciplinary removal resulting in a change of placement,
48 the individualized education program team shall conduct a manifestation determination and if
49 appropriate, complete a functional behavioral assessment and/or develop or review a behavioral
50 intervention plan.

51 (d) An individualized education program team shall be comprised of the following persons:

52 (1) The natural, adoptive, or foster parent of a child, a guardian but not the state if the child
53 is a ward of the state, an individual acting in the place of a natural or adoptive parent with whom
54 the child lives, or an individual assigned to be a surrogate parent of the child;

55 (2) At least one general education teacher of the student, if the student is or may be
56 participating in general education environment, including universal pre-K programs and Head
57 Start;

58 (3) At least one special education teacher of the student or, when appropriate, special
59 education service provider attending to the student;

60 (4) A representative of the county board of education who is qualified to provide or
61 supervise the provision of special education, knowledgeable about the general education
62 curriculum and knowledgeable about the availability of resources of the county board of education

63 and has the authority to allocate resources to the individualized education program;

64 (5) An individual who can interpret the instructional implications of evaluation results,
65 although this person does not need to be a separate member of the team if one of the other
66 required persons also meets this qualification; and

67 (6) The student, when the purpose of the meeting is consideration of the postsecondary
68 goals and transition services needed for reaching those goals, and at other meetings when
69 deemed appropriate by the parent or county board of education.

70 In addition to the foregoing required participants, the individualized education program
71 team may include the following individuals under the specific circumstances as follows:

72 To the extent appropriate and with parent or adult student consent, a representative of
73 any participating agency that is likely to be responsible for providing or paying for transition
74 services;

75 For a child previously served under West Virginia Birth to Three program, the parent may
76 invite the Part C service coordinator or other representatives of the Part C system to assist with
77 the smooth transition of services;

78 For a student being considered for or currently in a private school placement made by the
79 individualized education program team, ensure participation of a representative of the private
80 school or facility through attendance at the meeting, or other methods such as conference
81 telephone calls; and

82 At the discretion of the parent or county board of education, others with knowledge or
83 special expertise regarding the child, including related services personnel as appropriate.

84 The county board of education shall document the names, identities and representative
85 roles of each individualized education program team member on a form specified by the
86 department.

87 (e) A member of the individualized education program team is not required to attend an
88 individualized education program meeting, in whole or in part, if the parent of a student with a

89 disability and the county board of education agree, in writing, that the attendance of the member
90 is not necessary because the member's area of the curriculum or related services is not being
91 modified or discussed in the meeting.

92 Members of the individualized education program team may be excused from an
93 individualized education program meeting, in whole or in part, when the meeting involves a
94 modification to or discussion of the member's area of the curriculum or related services, if the
95 parent or adult student and county board of education consent to this in writing, or the member
96 submits, in writing to the parent and the individualized education program team, input into the
97 development of the individualized education program prior to the meeting.

98 School personnel shall contact the parent to discuss excusals, obtain parent consent, and
99 provide forms to the identified team members to submit reports in lieu of attendance. Excused
100 team members shall submit the form to parents and the individualized education program team
101 chair between receipt of parent consent for the excusal and the individualized education program
102 team meeting.

103 (f) The general education teacher's role in the development, review and revision of the
104 individualized education program includes discussion of the student's involvement and progress
105 in the general education curriculum; determination of appropriate positive behavioral interventions
106 and strategies for the student; and determination of supplementary aids and services, program
107 accommodations, modifications and supports for school personnel.

108 (g) The county board of education shall have the following duties regarding scheduling
109 and facilitating meetings of the individualized education program team:

110 (1) Schedule and notify the parent of the meeting at a place and time mutually agreed on
111 by the parent or adult student and the county board of education;

112 (2) Take steps to ensure one or both parents attend or have the opportunity to participate;

113 (3) No less than eight days prior to the meeting unless waived by the parent, provide the
114 parent or the adult student with written notice of the meeting using the form designated by the

115 department and shall include:

116 (A) The purpose, time and location of the meeting;

117 (B) Who will attend the meeting; and

118 (C) Information regarding the parent's or adult student's right to bring other people who
119 have knowledge or special expertise regarding the student to the meeting.

120 (4) Beginning not later than the first individualized education program to be in effect when
121 the student turns sixteen, or younger if determined appropriate by the individualized education
122 program team, the notice also shall indicate that the purpose of the meeting will be consideration
123 of the post-secondary goals and transition services for the student, indicate that the county board
124 of education will invite the student, and identify any other agency that will be invited to send a
125 representative with the consent of the parent or adult student.

126 (5) Invite the student, if appropriate or required, to attend and participate in his or her
127 individualized education program team meeting and if a purpose of the meeting is to consider
128 transition, but the student does not attend, the county board of education shall take other steps
129 to ensure that the student's preferences and interests are considered;

130 (6) Take whatever action is necessary to ensure that a parent or adult student understands
131 the proceedings at an individualized education program team meeting, including arranging for an
132 interpreter for a parent or adult student who has a hearing impairment or whose native language
133 is other than English;

134 (7) Document its attempts to arrange a mutually agreed upon time and place for the
135 meeting;

136 (8) When neither parent can attend in person, provide alternatives to physical meetings
137 such as video and telephone conferencing in the place of physical individualized education
138 program meetings if the parent or adult student and county board of education agree;

139 (9) If the parent refuses to attend or the county board of education cannot convince the
140 parent to attend, conduct the individualized education program team meeting and provide prior

141 written notice of the decisions made; and

142 (10) To the extent possible, the county board of education shall encourage the
143 consolidation of all individualized education program team meetings, including meetings that may
144 involve eligibility, reevaluation and individualized education program development.

§18-20A-502. Development of an individualized education program.

1 The West Virginia Department of Education provides individualized education program
2 and special education process forms/templates, including the online individualized education
3 program, to ensure that all individualized education programs are developed in compliance with
4 federal and state regulations. Therefore, districts are required to use the West Virginia
5 Department of Education Online IEP in the development of a student's individualized education
6 program. The individualized education program requirements are listed below.

7 (a) All individualized education programs shall include demographic components required
8 by federal law.

9 (b) The county board of education shall ensure the attendance and participation of the
10 individualized education program team members at the individualized education program meeting
11 and the county board shall document the attendance of team members by their signatures and
12 positions of team members. Team member signatures including parent or adult student do not
13 reflect agreement or disagreement with the individualized education program, but only indicate
14 attendance.

15 (c) In developing each student's individualized education program, the individualized
16 education program team shall consider:

17 (1) Strengths of the student;

18 (2) Concerns of the parents for enhancing the education of their child;

19 (3) Results of the initial evaluation or most recent evaluation of the student; and

20 (4) Academic, developmental and functional needs of the student.

21 Where any of the following special factors are applicable, the individualized education

22 program team shall include these factors in their consideration and document the team's
23 conclusions on them:

24 (1) For students with giftedness, the individualized education program team will consider
25 if acceleration is a focus of gifted service, and if so, its effect on high school graduation;

26 (2) The child's needs for assistive technology devices and services, the type of device and
27 provision for home use, if any;

28 (3) The communication needs of the student;

29 (4) If the student's behavior impedes his or her learning or that of others, the individualized
30 education program team shall consider the use of positive behavioral interventions and supports,
31 and other strategies, to address that behavior;

32 (5) If the student has blindness or low vision, the individualized education program shall
33 provide for instruction in braille and the use of braille unless the individualized education program
34 team determines that braille is not appropriate for the student; *Provided*, That this determination
35 may only be made after an evaluation of the student's reading and writing skills, needs and
36 appropriate reading and writing media, including an evaluation of the student's future needs for
37 instruction in braille or the use of braille;

38 (6) In the case of the student who is deaf or hard-of-hearing, the individualized education
39 program team shall consider the language and communication needs of the student, opportunities
40 for direct communications with peers and professional personnel in the student's language and
41 communication mode, the student's academic level and his or her full range of needs including
42 opportunities for direct instruction in the student's language and communication mode;

43 (7) If the student has limited English proficiency, the individualized education program
44 team will consider the language needs of the student as those needs relate to the individualized
45 education program;

46 (8) Consider the transition needs of the student; and

47 (9) Consider the student's ability to access print if the student has a physical disability and

48 cannot manipulate the material without strenuous effort or if the student is unable to read and
49 comprehend grade level print at a rate to complete the academic task independently and with
50 success; or if the student is blind or a low vision student.

51 (d) Using the information considered in subsection (c) of this section, the individualized
52 education program team shall identify and develop statements of present levels of academic
53 achievement and functional performance and measurable annual goals that enable school
54 personnel to track the effectiveness of services and to accurately report progress toward goals.

55 Statements of present levels of academic achievement and functional performance shall
56 address how a school-age student's disability or giftedness affects his or her involvement and
57 progress in the general education curriculum or, in the case of a preschool student, how the
58 student's disability affects his or her involvement and progress in the West Virginia Early Learning
59 Standards Framework and how the disability affects the student's participation in appropriate
60 activities.

61 Each statement shall:

62 (1) Be written in objective, measurable terms and easy-to-understand non-technical
63 language;

64 (2) Establish a basis for the other components of the individualized education program;

65 (3) Provide a starting point for annual goal development; and

66 (4) Articulate the gaps between the student's grade level expectations and his or her
67 demonstrated performance.

68 (e) Measurable academic and functional annual goals shall be related to the needs
69 described in the present levels of academic achievement and performance
70 statements. Specifically, annual goals shall be written to:

71 (1) Include a measurable statement that describes what a student is reasonably expected
72 to accomplish from the special education program within the time period covered by the
73 individualized education program;

74 (2) Enable the student to be involved in and make progress in the general education
75 curriculum and to meet other educational needs that result from the disability or giftedness;

76 (3) Include the timeframe, condition, behavior and the evaluation procedure with
77 performance criteria.

78 For students taking the statewide alternate accountability assessment based on alternate
79 academic achievement standards, each goal shall have at least two objectives. The written
80 objectives shall include a statement of how far the student is expected to progress toward the
81 annual goal and by what date.

82 The individualized education program team has the discretion to use objectives for any
83 student eligible for individualized education program services.

84 For purposes of determining the need for extended school year services, for each student
85 with a disability, the individualized education program team shall identify at least one critical skill
86 area that is needed for the student to maintain levels of performance.

87 The individualized education program shall include a statement describing how the
88 student's progress toward individualized education program goals will be measured and when the
89 parent or adult student will be informed of the student's progress toward meeting the annual goals.

90 (f) "Secondary transition services" are defined as a coordinated set of activities for a
91 student with an exceptionality that are designed within a results-oriented process focused on
92 improving the academic and functional achievement of the student to facilitate movement from
93 school to post-school activities, including post-secondary education, vocational education,
94 integrated employment, continuing and adult education, adult services, independent living or
95 community participation. The activities include instruction, community experiences, development
96 of employment and other post school adult-living objectives and, if appropriate, acquisition of daily
97 living skills and a provision of functional vocational evaluation. These activities are based on the
98 individual student's needs, taking into account the student's preferences and interests.

99 Beginning with the first individualized education program to be in effect when a student is

100 sixteen years old, or earlier if deemed appropriate by the individualized education program team,
101 the individualized education program shall include:

102 (1) Appropriate, measurable postsecondary goals related to independent living skills, if
103 needed;

104 (2) Appropriate measurable postsecondary goals based upon age-appropriate transition
105 assessment related to training, education and employment; and

106 (3) Transition services, including courses of study, needed to assist the student in reaching
107 postsecondary goals identified on the individualized education program.

108 The goals and transition services shall be updated annually in the individualized education
109 program.

110 The individualized education program shall determine whether or not special education
111 rights will transfer to the student on his or her eighteenth birthday and, no later than the student's
112 seventeenth birthday, shall inform the student of this determination and make a record of this
113 notice to the student as part of the individualized education program. Special education rights will
114 transfer from the parent to the student when the student turns eighteen years old unless the parent
115 has obtained legal guardianship.

116 (g) Each student's individualized education program shall describe the special education
117 and related services, supplementary aids and services, based on peer-reviewed research to the
118 extent practicable, and program modifications or supports for school personnel that will be
119 provided to or on behalf of the student to enable the student to advance appropriately toward
120 attaining the annual goals, be involved in and make progress in the general education curriculum,
121 have an equitable opportunity to participate in extracurricular and other nonacademic activities;
122 and be educated, and participate, with other students with and without disabilities.

123 The description of services in the individualized education program shall identify:

124 (1) Supplementary aids and services and program accommodations, modifications and
125 supports for school personnel. "Supplementary aids and services" means aids, services, and

126 other supports that are provided in general education classes or other education-related settings
127 to enable students in need of special education services to be educated with students without
128 exceptionalities to the maximum extent appropriate in accordance with requirements for the least
129 restrictive environment. These services shall be considered prior to removing a student from the
130 general education classroom.

131 The determination of which supplementary aids and services are appropriate for a
132 particular student shall be made on an individual basis. Supplementary aids and services are any
133 material/curricular/human resource or assistance, beyond what is normally afforded students
134 without exceptionalities, provided to support a student with an exceptionality's placement.
135 Supplementary aids may include, but are not limited to, large print books, positive behavioral
136 interventions, assistive technology devices, auditory trainers, curriculum accommodations,
137 services and other supports that are provided in general education classes or other education
138 related settings to enable students in need of special education services to be educated with
139 students without exceptionalities to the maximum extent appropriate. Supplementary services
140 may include, but are not limited to direct instruction, peer tutoring and note taking.

141 An accommodation can be a device, practice, intervention, or procedure provided to a
142 student with a disability that affords equal access to instruction or assessment. Accommodations
143 do not change the content of the general education curriculum, nor reduce learning or
144 achievement expectations, but allow students with disabilities access to the curriculum through
145 technology, universal design for learning (UDL), differentiated instruction (DI), cognitive strategies
146 instruction and scaffolding.

147 Modifications are changes in educational expectations for the student. These include
148 actual changes in the general education curriculum and instruction or the use of an alternative or
149 supplemental curriculum. Examples include mastery of essential concepts, acceleration, different
150 test questions and material at a different reading level.

151 Supports for school personnel may include, but are not limited to, additional training in the

152 use of assistive technology, specific instructional strategies or the use of technology; other
153 professional development activities such as mentoring or coaching; and assistance in planning
154 lessons using differentiated instruction.

155 (2) "Special education services" include specially designed instruction to meet the unique
156 needs of the student. Special education services are those necessary to enable the student to
157 achieve the annual goals, make progress in the general education curriculum and participate in
158 extracurricular and other non-academic activities. Special education services document the goal
159 area requiring specially designed instruction. Special education services are either direct or
160 indirect. Direct services are instruction, therapies or interventions provided one-on-one or in
161 groups to an eligible student in the general education classroom or in a special education school
162 environment, home or community. Indirect services are services provided by a special education
163 teacher or provider to the student's teachers to directly benefit the student.

164 (3) The term "related services" refers to transportation and such developmental,
165 corrective and other supportive services required to assist an eligible student to benefit from
166 special education as described in the individualized education program. The term "related
167 services" does not include a medical device that is surgically implanted, the optimization of that
168 device's functioning, and maintenance of that device or the replacement of such device. Related
169 services include, but are not limited to the following:

170 Assistive technology,

171 Audiology,

172 Speech-language therapy

173 Interpreting services,

174 Psychological services,

175 Physical therapy,

176 Occupational therapy,

177 Therapeutic recreation,

- 178 Counseling services,
179 Early identification and assessment of students' exceptionalities,
180 Rehabilitation counseling services,
181 Orientation and mobility services,
182 Medical services for diagnostic or evaluative purposes,
183 School nurse services,
184 Social work services in school,
185 Supports for school staff,
186 Parent counseling and training, and
187 Transportation.

188 This list of related services is not exhaustive and may include other developmental, corrective,
189 supportive services or transition services. Although services may be of benefit to a student with
190 an exceptionality, all of the services listed above may not be required for each individual student.
191 Related services are the responsibility of the county board of education only if the individualized
192 education program team determines they are required to assist the student to benefit from special
193 education. The student is not entitled to related services if he or she does not need special
194 education, or the parent or adult student does not consent to special education services.

195 For each service identified as a supplementary aid and service, a special education
196 service or a related service as detailed above, the individualized education program shall:

197 (1) State the location where services and modifications will be provided;

198 (2) List the anticipated extent and frequency of the service;

199 (3) State the date services will be initiated, in consideration of written notice requirements,
200 and the expected duration of the services and modifications.

201 (g) The individualized education program team shall annually determine and document
202 whether a student has a need for extended school year services. Students entitled to extended
203 school year services are those who require special education and related services in excess of

204 the regular school year to maintain identified critical skills as described in the current
205 individualized education program. In making its determination of a student's need for extended
206 school year services the individualized education program team shall review available
207 documentation indicating that the student exhibits, or may exhibit:

208 (1) Significant regression during an interruption in educational programming;
209 (2) A limited ability to recoup, or relearn skills once programming has resumed;
210 (3) Regression or recoupment problems that interfere with the maintenance of identified
211 critical skills as described in the current individualized education program; and
212 (4) Other factors that interfere with the maintenance of identified critical skills as described
213 in the current individualized education program, such as predictive data; degree of progress;
214 emerging skills and breakthrough opportunities; interfering behaviors; nature and/or severity of
215 the disability; and special circumstances.

216 The lack of clear evidence of such factors may not be used to deny a student extended
217 school year services, if the individualized education program team determines the need for such
218 services and includes these services in the individualized education program.

219 The type and length of the services the student requires is determined on an individual
220 basis by the individualized education program team. Extended school year services shall consist
221 of activities developed to maintain critical skills identified on the individualized education program
222 developed for the academic year. The individualized education program team shall document
223 the duration, number of hours per week and physical location of the special education and related
224 services to be delivered.

225 Extended school year services may not be limited to a particular category of disability or
226 be unilaterally limited in the type, amount or duration of those services and shall be provided at
227 no cost to the parent. The county board of education shall annually inform parents of students
228 with disabilities of the availability of extended school year services and of procedures and criteria
229 for determining a student's need for extended school year services, and of their right to refuse

230 extended school year services.

231 (i) Students with disabilities shall participate at the grade level at which they are enrolled
232 in all components of the West Virginia Measures of Academic Progress under standard conditions
233 or with accommodations based upon the criteria in either regular or alternate accountability
234 assessments.

235 The individualized education program team shall determine how the student participates
236 in the West Virginia Measures of Academic Progress, including whether the student takes the
237 WESTEST2 or meets the criteria for participation in the West Virginia Alternate Performance
238 Assessment and whether the student needs allowable accommodations to be assessed
239 appropriately. The parent, and the student if appropriate, shall be involved in and informed of
240 decisions regarding assessment participation. The implications of the decisions shall be carefully
241 explained to the parent and the student. The individualized education program shall specify the
242 conditions in which the student will participate in all the applicable assessments, either under
243 standard conditions applicable to all students, or with specific and acceptable accommodations,
244 or whether the student meets criteria for alternate assessment and why the student cannot
245 participate in the regular assessment.

246 When the student participates in the regular accountability assessment the student will
247 also participate in the other components of the West Virginia Measures of Academic Progress.
248 The accommodations needed for any statewide standardized accountability assessment or
249 district assessment tests, shall be specified on the individualized education program and be
250 acceptable accommodations. The accommodations indicated in the individualized education
251 program shall be provided and documented during test administration to verify appropriate
252 assessment accommodations were implemented.

253 (j) An eligible student shall be educated with general education students in the general
254 education classroom to the maximum extent appropriate. Removal from the general education
255 environment occurs only when the nature or severity of the exceptionality is such that education

256 in general classes and other settings with general education students cannot be achieved
257 satisfactorily even with the use of supplementary aids and services. This requirement is known
258 as the least restrictive environment. An appropriate, least restrictive environment is one that
259 enables the student to receive individualized education program services and make reasonable
260 gains toward goals identified in an individualized education program.

261 In determining an appropriate placement in the least restrictive environment, the
262 individualized education program team shall first consider the general education environment with
263 supplementary aids and services. If the student's individualized education program cannot be
264 implemented in that environment with an expectation of reasonable progress on and achievement
265 of individualized education program goals, a placement on the continuum of placement options
266 providing less education with students without disabilities may be considered. An eligible student
267 is not to be removed from age-appropriate general education classrooms solely because of
268 needed accommodations and modifications to the general education curriculum.

269 The individualized education program shall explain the extent, if any, to which the student
270 will not participate in the general education classroom, the general education curriculum, or
271 extracurricular or other nonacademic activities and indicate the percentage of time in general and
272 special education.

273 The individualized education program team shall determine the supplementary aids and
274 services appropriate and necessary for the student to participate with students without disabilities
275 in nonacademic and extracurricular services and activities to the maximum extent appropriate.
276 These services and activities may include, but are not limited to, meals, recess, field trips,
277 counseling services, athletics, transportation, health services, recreational activities, special
278 interest groups or clubs sponsored by the county board of education, referrals to community
279 agencies, career development and assistance in making outside employment available.

280 Reassignment of students to another classroom or building in the school district is not a
281 change of placement for a student as long as the individualized education program goals remain

282 unchanged and the degree of interaction with peers without disabilities remains the same.

283 Placement decisions for a student shall be made after all sections of the individualized
284 education program, except the educational environment section, have been completed.

285 Placement shall be determined at least annually by the individualized education program team.

286 The individualized education program team shall consider the following when determining the
287 least restrictive environment in which the individualized education program can be implemented:

288 (1) The maximum extent to which the student may be educated with age-appropriate, non-
289 exceptional peers, without regard to whether the students are educated in public or private
290 institutions or other care facilities;

291 (2) The services and placement needed by each student shall be based on the student's
292 unique needs that result from his or her disability or giftedness, not on the student's category of
293 exceptionality or the availability of placement options, services, staff or space;

294 (4) A student with a disability shall be enrolled in the school he or she would attend if not
295 disabled, unless the individualized education program requires another location in which case,
296 the student shall be provided an educational program as close to the student's home as possible;

297 (5) In considering a setting outside the general education environment, the individualized
298 education program team shall determine placement in environments, including classrooms and
299 schools, with similar-age peers;

300 (6) Consideration shall be given to any potentially harmful effects of the placement on the
301 student or on the quality of services;

302 (7) Consideration shall be given to the array of services and continuum of placement
303 options to meet the individual needs of each student.

304 In determining an appropriate placement for a student with an exceptionality in the least
305 restrictive environment, the individualized education program team shall consider the student's
306 needs and the services required to meet those needs. Regardless of placement, the student shall
307 be given access to the general education curriculum unless the individualized education program

308 team determines it to be inappropriate.

309 (k) If the parent or adult student to whom rights have been transferred refuses to consent
310 to the initial provision of special education and related services described in the individualized
311 education program, the county board of education will not provide special education and related
312 services to the student. The county board of education shall document its efforts to obtain
313 informed consent from the parent or adult student for the initial provision of special education and
314 related services.

315 A parent or adult student may revoke consent for continued provision of special education
316 and related services at any time. The revocation of consent shall be in writing. Within five days of
317 receipt of the written revocation of consent, the county board of education shall provide prior
318 written notice to the parent, and to the adult student, if applicable, that special education and
319 related services will cease.

320 When a parent or adult student refuses to respond to a request for or refuses consent to
321 the initial provision of special education and related services or revokes consent for continued
322 special education and related services:

323 (1) The county board of education shall provide written notice containing all the content
324 required by section one thousand three of this article and shall fully inform the parent of the
325 reasons the county board of education believes the student should receive special education and
326 the potential consequences of refusing services, such as implications for student achievement,
327 graduation, discipline protections and transition to post school outcomes.

328 (2) Neither mediation nor a due process complaint may be used to attempt to obtain
329 agreement or ruling that services be provided.

330 (3) The county board of education will not be in violation of the requirement to make free
331 appropriate public education available to the student or the requirement to provide special
332 education and related services; and

333 (4) The county board of education will not be required to convene an individualized

334 education program meeting or develop an individualized education program for the student.

335 When consent for continued provision of special education and related services is revoked
336 after the student has initially been provided services the county board of education is not required
337 to amend the student's educational records to remove any references to the student's receipt of
338 special education and related services because of the revocation of consent; the parent or adult
339 student maintains the right to request initial evaluation; the county board of education is not
340 deemed to have knowledge that the student is a student with a disability, and the student may be
341 disciplined as a general education student.

342 (l) The revocation of consent provisions in this section apply to revocation of all special
343 education and related services. Consent cannot be revoked for a particular service.
344 Disagreements with the provision of a particular service, a change in placement or other
345 individualized education program components may be addressed by the individualized education
346 program team and the dispute resolution processes. If the individualized education program team
347 agrees that a free appropriate public education would be provided if the student does not receive
348 the service or individualized education program provision in question, the individualized education
349 program may be revised accordingly. If, however, the individualized education program team and
350 parent or adult student disagree regarding individualized education program provisions, the
351 county board of education shall provide written notice of the proposed or refused changes. The
352 parent may use dispute resolution processes as defined in part XI of this article.

353 (m) At the conclusion of the individualized education program team meeting, prior written
354 notice and a copy of the individualized education program shall be provided to the parent /adult
355 student. Prior to the initiation of services, the county board of education shall ensure that the
356 student's individualized education program is accessible to each service provider who is
357 responsible for its implementation, including but not limited to each general education teacher
358 (including teachers of music, musical education, art and driver education), special education
359 teacher, related service provider and other providers. In addition, each teacher and provider shall

360 be informed of his or her specific responsibilities related to implementing the student's
361 individualized education program and the specific accommodations, modifications and supports
362 that shall be provided for the student in accordance with the individualized education program.
363 Teachers in whose class or program a student with exceptional needs is enrolled shall read and
364 sign a copy of the student's individualized education program acknowledging that he or she has
365 read and understands it as specified in section one-c, of article twenty of this chapter.

§18-20A-503. Reviews of the individualized education program.

1 (a) Each student's individualized education program shall be reviewed at least annually.
2 Meetings may be held any time throughout the school year, as long as the individualized
3 education program is reviewed annually and is in effect at the beginning of each school year.
4 Either at or after the annual review, written notice that the new individualized education program
5 changes will be implemented shall be provided to the parent or adult student.

6 The purposes of the individualized education program review include, but are not limited
7 to, the following:

8 (1) To determine whether the student's annual goals have been achieved;

9 (2) To revise the individualized education program if there is any lack of expected progress
10 toward annual goals and in the general education curriculum, where appropriate;

11 (3) To consider whether a reevaluation is necessary or to address the results of
12 reevaluation;

13 (4) To address information about the student provided to, or by, the parent or adult student;

14 and

15 (5) To address the student's anticipated needs.

16 (b) In making changes to a student's individualized education program after the annual
17 individualized education program meeting for a school year, the parent/ adult student and the
18 county board of education may agree, in writing, not to convene an individualized education
19 program meeting for the purposes of making such changes, and instead, may develop a written

20 document to amend the student's current individualized education program. Districts shall
21 document the changes made to the individualized education program on the individualized
22 education program Amendment Form and provide a copy to the parents. The changes made
23 during the amendment process shall be incorporated into the Online IEP. The parent or adult
24 student may request a copy of the revised individualized education program with the amendment
25 incorporated. The annual review date remains the date of the original Online IEP. In accordance
26 with section one-c, article twenty of this chapter, each service provider impacted by the changes
27 shall read and sign a copy of the student's individualized education program.

28 (c) If the parent or adult student believes that the student is not progressing satisfactorily
29 or that there is a problem with the current individualized education program, he or she may request
30 an individualized education program team meeting. The county board of education shall grant
31 any reasonable request for such a meeting. If the county board of education refuses to convene
32 an individualized education program meeting requested by the parent or adult student, the county
33 board of education shall provide written notice to the parent or the adult student, including an
34 explanation of why the county board of education has determined the meeting is unnecessary.

35 If any other member of the individualized education program team feels that the student's
36 placement or individualized education program services are not appropriate, that team member
37 may request an individualized education program team meeting.

§18-20A-504. Creation, modification and application individualized education programs for transfer students.

1 (a) When a student with a current individualized education program transfers school
2 districts within the state within the same school year, and enrolls in a new school, the county
3 board of education in the destination county shall make reasonable efforts to consult with the
4 parent within two school days of initial enrollment and to initiate free appropriate public education
5 for the student within one school day of the parent consultation. The program of instruction shall
6 include services comparable to those described in the previously held individualized education

7 program. Within ten school days of the parent or adult student consultation, the county board of
8 education shall adopt the previously held individualized education program or develop and
9 implement a new individualized education program.

10 (b) When a student with a disability transfers from out of state to a West Virginia school
11 district within the same school year, and enrolls in a new school, and had an individualized
12 education program that was in effect in that other state, the county board of education shall make
13 reasonable efforts to consult with the parent within two school days of initial enrollment and to
14 initiate free appropriate public education for the student within one school day of the parent
15 consultation. The program of instruction shall include services comparable to those described in
16 the previously held individualized education program, in consultation with the parent or adult
17 student, until such time as the county board of education conducts an evaluation, if necessary,
18 determines eligibility, develops and implements a new individualized education program, if
19 appropriate.

20 Within two school days of enrollment, the receiving county board of education shall
21 request records and supporting documents and any other records related to the provision of
22 special education and related services from the sending district. If the county board of education
23 decides an evaluation is necessary to determine the transfer student's eligibility under West
24 Virginia eligibility criteria, the county board of education shall conduct the evaluation using the
25 requirements and timelines for initial evaluation, including obtaining parental consent.

26 (c) The county board of education in which the student was previously enrolled shall take
27 reasonable steps to respond within one school day to the request for records from the receiving
28 district. This includes schools administered by the Office of Institutional Education Programs and
29 the West Virginia Schools for the Deaf and Blind. Parental consent is not required when
30 transmitting records to a district in which the student seeks or intends to enroll.

**§18-20A-505. Individualized education programs within the West Virginia Birth to Three
Program.**

1 (a) Each county board of education shall develop and have in effect an interagency
2 agreement with the West Virginia Department of Health and Human Resources for purpose of the
3 West Virginia Birth to Three Program. The agreement shall outline the obligations of each agency
4 to ensure a smooth and effective transition of children assisted under the West Virginia Birth to
5 Three Program to programs serving students within county school systems. All county boards of
6 education are required to develop procedures for the transition of these children to receive
7 necessary services within the school system.

8 In the case of a child who may be eligible for services because of developmental delays,
9 the county board of education shall participate in a transition planning conference with the family
10 that is arranged by the department of health and human resources. With the family's agreement,
11 the conference shall be conducted at least ninety days and no more than nine months prior to the
12 child's third birthday to discuss eligibility requirements and any services the child may receive.

13 The department of health and human resources has the following duties to effect the
14 child's transition:

15 (1) Review the child's program options for the period from the child's third birthday through
16 the remainder of the school year; and

17 (2) Establish a transition plan that includes steps to support the transition of the child with
18 a disability to preschool services.

19 (b) A child three through five years old who is eligible as a student with developmental
20 delays shall have an individualized education program implemented by his or her third birthday.
21 If a child's third birthday occurs during the summer, the individualized education program team
22 shall determine the date when services under the individualized education program will occur. At
23 the discretion of the county board of education, the individualized education program team may
24 consider an individual family service plan, which may be used in place of an individualized
25 education program, if the child's parent is provided with a detailed explanation of the differences
26 between this plan and an individualized education program and if written parental consent to use

27 the individual family service plan is obtained. The county board of education shall not be required
28 to develop an individual family service plan instead of an individualized education program. The
29 county board of education is required to implement only the educational components of the
30 individual family service plan, if one is used.

31 (c)(1) When a student with a disability transitions from the West Virginia Birth to Three
32 Program or similar program, parental consent for the initial provision of special education and
33 related services in any program from students with exceptionalities and written notice of the
34 proposed individualized education program or individual family service plan are required.

35 (2) The county board of education shall obtain written parental consent for the release of
36 information to obtain pertinent student records from non-educational agencies such as the
37 department of health and human resources, developmental disabilities programs, medical
38 providers, day-care centers and Head Start.

39 (3) At the transition planning conference, if further assessments are necessary to
40 determine eligibility and the student's present levels of performance, informed consent to evaluate
41 is required. Otherwise, only written notice to inform the parent of the district's decision to use the
42 current evaluation data and not to conduct any further assessments shall be provided to the
43 parent. The parent shall also be informed of his or her right to request additional assessments.

44 (d) The timelines for transition from WV Birth to Three to the local school district will not
45 apply to a district under any of the following, documented circumstances:

46 (1) The parent repeatedly fails or refuses to produce the student for an evaluation or
47 otherwise interrupts the evaluation process;

48 (2) The child moves or transfers out of the district;

49 (3) There is a delay due to exceptional family circumstances including, but not limited to:
50 the family rescheduling or canceling the individualized education program meeting due to
51 sickness or unavailability of the parent and/or child; and extreme weather conditions or a natural
52 disaster where the length of the delay in conducting the meeting is directly proportional to the

53 duration and severity of the disruption caused by the extreme weather conditions or natural
54 disaster; or

55 (4) The child was referred to the West Virginia Birth to Three Program less than ninety
56 days before the child's third birthday. When the child is referred to the county board of education
57 less than ninety days before the third birthday, the evaluation shall be completed within eighty
58 days of the parent's consent, even if the timeline exceeds the child's third birthdate. Every effort
59 shall be made to complete evaluation, eligibility and the individualized education program, if
60 applicable, by the third birthdate.

61 (e) If an educational placement dispute arises involving a child transitioning from the West
62 Virginia Birth to Three Program to a public school program or public school services, the child
63 may not remain or continue in prior program when he or she is over the age of three. With written
64 consent of the parent, the child shall be placed in the public school until completion of all the
65 hearing proceedings. If the parent does not give written consent, the student shall not receive
66 services until completion of the hearing proceedings.

67 (f) A copy of the procedural safeguards notice as specified in section one thousand two of
68 this article shall be made available to the parent or adult student only one time a year except that
69 a copy will also be given upon:

70 (1) Initial referral or parental request for evaluation;

71 (2) The first occurrence of the filing of a due process or state complaint;

72 (3) Issuance of a disciplinary notice of suspension or expulsion resulting in a change of
73 placement; and

74 (4) The request of a parent or adult student.

§18-20A-506. Students with disabilities in adult prisons

1 The following are exceptions for students with disabilities who are convicted as adults
2 under West Virginia law and incarcerated in adult prisons:

3 (1) The student may not participate in statewide assessments;

4 (2) Transition planning and services do not apply if the student will remain incarcerated
5 beyond his or her twenty-first birthday.

6 The individualized education program team may revise the student's individualized
7 education program and placement, regardless of the least restrictive environment requirements,
8 if the state has demonstrated a bona fide security or other compelling penological interest that
9 cannot be otherwise accommodated.

PART VI. ADMINISTRATION OF SERVICES.

§18-20A-600. Duty to provide necessary services.

1 Each county board of education shall provide the special education and related services
2 necessary to implement each student's individualized education program.

§18-20A-601. Initiation of services

1 A complete individualized education program shall be in effect prior to the provision of
2 special education and related services. For initial individualized education programs, services
3 shall be implemented as soon as possible. Short delays in the immediate initiation of services
4 may occur when individualized education program team meetings are held during the summer or
5 a vacation period, or when arrangements for services, such as transportation, shall be made. A
6 delay during the school year shall not exceed fifteen days. The implementation of the
7 individualized education program shall begin in the fall, unless the individualized education
8 program team determines that the student needs extended school year or other services during
9 the summer, in which case these services shall be then provided.

10 For a preschool student, the individualized education program shall be in effect by the
11 student's third birthday. If the third birthday occurs during the summer the individualized
12 education program team shall meet to complete the individualized education program prior to the
13 third birthday and to determine the date when services will be initiated. If the individualized
14 education program team determines the child needs extended school year or other services
15 during the summer, these services shall be provided once the child turns three years of age,

16 otherwise the implementation of the individualized education program shall begin in the fall.

17 A current individualized education program shall be in effect at the beginning of each
18 school year for each student receiving special education and related services. For a student
19 transferring from another district or state, and in consultation with the parent or the adult student,
20 the county board of education shall initiate special education services comparable to those
21 provided by the previous district until the current individualized education program is adopted or
22 revised as specified in section five hundred four, part V of this article.

§18-20A-602. Provision of individualized education program information

1 The student's individualized education program shall be accessible to each general
2 education teacher, special education teacher, related service provider and others responsible for
3 its implementation. Each teacher and provider shall be informed of his or her specific
4 responsibilities related to implementing the student's individualized education program.

§18-20A-603. Services to be provided by county board of education.

1 The county board of education shall provide:

2 (1) A continuum of service options in order to respond to the intensity and severity of
3 student needs;

4 (2) Services in school facilities that serve age-appropriate non-exceptional peers;

5 (3) Classrooms for eligible school age students with exceptionalities in close proximity to
6 classrooms for age-appropriate non-exceptional peers;

7 (4) Classrooms for eligible students with exceptionalities that are adequate and
8 comparable to the classrooms for students without exceptionalities;

9 (5) Classrooms and facilities for eligible students with exceptionalities with physical or
10 sensory impairments that are in compliance, to the extent necessary, with the requirements of the
11 Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the specifications
12 outlined in article ten-f, chapter eighteen of this code, the current Uniform Federal Accessibility
13 Standards and Policy 6200 of the West Virginia State Board of Education;

14 (6) Transportation, specially designed if necessary, for all students with exceptionalities in
15 accordance with section thirteen, article five, chapter eighteen of this code and state board of
16 education policies governing transportation;

17 (7) Appropriate grouping of students with exceptionalities for specially designed instruction
18 based upon meeting the students' similar social, functional and/or academic needs, as specified
19 in their individualized education programs and without regard to identified exceptionality;

20 (8) Opportunity for students with disabilities to earn the required credits for graduation;

21 (9) Daily monitoring of hearing aids or the external component of a surgically implanted
22 devices worn by students in schools in accordance with established procedures to assure they
23 are functioning properly;

24 (10) Assistive technology devices or assistive technology services, or both, to a student
25 with a disability if required as part of the student's special education, related services or
26 supplemental services;

27 (11) On a case-by-case basis, school-purchased assistive technology devices in a
28 student's home or in other settings if the student's individualized education program team
29 determines that the child needs access to those devices in order to receive free appropriate public
30 education; and

31 (12) Services for young children in the least restrictive environment which includes utilizing
32 approved participating partners in West Virginia Pre-K. The socioeconomic level, ability and
33 funding streams may not be considered as deterrents to providing fully inclusive programs.

§18-20A-604. Staffing requirements and limits on class size.

1 (a) Each county board of education shall provide highly qualified personnel who are
2 appropriately trained for the areas of exceptionality in which they have primary responsibility and
3 who are adequate in number to implement the individualized education program of each eligible
4 student in the county. Service personnel shall be appropriately trained and supervised by qualified
5 professionals.

6 As required by section one-c, article twenty, of this chapter, an individualized education
7 program may specify training for general education teachers to assist them in implementing the
8 individualized education program goals and objectives. This training may be provided through
9 individual consultation or formal professional development and shall be provided by persons
10 trained or certified to address the student's exceptional needs. In addition, general education
11 teachers are entitled to training regarding the integrated classroom program and additional
12 individualized training developed by the county board of education, if requested, to prepare the
13 teacher to meet the exceptional needs of individual students. Whenever possible, this training
14 shall be provided prior to placement. Where prior consultation or training is not possible, it shall
15 be provided no later than ten days following the placement of the student into the general
16 education classroom. Unavoidable delays in the provision of training shall not result in the
17 exclusion of a student from any class.

18 (b) The county board of education shall provide adequate staff to implement the
19 individualized education program of each student. The number of students served in an
20 instructional period and the assignment of paraprofessionals or aides shall be determined based
21 on the intensity of services required by the students. Teachers' class lists and student schedules
22 shall be developed and monitored to ensure the implementation of individualized education
23 program services. While highly qualified teachers and licensed therapists shall design and
24 provide initial or original instruction, support personnel may provide reinforcement and practice of
25 previously taught skills or content. Additionally, support personnel may be required to provide
26 assistance to students in response to specific needs related to significant cognitive or sensory
27 impairments, communication, safety, mobility; personal care, behavior, medical management or
28 health care, or other unique circumstances.

29 When making staffing determinations the county board of education shall also take the
30 following factors in to consideration: planning time, data collection, observation, assessment and
31 report preparation, consultation and individualized education program planning with general

32 educators, individualized education program management, individualized education program
 33 team meetings and meetings with parents, the additional assistance that may be required for
 34 assisting younger children with personal tasks such as toileting, dressing and feeding, and travel
 35 time for itinerant personnel.

36 (c) To ensure the provision of a free appropriate public education and adherence to
 37 procedural requirements, professional special education personnel may be assigned a group of
 38 students for whom they not only provide direct or indirect special education services but also for
 39 whom they provide specific case management or procedural accountability duties such as
 40 sending parent notices, scheduling individualized education program meetings, reporting
 41 progress to parents, coordinating services, tracking timelines and managing paperwork. The
 42 maximum number of students that may be assigned to particular service providers shall be
 43 determined from the following Table One:

<u>Table One</u> <u>Maximum Limits of Case Management Assignments</u>	
<u>Teachers of students with developmental delays, ages 3-5</u>	<u>20 students with individualized education programs</u>
<u>Teachers of the gifted</u>	<u>45 students</u>
<u>Speech therapists</u>	<u>50 students</u>
<u>Teacher of all other exceptionalities</u>	<u>30 students</u>

44 These shall be maximum limits within which the school or district administrator, in
 45 consideration of the teacher's schedule and overall responsibilities, shall determine the number
 46 of students assigned to specific teachers or providers.

47 (d) All WV Pre-K classrooms, including special education, should to the extent practicable
 48 reflect the natural proportions of students with disabilities to those without disabilities within the
 49 school or community, but with no more than ten students with disabilities per session. Pre-K
 50 classrooms shall be limited to no more than twenty students per session. Pre-K special education

51 classrooms require at least one aide regardless of the number of students being served. The
52 provision of additional support staff shall be determined based on student needs and the
53 individualized education program. All Universal Pre-K classrooms, including special education,
54 shall provide a minimum of thirty-five square feet per child of usable indoor space for daily
55 program activities.

56 (e) To maximize the effectiveness of instruction for all students, the percentage of students
57 with disabilities, excluding those with speech and language impairments, receiving specially
58 designed instruction in general education settings should approximate natural proportions that
59 are no more than thirty percent of the total class enrollment when integrated classrooms are
60 established in the four core academic subjects: English and Language Arts, Science, Social
61 Studies and Math. For integrated classrooms where instructional responsibilities are shared, the
62 special educator shall not be assigned to more than two co-teaching or integrated classrooms
63 during one instructional block.

64 (f) Students may receive special education services in special education environments.
65 Special education staffing per instructional period shall be based on the student's level of need
66 without regard to the area of disability. When assigning students within special education
67 environments, the district special education administrator or designee shall consider the following
68 characteristics of needs:

69 (1) Students with Level I needs typically, but not exclusively, function within the school
70 setting by:

71 • Receiving varying levels of assistance from a special educator during general education
72 core academic classes or elective classes;

73 • Receiving small group instruction within special education classes;

74 • Taking the regular assessments under standard conditions or with accommodations;

75 • Participating in physical education classes independently;

76 • Participating in co-curricular or extracurricular activities independently;

- 77 • Receiving special education services in GEFT or GEPT;
- 78 • Using assistive technology to access WV CSOs;
- 79 • Working toward a standard diploma; or
- 80 • Participating in transition activities leading to a vocational completer certificate,
- 81 postsecondary education, military service or employment.

82 (2) Students identified with Level I needs may reflect varied levels of capacity across the
83 areas below:

- 84 • Cognition;
- 85 • Academic performance;
- 86 • Social interaction;
- 87 • Emotional/behavioral areas;
- 88 • Communication;
- 89 • Sensory abilities;
- 90 • Perceptual abilities;
- 91 • Motor abilities;
- 92 • Health/medical areas; and/or
- 93 • Other manifestations of their disability.

94 (4) Students with Level II needs typically, but not exclusively, require services such as the
95 following to function within a school setting:

- 96 • A markedly modified curriculum with a focus on basic or functional academics and life
- 97 skills;
- 98 • Close adult supervision in structured opportunities when participating in general
- 99 education classes, co-curricular and/or extracurricular activities;
- 100 • Close adult supervision to maintain the safety of the student or others;
- 101 • Close adult instruction, assistance and/or supervision with the use of assistive
- 102 technology, medical equipment, medical procedures, travel training or mobility;

- 103 • A wide array and/or intensity of related services;
- 104 • A large number of repetitive trials or opportunities to demonstrate skills with a
- 105 concomitant need for progress monitoring and record keeping on a daily basis;
- 106 • Transition activities that focus on special education vocational classes, supported
- 107 employment or sheltered workshops; and/or
- 108 • Instruction until the age of twenty-one.
- 109 (4) Students identified with Level II needs have significant and comprehensive needs
- 110 related to:
- 111 • Cognition;
- 112 • Academic performance;
- 113 • Functional performance;
- 114 • Social interaction;
- 115 • Emotional/behavioral areas;
- 116 • Communication;
- 117 • Sensory abilities;
- 118 • Perceptual abilities;
- 119 • Motor abilities;
- 120 • Health/medical areas; and/or
- 121 • Other manifestations of their disability.
- 122 (5) Level Three is an additional, optional level which may be used in consideration of
- 123 additional needs and staffing requirements. Students with Level III needs typically, but not
- 124 exclusively, demonstrate those needs shown at Level II as well as needs such as those shown
- 125 below to function within a school setting:
- 126 • Intense adult supervision across settings because the student poses a danger to him or
- 127 herself or to others;
- 128 • Intensive instruction, services, safety assistance and supervision to learn and maintain

129 skills and to increase independence in activities of daily living; and

130 • Transition services that include coordination and linkages with the Office of Behavioral
 131 Health Services for Mental Retardation/Developmental Disabilities Waiver Program and adult
 132 community services and community use.

133 (6) Class size for instructional periods for students with disabilities shall be limited by the
 134 students' programmatic level and level of service needs pursuant to the following Table Two:

<u>Table Two</u> <u>Maximum Number of Students per Instructional Period Based on Level of Service</u>			
	<u>Early Learning Programs</u> <u>Grades K-5</u>	<u>Middle Level Programs</u> <u>Grades 6-8</u>	<u>Adolescent Education Programs</u> <u>Grades 9-12</u>
<u>Level I service needs</u>	<u>12 students</u> <u>with a minimum</u> <u>staffing ratio of 1:6</u>	<u>12 students</u>	<u>12 students</u>
<u>Level II service needs</u>	<u>12 students</u> <u>with a minimum</u> <u>staffing ratio of 1:6</u>	<u>12 students</u> <u>with a minimum</u> <u>staffing ratio of 1:6</u>	<u>12 students</u> <u>with a minimum</u> <u>staffing ratio of 1:6</u>
<u>Level III service needs</u> <u>(optional)</u>	<u>8 students</u> <u>with a minimum</u> <u>staffing ratio of 1:4</u>	<u>8 students</u> <u>with a minimum</u> <u>staffing ratio of 1:4</u>	<u>8 students</u> <u>with a minimum</u> <u>staffing ratio of 1:4</u>

135 When students with different levels of service need are provided instruction in the same
 136 class, the minimum staffing ratio for the highest level of need applies. These ratios do not preclude
 137 the use of additional staff to support a student with Level II or Level III service needs. Staffing
 138 reflects both the standards as set forth in policy and the needs of the student as reflected on the
 139 individualized education program. Chapter 6, Section 4 requires each county board of education
 140 to provide highly qualified personnel in adequate numbers to implement the individualized
 141 education program of each eligible student in the county board of education.

142 (g) Waivers of maximum limits may be requested in writing through the department of
 143 education. Waivers may require an on-site visit, will be considered on a case-by-case basis and
 144 remain valid for the current school year only.

145 (h) When gifted services are delivered in a special education setting, no more than fifteen
 146 students may be scheduled in an instructional period.

147 (i) Class size for children, ages three through five, shall be determined according to the
 148 following Table Three:

<u>Table Three</u> <u>Maximum Number of Students Per Classroom</u> <u>for Children with Developmental Delays</u>		
<u>Program</u>	<u>Maximum Students Per Classroom</u>	<u>Staff</u>
<u>Universal Pre-K with Students with IEPs</u>	<u>20 students per classroom with limit of 10 students with IEPs per classroom</u>	<u>2 staff persons per classroom (1 teacher and 1 additional staff person) with no more than 9 students with IEPs</u>
		<u>3 staff persons per classroom (1 teacher and 2 additional staff persons) required for 10 students with IEPs</u>
<u>Special Education Pre-K</u>	<u>8 students</u>	<u>1 teacher and 1 additional staff person</u>
	<u>10 students</u>	<u>1 teacher and 2 additional staff persons</u>

149 When student numbers exceed staffing ratios a waiver shall be submitted. Waivers to
 150 staffing ratios may be requested in writing through the OSP waiver process. Waivers may require
 151 an on-site visit, will be considered on a case-by-case basis and remain valid for the current school
 152 year only.

PART VII. DISCIPLINE.**§18-20A-700. Disciplinary situations and protections for the student.**

1 (a) If a student's behavior, regardless of the student's disability, impedes his or her
2 learning or the learning of others, the individualized education program team shall consider the
3 use of strategies, including positive behavioral interventions and supports, to address the
4 behavior. If the individualized education program team determines that such services or supports
5 are needed, they shall be included in the individualized education program and be implemented.

6 The county board of education shall consider any unique circumstances on a case-by-
7 case basis when determining whether a change of placement is appropriate for a student with a
8 disability. However, these procedures do not prevent county board of education personnel from
9 maintaining a safe environment conducive to learning that is critical for all students.

10 (b) If the county board of education has knowledge that the student has a disability before
11 the occurrence of behavior that precipitates disciplinary action even if no eligibility determination
12 has yet been made pursuant to section four hundred one of this article. The county board of
13 education is deemed to have knowledge that the student has a disability under one or more of
14 the following circumstances:

15 (1) The parent or adult student has expressed concern to county board of education
16 professional personnel that results in written documentation, that the student may need special
17 education and related services;

18 (2) The parent or adult student has requested in writing that the student be evaluated for
19 special education; or

20 (3) The student's teacher or other district personnel have expressed concern about a
21 pattern of behavior demonstrated by the student directly to the director of special education or to
22 other district supervisory personnel in accordance with the district's established child find system
23 and referral process.

24 Pursuant to section seven hundred three of this article, these protections may also apply

25 if a request for an evaluation of a student who is not currently eligible for special education is
26 made during the period in which the student is subject to disciplinary measures.

27 These protections are not afforded to students who are eligible solely under the category
28 of gifted. The protections also do not apply when there is no basis of knowledge that a student
29 has a disability because an evaluation was conducted and a determination was made that the
30 student did not have a disability, the parent or adult student did not give written consent for an
31 evaluation, or the parent or adult student refused special education services.

32 If the county board of education did not have a basis of knowledge that a student was a
33 student with a disability prior to taking disciplinary measures, the student is subject to the same
34 disciplinary measures that are applied to all other students who engage in comparable behaviors.

35 (c) “Disciplinary removals” are out-of-school suspensions, expulsions and placements in
36 interim alternative educational settings. In determining the number of cumulative school days a
37 student has been removed, consideration may be given to days of removal due to in-school
38 suspensions, partial day suspensions and bus suspensions. An in-school suspension is not
39 considered a day of suspension for purposes of this chapter as long as the student is afforded
40 the opportunity to continue to participate in the general curriculum, continue to receive services
41 specified on the student’s individualized education program and continue to participate with
42 students without disabilities to the extent he or she would have in his or her current placement.
43 Portions of a school day that a student has been suspended may be considered a removal in
44 regard to determining whether there is a pattern of removals that constitutes a disciplinary change
45 of placement.

46 Whether a bus suspension counts as a day of suspension depends on whether the bus
47 transportation is a part of the student’s individualized education program. If bus transportation is
48 a part of the student’s individualized education program, a bus suspension shall be treated as a
49 disciplinary removal unless the county board of education provides the bus service in some other
50 way, because transportation is necessary for the student to obtain access to the location where

51 services will be delivered. If bus transportation is not a part of the student's individualized
52 education program, a bus suspension is not a disciplinary removal. In these cases, the student
53 and the student's parent have the same obligation to get the student to and from school as a
54 student without disabilities who has been suspended from the bus. However, the county board of
55 education should consider whether the behavior on the bus is similar to behavior in a classroom
56 that is addressed in the individualized education program and whether the student's behavior on
57 the bus should be addressed in the individualized education program or in a behavior intervention
58 plan.

59 (d) A "disciplinary change of placement" is a removal from the student's current
60 educational placement for more than ten consecutive school days or a series of removals that
61 constitutes a pattern. A pattern is established when the series of removals totals more than ten
62 cumulative school days in a school year, the student's behavior is substantially similar to his/her
63 behavior in the previous incidents that resulted in the series of removals, and additional factors
64 such as the length of each removal, the total amount of time the student is removed, and the
65 proximity of the removals to one another. Whether a pattern of removals constitutes a change of
66 placement shall be determined on a case-by-case basis by school personnel and shall be
67 documented on forms provided by the department of education. These determinations are subject
68 to due process and judicial review.

69 After a student with a disability has been removed from his or her current placement for
70 ten school days in the same school year, during any subsequent day of removal the county board
71 of education shall provide individualized educational program services to the student.

§18-20A-701. Provisions for short term removal of a student.

1 During the initial ten cumulative days of removal, services need not be provided to a
2 student with a disability unless services are provided to students without disabilities. These
3 removals shall be applied to the same extent as they are applied to students without disabilities.

4 School personnel may remove a student with a disability for up to ten consecutive school

5 days per incident for separate acts of misconduct in a school year as long as the removals do not
6 constitute a pattern resulting in a change of placement.

7 For each subsequent removal beyond ten cumulative school days in a year that is not a
8 change in placement, school personnel in consultation with at least one of the student's teachers
9 shall determine the extent to which services are needed to enable the student to continue to
10 participate in the general education curriculum, although in another setting, and to progress
11 toward meeting the goals set out in the student's individualized education program. This
12 consultation shall be documented on a form provided by the department of education.

§18-20A-702. District actions when considering a disciplinary change of placement

1 (a) A manifestation determination is required if the county board of education is
2 considering removing a student with a disability from his or her current educational placement for
3 disciplinary reasons beyond ten consecutive school days or more than ten cumulative school days
4 when the county board of education deems that a pattern exists. A "manifestation determination"
5 is a review of the relationship between the student's disability and the behavior subject to
6 disciplinary action. This review shall be documented on a form provided by the department of
7 education. When considering a disciplinary action that will result in a change of placement, the
8 county board of education shall:

9 (1) Provide same day written notice of the removal, the written notice specified in section
10 one thousand three of this article and the procedural safeguards notice specified in section one
11 thousand two of this article to the parent or adult student of the disciplinary action to be taken;
12 and

13 (2) Within ten school days of any decision to change placement, meet with the parent and
14 relevant members of the individualized education program team to conduct a manifestation
15 determination by reviewing all pertinent information in the student's file, including the student's
16 individualized education program, any teacher observations, and any relevant information
17 provided by the parents to determine if the conduct in question was caused by, or had a direct

18 and substantial relationship to the student's disability and if the conduct in question was the direct
19 result of the county board of education's failure to implement the individualized education
20 program. If the county board of education, the parent and relevant members of the individualized
21 education program team determine that either of the foregoing conditions is met, the conduct shall
22 be determined to be a manifestation of the student's disability, and the county board of education
23 shall take immediate steps to remedy those deficiencies.

24 (b) When the conduct is determined to be a manifestation of the student's disability, the
25 individualized education program team shall:

26 (1) Conduct a functional behavior assessment, unless an assessment was conducted
27 before the behavior, which resulted in the change of placement, occurred;

28 (2) Develop and implement a behavior intervention plan, or review the existing behavior
29 intervention plan and modify, as needed, to address the current behaviors; and

30 (3) Return the student to the placement from which the student was removed, unless the
31 parent and the county board of education agree to a change of placement as part of the
32 modification of the behavior intervention plan.

33 (c) When the conduct is determined not to be a manifestation of the student's disability,
34 school personnel may apply relevant disciplinary procedures in the same manner for the same
35 duration as the procedures applicable to students without disabilities, except as provided below:

36 (1) Convene the individualized education program team to determine the educational
37 services to be provided to enable the student to continue to participate in the general education
38 curriculum, although in another setting, and to progress toward meeting the goals set out in the
39 student's individualized education program; and

40 (2) Provide, as appropriate, a functional behavioral assessment, and behavior intervention
41 services and modifications that are designed to address the behavior violation so that it does not
42 recur.

43 (d) School personnel may remove a student to an interim alternative educational setting

44 for not more than forty-five school days without regard to whether the behavior is determined to
45 be a manifestation of the student's disability if the student:

46 (1) Carries or possesses a weapon at school, on school premises or at a school function;

47 (2) Knowingly possesses, carries, or uses illegal drugs or sells or solicits the sale of a
48 controlled substance while at school, on school premises or at a school function; or

49 (3) Inflicts serious bodily injury to another person at school, on school premises, or at a
50 school function.

51 For the purposes of this section,

52 "Weapon" means a device, instrument, material or substance, animate or inanimate, that
53 is used for, or is readily capable of causing death or serious bodily injury, except that such a term
54 does NOT include a pocket knife with a blade of less than two and one-half inches in length;

55 "Illegal drug" means a controlled substance, a drug or other substance identified under
56 schedules I, II, III, IV or V in Section 202(c) of the Controlled Substance Act, 21 U.S.C. §812 (c),
57 but "illegal drug" does not include a controlled substance that is legally possessed or used under
58 the supervision of a licensed health care professional or used under any other authority under the
59 Controlled Substance Act or under any other provision of federal law.

60 "Serious bodily injury" means an injury to a person that involves a substantial risk of death,
61 extreme physical pain, protracted and obvious disfigurement; or protracted loss or impairment of
62 the function of a bodily member, organ or mental faculty.

63 When used, the interim alternative educational setting shall enable the student to receive
64 educational services and participate in the general education curriculum and to progress toward
65 meeting the goals set out in the student's individualized education program. The setting shall
66 include, as appropriate to the student, a functional behavioral assessment and behavioral
67 intervention services and modifications to address the behavior violation so that it does not recur.

68 (e) Through an expedited due process hearing, county board of education administrators
69 may ask a West Virginia Department of Education hearing officer to remove a student with a

70 disability to an appropriate interim alternative educational setting if the county board of education
71 believes that maintaining the current placement of the student is substantially likely to result in
72 injury to the student or others. The hearing officer may order a change of placement to an
73 appropriate interim alternative educational setting for not more than forty-five school days. This
74 procedure may be repeated if the county board of education believes the student would be
75 dangerous if returned to the original placement.

76 (f) If the student's placement will change to an interim alternative educational setting, the
77 individualized education program team shall create or select an interim alternative educational
78 setting that enables the student to:

79 (1) Continue to receive education services so as to enable the student to continue to
80 participate in the general education curriculum, although in another setting, and to progress
81 toward meeting the goals set out in his or her individualized education program; and

82 (2) Receive, as appropriate, a functional behavioral assessment and behavioral
83 intervention services to address the behavior violation so that it does not recur.

§18-20A-703. Expediting hearings; parental requests for evaluation; referral to
enforcement and judicial authorities.

1 (a) An "expedited hearing" is a hearing conducted by a West Virginia Department of
2 Education special education due process hearing officer that occurs within twenty school days of
3 the request with a decision rendered within ten school days of the hearing.

4 An expedited due process hearing may be requested if:

5 (1) The parent or adult student disagrees with the manifestation determination decision or
6 any decision of the individualized education program team regarding a change of placement
7 during a disciplinary proceeding, or a decision regarding the student's placement in an interim
8 alternative educational setting; or

9 (2) The county board of education believes that maintaining the current placement is
10 substantially likely to result in injury to the student or to others.

11 A decision of a hearing officer in an expedited hearing is subject to judicial review by a
12 circuit court as provided in section four, article five of chapter twenty-nine-a of this code or may
13 be appealed to an appropriate federal district court.

14 When a request for an expedited hearing has been made, the student shall remain in the
15 interim alternative educational setting pending the decision of the hearing officer or until the
16 expiration of the disciplinary removal, whichever occurs first unless the parent and the department
17 of education or the county board of education agree otherwise.

18 (b) If a request for an evaluation of a student who is not currently eligible for special
19 education is made during the period in which the student is subject to disciplinary measures, the
20 evaluation shall be conducted in an expedited manner. Pending the results of the evaluation, the
21 student remains in the educational placement determined by county board of education officials,
22 which can include suspension or expulsion without educational services if services cease for
23 students without disabilities.

24 (1) If the student is subsequently determined eligible for special education, the county
25 board of education shall immediately:

26 (A) Convene an individualized education program team meeting to develop an
27 individualized education program, and

28 (B) Conduct a manifestation determination.

29 (2) If the evaluation team determines that the student is not a student with a disability and
30 is not eligible for special education, he or she will be subject to the same disciplinary actions as
31 all other students without disabilities who engage in comparable behaviors.

32 (c) The county board of education may report a crime committed by a student with a
33 disability to appropriate authorities. If a student brings a firearm to school, law enforcement shall
34 be contacted pursuant to pertinent provisions of state and federal law. If the county board of
35 education reports a crime, it shall ensure that copies of the special education and disciplinary
36 records of the student are provided to the appropriate law enforcement authorities for

37 consideration, to the extent the release of records is permitted by the Family Educational Rights
38 and Privacy Act, 20 U.S.C. § 1232g, and the policies of the West Virginia Board of Education.

PART VIII. PRIVATE SCHOOL STUDENTS

§18-20A-801. Categories of private school placements.

1 For purposes of determining and establishing the county board of education's
2 responsibilities for serving private school students, the placement of a student in a private school
3 shall be categorized based on the person or entity who enrolls or places the student in a private
4 school and why.

5 (1) *Voluntary Enrollment by a Parent* -- A parent may choose to enroll his or her child in a
6 private school for a variety of personal reasons, such as to obtain a religious education, to attend
7 a school with a particular philosophy or curriculum, or because the parent is dissatisfied with the
8 services offered or provided by the county board of education.

9 (2) *Placement by the County Board of Education* -- A county board of education may place
10 a student in a private school or facility to fulfill its obligation to provide a free appropriate public
11 education pursuant to the determinations and program made by an individualized education
12 program team.

13 (3) *Unilateral Placement by a Parent* -- A parent may withdraw a student with a disability
14 from a public school and then enroll the student in a private school or provide services from a
15 private provider at parent expense because he or she believes the county board of education has
16 not provided a free appropriate public education in a timely manner. All students who are
17 unilaterally placed are also deemed to be voluntarily enrolled in a private school.

§18-20A-802. Students voluntarily enrolled by a parent; funding obligations.

1 The extent of services provided through funds is determined based on the number and
2 location of the students enrolled in private schools in the district.

3 (a) The county board of education shall have an ongoing Child Find system to locate,
4 identify, and evaluate all students with disabilities ages three through twenty-one residing or

5 educated within the district's geographic boundaries, including students who have been placed
6 by a parent in a private school located in the county regardless of the student's residency.

7 The Child Find process shall ensure the equitable participation of parentally-placed private
8 school students with disabilities and include activities similar to the activities for public school
9 students including comparable timelines for the evaluation process. The county board of
10 education shall consult with private school representatives and representatives of parents who
11 place their children in private schools regarding the development, implementation and
12 modification of Child Find procedures.

13 (b) The county board of education shall conduct an annual count of the number of
14 parentally-placed private school students with disabilities on December 1. This count shall be
15 used to determine the amount of funds the county board of education shall expend to provide
16 special education and related services to private school students in the next fiscal year in
17 accordance with the provisions of this section. The county board of education shall consult with
18 representatives of private school students to determine how to conduct the count. All eligible
19 parentally-placed private school students shall be counted, regardless of whether they are
20 receiving services. Each county board of education shall maintain and provide the West Virginia
21 Department of Education with a record of the number of students evaluated, the number of
22 students determined to be students with disabilities and the number of students receiving services
23 for students with exceptionalities.

24 (c) To ensure timely and meaningful consultation, a county board of education shall
25 consult with private school representatives and representatives of parents of parentally-placed
26 private school students with disabilities during the design and development of special education
27 and related services for the students, including the following:

28 (1) The Child Find process and how parentally-placed private school students suspected
29 of having a disability can participate equitably, including how parents, teachers, and private school
30 officials will be informed of the process;

31 (2) The determination of the proportionate amount of federal funds available to serve
32 parentally-placed private school students with disabilities, including the determination of how the
33 amount was calculated;

34 (3) The consultation process among the county board of education, private school officials
35 and representatives of parents of parentally-placed private school students with disabilities,
36 including how such process will operate throughout the school year to ensure that parentally-
37 placed private school students with disabilities identified through the Child Find process can
38 meaningfully participate in special education and/or related services;

39 (4) How, where, and by whom special education and related services will be provided for
40 parentally-placed private school students with disabilities, including a discussion of:

41 (A) Types of services, including direct services and alternate service delivery mechanisms;

42 (B) How the services provided will be evaluated;

43 (C) How such services will be apportioned if funds are insufficient to serve all students;

44 and

45 (D) How and when these decisions will be made;

46 (5) If the county board of education disagrees with the views of the private school officials
47 on the provision of services or the types of services, whether provided directly or through a
48 contract, how the county board of education will provide to the private school officials a written
49 explanation of the reasons why the county board of education chose not to provide services
50 directly or through a contract; and

51 (6) Provision for obtaining a written affirmation signed by the representatives of
52 participating private schools when timely and meaningful consultation has occurred and
53 documentation of the consultation process to the West Virginia Department of Education when
54 written affirmation is not provided within a reasonable time.

55 (d) A private school official has the right to submit a complaint to the West Virginia
56 Department of Education that the county board of education did not engage in consultation that

57 was meaningful and timely or did not give due consideration to the views of the private school
58 official. If the private school official wishes to submit a complaint, the official shall provide the
59 basis of the complaint to the West Virginia Department of Education. The county board of
60 education shall forward the appropriate documentation to the department of education. If the
61 private school official is dissatisfied with the decision of the West Virginia Department of
62 Education, the official may submit a complaint to the Secretary of the United States Department
63 of Education by providing the basis of the complaint against the county board of education to the
64 secretary, and the West Virginia Department of Education will forward the appropriate
65 documentation to the secretary.

66 (e) To determine the proportionate amount of government funds used to provide services
67 for parentally-placed students in private schools, the county board of education shall first
68 determine the number of these private school students through the Child Find activities developed
69 in the consultation process.

70 The number of parentally-placed private school students who are found eligible as a
71 student with a disability as of December 1 of the previous year shall divided by the total number
72 of students with disabilities in all placements in the county to arrive at the percentage of private
73 school students with disabilities. This percentage shall then be applied to the total funding
74 received by the county board of education under Part B and Section 619 of the Individuals with
75 Disabilities Education Improvement Act of 2004 to determine the county board of education's
76 obligation.

77 (1) State and local funds may supplement but may not supplant the proportionate amount
78 of federal funds required to be expended for parentally-placed private school students with
79 disabilities.

80 (2) The costs of private school consultations and execution of Child Find activities,
81 including individual evaluations, may not be paid from the proportionate share of funds.

82 (3) The cost of any special education or related service, such as direct service,

83 consultation, equipment, materials, or transportation may be used to determine that the county
84 board of education has satisfied its expenditure requirement for private school students with
85 disabilities.

86 (4) If a county board of education has not expended for equitable services all of the funds
87 described in the expenditure requirements by the end of the fiscal year, the county board of
88 education shall obligate the remaining funds for special education and related services to
89 parentally-placed private school students with disabilities during a carry-over period of one
90 additional year.

91 (f)(1) The county board of education shall control and administer funds provided under
92 Part B of the Individuals with Disabilities Education Improvement Act of 2004 that are used to
93 provide special education and related services for parentally-placed private school students with
94 disabilities.

95 (2) The county board of education may place equipment and supplies that are purchased
96 with federal funds in a private school for a period of time needed for a program for eligible students
97 with disabilities; however, the county board of education shall:

98 (A) Retain title and exercise continuing administrative control over all equipment and
99 supplies;

100 (B) Ensure that all equipment and supplies are used only for the purposes specified in the
101 Individuals with Disabilities Education Improvement Act of 2004;

102 (C) Ensure that all equipment and supplies can be removed without remodeling the private
103 school; and

104 (D) Remove equipment and supplies if no longer needed or if necessary to prevent
105 unauthorized use.

106 (3) The county board of education may use the federal funds to pay an employee of a
107 private school to provide services to students with disabilities with a service plan when the
108 employee performs the services outside of his or her regular hours of duty and under public

109 supervision and control.

110 (4) A county board of education may use relevant federal funds to make public school
111 personnel available in private facilities to the extent necessary to implement the students' service
112 plans and if those services are not normally provided by the private school.

113 (5) Part B and Section 619 funds shall not be used to:

114 (A) Finance the existing level of instruction in the private school or otherwise benefit the
115 private school;

116 (B) Meet the needs of the private school; or

117 (C) Meet the general needs of students enrolled in the private school.

118 (6) Part B and Section 619 funds shall not be used for repairs, remodeling, or construction
119 of private school facilities.

120 (7) Part B and Section 619 funds shall not be used for classes that are organized
121 separately on the basis of school enrollment or religion if the classes are on the same site and
122 include students enrolled in public and private schools.

123 (g) No private school student with a disability has an individual right to receive some or all
124 of the special education and related services that the student would receive if enrolled in the
125 county board of education. Decisions about the services that will be provided shall be made in
126 accordance with the consultation requirements of subsection (c) of this section.

127 (1) Following consultation with the private school representatives, the county board of
128 education shall make final decisions with respect to services to be provided. Annual consultation
129 is not required to make these decisions. The county board of education shall determine the period
130 between consultations based on changing circumstances within the county board of education,
131 such as significant changes in the total amount of funds to be expended and/or the number and
132 location of private school students with disabilities.

133 (2) If a student is designated to receive services, the county board of education shall
134 initiate and conduct meetings to develop, review and revise a service plan for the student. A team

135 composed of the same members required for individualized education program teams shall
136 develop the service plan. In addition, the county board of education shall ensure that a
137 representative of the religious or other private school attends the meeting. If the representative
138 cannot attend, the county board of education shall use other means to ensure participation,
139 including individual or conference telephone calls. The service plan shall describe the specific
140 special education and related services that shall be provided to the student in light of the
141 determinations that have been made by the county board of education.

142 If a parent makes clear his or her intention to keep his or her eligible child enrolled in the
143 private elementary or secondary school located in another county board of education, the county
144 board of education where the student resides need not provide the free appropriate public
145 education to the student.

146 (h) (1) Private school students with disabilities may receive a different amount of services
147 than public school students with disabilities and are not entitled to every service or the amount of
148 service that they would receive if enrolled in public school.

149 (2) Each student receiving services shall have a service plan that describes the specific
150 special education and related services the county board of education shall provide in light of the
151 services the county board of education determined, through the consultation process, it will make
152 available.

153 (3) To the extent appropriate, the county board of education shall initiate and conduct
154 meetings to develop, review, and revise service plans consistent with the requirements for
155 developing an individualized education program as outlined in part V of this article.

156 (4) The county board of education shall ensure that a representative of the private school
157 attends each meeting. If the representative cannot attend, the county board of education shall
158 use other methods to ensure participation by the school, including individual or conference
159 telephone calls.

160 (5) Services shall be provided by employees of the county board of education or through

161 contract by the county board of education with an individual, association, agency, organization,
162 or other entity.

163 (6) Special education and related services, including materials and equipment, shall be
164 secular, neutral and nonideological.

165 (7) Services may be provided on the premises of private, including religious, schools, to
166 the extent consistent with law.

167 (8) Services provided to private school students with disabilities shall be provided by
168 personnel meeting the same standards as personnel providing services in the public schools.

169 (9) If necessary for a private school student to benefit from or participate in the services
170 the county board of education has selected to provide, the county board of education shall provide
171 transportation from the student's school or home to the site where services will be provided. The
172 county board of education shall take the student back to either the private school or the home,
173 depending on the timing of the services. Transportation costs may be included in the county board
174 of education's expenditure requirement. The county board of education shall not be required to
175 transport the student from home to the private school.

176 (i) Given the services that the county board of education has elected to provide to private
177 school students, the service plan shall meet the requirements of the individualized education
178 program to the extent appropriate. The service plan excludes elements that, although typical for
179 an individualized education program, would be inappropriate given the services the county board
180 of education has elected to provide.

181 (j) Parents of private school students may only file a due process complaint, as provided
182 in section one thousand one hundred four of this article, on the issues of evaluation and Child
183 Find activities. The due process complaint request shall be filed with the county board of education
184 in which the private school is located and a copy shall be forwarded to the state department of
185 education. Parents may challenge decisions regarding the provision of services by filing a formal
186 state complaint with the department of education in accordance with procedures outlined in

187 section one thousand one hundred two of this article.

§18-20A-803. Students placed in private facilities by the school district.

1 (a) When the county board of education, through the individualized education program
2 team, places a student with a disability in a private school or facility, the county board of education
3 shall ensure the following:

4 (1) A meeting is initiated and conducted to develop an individualized education program
5 for the student;

6 (2) All special education procedures and timelines are followed;

7 (3) Special education and related services are provided in accordance with an
8 individualized education program;

9 (4) A representative of the private school or facility shall attend the meeting to develop the
10 individualized education program or other methods are used to ensure participation by the private
11 school or facility, including individual or conference telephone calls if the representative cannot
12 attend;

13 (5) The responsibility for reviewing and revising individualized education programs
14 remains with the county board of education;

15 (6) Services are provided at no cost to the parent, including reimbursement to the parent
16 for transportation and other costs associated with participation at an individualized education
17 program meeting conducted in a geographical area outside the jurisdiction of the county board of
18 education;

19 (7) The placement in the private school or facility is the least restrictive environment for
20 that student.

21 (8) The student is provided an education that meets state and district standards.

22 (9) The student is afforded the same rights as students with disabilities who attend public
23 schools and the parent is afforded the same rights as parents of students attending public schools.

24 (10) Even if a private school or facility implements a student's individualized education

25 program, responsibility for compliance with this part remains with the county board of education
26 and the state department of education.

27 (b) At the discretion of the county board of education, once a student with a disability
28 enters a private school or facility, meetings to review and revise the individualized education
29 program may be initiated and conducted by the private school or facility. If the private school
30 conducts a meeting, the county board of education shall ensure that the parent and a county
31 board of education representative are involved in and agree to any proposed changes in the
32 individualized education program before the changes are implemented.

33 (c) The county board of education may only place a student with a disability in a private
34 school or facility outside of West Virginia after documenting the following conditions

35 (1) A free appropriate public education cannot be provided within the county, within the
36 region, or within the state;

37 (2) More than one private school or facility was investigated as to the feasibility of providing
38 appropriate and necessary services;

39 (3) The selected private school or facility has an approved status in the state in which it is
40 located, and assurances have been provided that the school or facility meets the requirements of
41 the Individuals with Disabilities Education Improvement Act of 2004;

42 (4) A current and complete individualized education program has been developed; and

43 (5) A current signed contract between the county board of education and the private school
44 or facility exists.

§18-20A-804. Unilateral placement by a parent.

1 (a)(1) The county board of education is not required to pay for costs of tuition, special
2 education, or related services at a private school or facility for a student who was unilaterally
3 placed there by a parent if the county board of education made a free appropriate public education
4 available to the student in a timely manner. However, the student is shall be included in the
5 population considered for services through the consultation process for parentally-placed private

6 school students to the extent applicable.If a parent disagrees with the availability of a free
7 appropriate public education and there is a question about financial responsibility, the parent may
8 file a due process complaint.

9 (2) If the parent of a student with a disability, who previously received special education
10 and related services from the county board of education, enrolls the student in a private
11 elementary or secondary school without the consent of the county board of education, a court or
12 hearing officer may order the county board of education to reimburse the parent for the costs of
13 unilaterally placing the student in a private school if the court or a hearing officer determines that:

14 (A) The county board of education had not made a free appropriate public education
15 available to the eligible student in a timely manner prior to the time the parent enrolled the student
16 in the private school; and

17 (B) The private school placement is appropriate. A hearing officer may find a student's
18 placement in a private school or facility by a parent appropriate even if the private school or facility
19 does not meet state standards.

20 (b) A court or hearing officer may reduce or deny reimbursement to a parent for the cost
21 of a unilateral placement in a private school or facility under the following circumstances:

22 (1) Prior to removal of the student from the public school, the county board of education
23 informed the parent of its intent to evaluate the student, including a statement of the purpose of
24 the evaluation that was appropriate and reasonable, but the parent did not make the student
25 available for the evaluation;

26 (2) There is a finding by the court or hearing officer, that the actions taken by the parent
27 were unreasonable; or

28 (3) The parent did not inform the county board of education in writing that he or she
29 rejected the placement proposed by the county board of education to provide a free appropriate
30 public education and did not state his or her concerns and intent to enroll the student in a private
31 school. This written notification by the parent shall have been provided to the individualized

32 education program team at the most recent individualized education program meeting prior to
 33 removing the student from the public school or the county board of education in writing at least
 34 ten business days, including any holidays that occur on a business day prior to removing the
 35 student from public school.

36 Reimbursement shall not be reduced or denied if the county board of education did not
 37 notify the parent of his or her obligation to provide the foregoing written notice, the school
 38 prevented the parent from providing notice or the county board of education's proposed
 39 placement would likely result in physical harm to the student.

40 Reimbursement may not be reduced or denied for the parent's failure to provide the notice
 41 referenced above, in the discretion of the court or hearing officer if the parents are not literate or
 42 cannot write in English or if he reduction or denial of reimbursement would likely result in serious
 43 emotional harm to the student.

PART IX. GENERAL SUPERVISION AND ACCOUNTABILITY FOR PERFORMANCE AND COMPLIANCE

§18-20A-901. State responsibilities for compliance with federal law regarding students with exceptionalities.

1 (a) The West Virginia Board of Education shall establish policies and shall ensures that
 2 procedures are in effect to provide a free appropriate public education to all students with
 3 exceptionalities in accordance with state and federal laws and regulations. The board shall
 4 ensure that the West Virginia Department of Education implements the general supervision of all
 5 programs and services for eligible students with exceptionalities and that all services meet state
 6 standards and the requirements of the Individuals with Disabilities Education Improvement Act of
 7 2004.

8 The West Virginia Board of Education shall have the primary responsibility to:

9 (1) Establish rules pertaining to the education of all eligible students with exceptionalities
 10 in the state;

11 (2) Establish standards pertaining to the education of all eligible students with

12 exceptionalities in the state;

13 (3) Establish regulations to protect student and parent rights as they pertain to the
14 education of all eligible students with exceptionalities in the state;

15 (4) Ensure that eligible students with exceptionalities in the state, including individuals in
16 residential institutions and private schools, receive an education in accordance with state and
17 federal laws;

18 (5) Establish certification requirements for personnel providing educational and related
19 services to eligible students with exceptionalities;

20 (6) Approve allocations and disburse state and federal funds designated for the education
21 of eligible students with exceptionalities;

22 (7) Administer education programs, including programs providing special education and
23 related services for students with exceptionalities, in the state's correctional institutions in
24 accordance with applicable state and federal laws and regulations;

25 (8) Adopt the National Instructional Materials Accessibility Standard for purposes of
26 providing instructional materials to persons with blindness or other persons with print disabilities
27 in a timely manner after publication of the National Instructional Materials Accessibility Standard
28 in the Federal Register; and

29 (9) Work collaboratively, to the maximum extent possible, with the state agency
30 responsible for assistive technology programs.

31 (b) The West Virginia Department of Education has the primary responsibility for
32 administering the requirements of the Individuals with Disabilities Education Improvement Act of
33 2004 and ensuring that students with exceptionalities receive a free appropriate public education.
34 The West Virginia Department of Education shall develop quality educational services for eligible
35 students with exceptionalities in the state, provide guidance in the implementation of state board
36 of education policies and regulations governing the education of eligible students with
37 exceptionalities, and provide direction and assistance for special education services in the state.

38 General supervision responsibilities of the West Virginia Department of Education include
39 administration of funding, monitoring and supervision of local educational agency implementation
40 and implementation of interagency agreements to ensure collaboration among agencies serving
41 students with exceptionalities. The West Virginia Department of Education has the duty to ensure
42 that:

43 (1) The requirements of Part B of the Individuals with Disabilities Education Improvement
44 Act of 2004 shall be implemented;

45 (2) Each educational program for students with exceptionalities administered within the
46 state, including each program administered by any other state or local agency, is under the
47 general supervision of the West Virginia Department of Education and meets the education
48 standards of the department;

49 (3) Policies and procedures implementing the state monitoring and enforcement
50 requirements of the Individuals with Disabilities Education Improvement Act of 2004 are in effect;

51 (4) The requirements of Subtitle B of title VII of the McKinney-Vento Homeless Assistance
52 Act, 42 U.S.C. § 11431 et seq., are met in the provision of special education services to homeless
53 students;

54 (5) The West Virginia Advisory Council for the Education of Exceptional Children is
55 supported in order to provide guidance with respect to the education and related services for
56 students with exceptionalities in the state;

57 (6) Policies and procedures are in place to prevent inappropriate overidentification or
58 disproportionate representation by race and ethnicity of students as students with disabilities;

59 (A) Data shall be collected and examined to determine if significant disproportionality
60 based upon race and ethnicity is occurring in the state and the school districts with respect to:

61 (i) The identification of students as students with disabilities, including those with a
62 particular impairment;

63 (ii) The placement in particular educational settings of these students; and

64 (iii) The incidence, duration and type of disciplinary actions, including suspensions and
65 expulsions.

66 (B) When a significant disproportionality in identification or placement is determined to
67 exist:

68 (i) A review of the policies, practices and procedures shall be conducted, and, if
69 appropriate, the policies, practices and procedures used in the identification or placement are
70 revised to ensure that the policies, practices and procedures comply with the requirements of the
71 Individuals with Disabilities Education Improvement Act of 2004;

72 (ii) The county board of education shall be required to use the proper amount of federal
73 funds to provide early intervening services to students in the county board of education,
74 particularly, but not exclusively, to students in those groups that were significantly overidentified;
75 and

76 (iii) The county board of education is required to publicly report on the revision of policies,
77 practices and procedures described in this subparagraph (i) of this paragraph;

78 (7) The necessary procedures are developed, including guidelines, forms and instruments
79 to implement the state board of education policies, state and federal laws governing the education
80 of students with exceptionalities;

81 (8) A practical method is developed and implemented to determine which students are
82 currently receiving needed special education and related services;

83 (9) Teachers and administrators in all districts are fully informed about their responsibilities
84 for implementing least restrictive environment requirements and are provided with technical
85 assistance and training necessary to assist them in this effort;

86 (10) The requirement of a least restrictive environment is effectively implemented for
87 students in private or public institutions, including, if necessary, making arrangements such as
88 memoranda of agreements or special implementation procedures;

89 (11) Copies of applicable standards are disseminated to each private school and facility

90 to which a county board of education has referred or placed a student with a disability;

91 (12) The implementation of all special education programs, including individualized
92 education program and least restrictive environment requirements, for all eligible students with
93 exceptionalities in the state, including students placed in residential institutions and private
94 schools, incarcerated youth, and students with disabilities who are convicted as adults under state
95 law and incarcerated in adult prisons is monitored through procedures such as written reports,
96 on-site visits and parent questionnaires to assure the compliance with federal laws and
97 regulations, state laws, policies, standards and regulations;

98 (13) If there is evidence that a county board of education makes placements that are
99 inconsistent with least restrictive environment requirements, the West Virginia Department of
100 Education shall conduct a review of the county board of education's justification for its actions and
101 assists in planning and implementing any necessary corrective actions;

102 (14) Data, including data disaggregated by race and ethnicity, shall be examined to
103 determine if significant discrepancies are occurring in the rate of long-term suspensions and
104 expulsions of students with disabilities. If discrepancies are occurring, a review of the county
105 board of education's policies, practices and procedures relating to the development and
106 implementation of individualized education programs shall be conducted and, if appropriate, they
107 may be revised to include the use of positive behavior interventions and supports, and procedural
108 safeguards, to comply with the Individuals with Disabilities Education Improvement Act of 2004.

109 (15) Direct educational services are provided, including special education and related
110 services for students with exceptionalities, in the state's correctional institutions in accordance
111 with written procedures developed to implement applicable state and federal laws and regulations;

112 (16) An opportunity is provided for those private schools and facilities to participate in the
113 development and revision of state standards that apply to them in the provision of services to
114 students with disabilities;

115 (17) Assistance is provided to county boards of education in the development and

116 modification of educational programs of study to meet the needs of students with exceptionalities
117 in early, middle, adolescent and adult education;

118 (18) Statewide planning for educational services for eligible students with exceptionalities
119 is completed;

120 (19) The department participates in the development and provision of programs for the
121 training of educational personnel related to special education issues and services;

122 (20) The department develops contacts and communications with:

123 (A) Other state and regional agencies, parent and professional organizations, and private
124 agencies serving students with exceptionalities;

125 (B) Colleges and universities preparing personnel to work with students with
126 exceptionalities; and

127 (C) Federal projects and national agencies which provide services for students with
128 exceptionalities;

129 (21) Districts, parents and other agencies are informed of the content and implications of
130 state and federal laws pertaining to the education of eligible students with exceptionalities;

131 (22) Each county board of education establishes, maintains and implements procedural
132 safeguards that meet the requirements of the Individuals with Disabilities Education Improvement
133 Act of 2004;

134 (23) Methods for the provision of services are prescribed as follows:

135 (A) An interagency agreement or other mechanism for interagency coordination is in effect
136 between each non-educational public agency and the West Virginia Department of Education that
137 are needed to ensure that free appropriate public education is provided, including the provision
138 of the these services during the pendency of any interagency dispute referred to below, which
139 agreement or mechanism shall include the following:

140 (i) An identification of, or a method for defining, the financial responsibility of each agency,
141 including the state Medicaid agency and other public insurers of students with exceptionalities,

142 for providing any services that are also considered special education or related services;

143 (ii) The conditions, terms, and procedures under which a county board of education shall
144 be reimbursed by other agencies;

145 (iii) Procedures for resolving interagency disputes from other agencies or otherwise
146 implement the provisions of the agreement or mechanism; and

147 (iv) Policies and procedures for agencies to determine and identify the interagency
148 coordination responsibilities of each agency to promote the coordination and timely and
149 appropriate delivery of any services that are also considered special education;

150 (B) If any public agency other than an educational agency is otherwise obligated under
151 federal or state law, or is assigned responsibility under state policy or pursuant to an interagency
152 agreement, to provide or pay for any services that are also considered special education or related
153 services that are necessary for ensuring free appropriate public education to students with
154 disabilities within the state, the public agency shall fulfill that obligation or responsibility, either
155 directly or through contract or other arrangement;

156 (C) Ensure that a noneducational public agency described in paragraph (B) of this
157 subsection may not disqualify an eligible service for Medicaid reimbursement on the grounds that
158 the service is provided in a school context;

159 (D) Ensure that if a public agency other than an educational agency fails to provide or pay
160 for the special education and related services described in paragraph (B) of this subsection, the
161 county board of education or the state agency responsible for developing the student's
162 individualized education program shall provide or pay for these services to the student in a timely
163 manner;

164 (E) Ensure that all federally-mandated requirements are met through:

165 (i) State statute or rule;

166 (ii) Signed agreements between respective agency officials that clearly identify the
167 responsibilities of each agency relating to the provision of services; or

168 (iii) Other appropriate written methods as determined by the secretary of the department
169 of education or by his or her designee; and

170 (F) Document that the requirements of this subdivision;

171 (24) The state performance plan for special education is developed, reviewed and revised,
172 including performance goals and indicators, and progress is reported annually, including the
173 progress of students with disabilities on statewide assessments, as required by the United States
174 Department of Education;

175 (25) Valid and reliable data and information needed to report annually to the United States
176 Department of Education are collected, including data for the state performance plan, annual
177 performance report and report required by Section 618 of the Individuals with Disabilities
178 Education Improvement Act of 2004;

179 (26) Districts are given reasonable notice and an opportunity for a hearing under 34 CFR
180 §76.401(d) prior to the state making a final determination that a county board of education is not
181 eligible for assistance under Part B of the Individuals with Disabilities Education Improvement Act
182 of 2004;

183 (27) The state's funding mechanism does not result in placements that violate the least
184 restrictive environment requirements and does not distribute funds based on the students'
185 placements that would result in the failure to provide a student with a disability free appropriate
186 public education according to the student's unique needs described on the individualized
187 education program;

188 (28) State and county board of education personnel are prohibited from requiring parents
189 to obtain a prescription for controlled substances as a condition of attending school, receiving an
190 evaluation or receiving services;

191 (29) State and district-wide assessments, to the extent possible, are developed and
192 administered using universal design principles; and

193 (30) Developing, annually reviewing and amending as necessary, a state plan for high

194 cost and high acuity funds in accordance with 34 CFR § 300.704(c) and section five, article twenty
195 of this chapter in consultation with local educational agency representatives, to include a definition
196 of children with high acuity needs.

197 (c) The school districts, including the West Virginia Schools for the Deaf and Blind and
198 schools under the supervision of the West Virginia Department of Education Office of Institutional
199 Education Programs, have the responsibility for implementing the requirements of the Individuals
200 with Disabilities Education Improvement Act of 2004 and section two, article twenty of this chapter,
201 and ensuring a free appropriate public education for students with exceptionalities. The school
202 districts shall ensure that:

203 (1) Data that are maintained, collected and reported to the West Virginia Department of
204 Education regarding special education students and personnel are accurate;

205 (2) Information related to parentally-placed private school students is maintained and
206 provided to the West Virginia Department of Education including:

207 (A) The number of students evaluated;

208 (B) The number of students determined to be student with a disability; and

209 (C) The number of students served.

210 (3) The compliance with the regulations of agencies, organizations, or individuals who
211 provide contractual special education and/or related services is monitored;

212 (4) Other agencies, organizations, or individuals are informed of the State and federal
213 requirements pertaining to the education of students with exceptionalities;

214 (5) Ongoing program evaluations are conducted to improve the effectiveness of services
215 provided to eligible students with exceptionalities; and

216 (6) Personally identifiable student data are collected, maintained and disclosed only in
217 accordance with state and federal confidentiality requirements.

§18-20A-902. State performance plan

1 (a) The department of education shall develop and execute a plan, to be known as the

2 state performance plan, to measure progress annually on performance goals and indicators
3 related to participation and results on statewide assessments, graduation rates, drop-out rates,
4 disproportionality and suspension rates for students with disabilities. To the maximum extent
5 possible, the state performance plan goals for students with disabilities shall be consistent with
6 the goals and standards established by the state for all students. In the preparation and execution
7 of the plan, priority shall be given to monitoring and review of the following:

8 (1) The provision of a free appropriate public education in the least restrictive environment,
9 which includes graduation rates, dropout rates, participation and performance in statewide
10 assessment, suspension rates, parent involvement, child find and placement in the least
11 restrictive environment;

12 (2) Disproportionality, which includes appropriate identification of racial/ethnic groups as
13 students with disabilities; and

14 (3) General supervision, which includes effective transition from early intervention to public
15 school programs, effective secondary transition and post school outcomes, correction of
16 noncompliance with federal requirements and effectiveness of the monitoring and dispute
17 resolution systems.

18 The department of education shall collect, review and analyze data annually to determine
19 whether the state and each county board of education have met the established targets on each
20 of the indicators identified by the department. Data shall be collected through a dedicated
21 statewide computer network with an integrated record system for all student, personnel and
22 financial information, a system of compliance procedures through which districts submit their self-
23 assessment data, and web-based data systems for collection of the dispute resolution procedures
24 described in part XI of this article.

25 Results of the analysis of state performance plan indicators shall be reported by the
26 department in an annual performance report, which shall be provided in written and electronic
27 format to the Legislature and published on the West Virginia Department of Education website.

28 (b) The county board of education shall, on an annual basis:

29 (1) Use data-based decision-making procedures and a local steering committee to review
30 and analyze district-level data to determine if the county board of education is making progress
31 toward the state's performance goals and indicators and district self-assessment improvement
32 plans;

33 (2) Develop, implement, and revise county board of education improvement plans as
34 necessary to make progress toward performance goals and indicators, and submit these plans
35 and progress reports as required to the department of education; and

36 (3) Correct any noncompliance on state performance plan indicators within one year of
37 notification by the West Virginia Department of Education.

38 (c) The West Virginia Department of Education shall monitor districts' implementation of
39 the requirements of federal law and this policy and shall ensure, when a district's noncompliance
40 is identified, that it is corrected as soon as possible, and in no case later than one year after
41 notification of the noncompliance. The county board of education shall be notified of the
42 noncompliance in writing.

43 Upon notification in writing of a noncompliance, the county board of education shall
44 develop and implement such corrective actions as are required to correct the noncompliance as
45 soon as possible, and in no case later than one year from the date of notification. The county
46 board of education will provide documentation to the department sufficient to verify the
47 noncompliance has been corrected as soon as possible and within timelines set by department
48 to ensure timely review and approval of the documentation.

49 (d) The department of education is required to collect and report statewide and district-
50 wide data on the assessment of students with disabilities, including the number of students with
51 disabilities participating in regular assessments and the number of those students who were
52 provided accommodations, the number of students participating in alternate assessments, and
53 the performance results of students with disabilities, if doing so is statistically sound and does not

54 disclose results identifiable to individual students.

55 Whenever the department of education reports information to the public on the
56 assessment of students without disabilities, it shall include the information stated above, as well
57 as aggregated data that includes the performance of students with disabilities together with all
58 other students and disaggregated data on the performance of students with disabilities.

59 The county board of education has the duty to include all students in statewide and district-
60 wide assessments, with or without accommodations, if determined appropriate by the
61 individualized education program team. The county board of education shall ensure that all
62 students with disabilities participate in West Virginia Measures of Academic Progress (WVMAP),
63 use data-based decision-making procedures to review and analyze district-level data to determine
64 if the district is making progress in including all eligible students with disabilities in the statewide
65 assessment program and in consistently improving the level of performance by students with
66 disabilities, and develop, implement, and revise district improvement plans as necessary to make
67 progress.

68 (e) The West Virginia Department of Education shall collect and analyze discipline data,
69 including data disaggregated by race and ethnicity, from school districts to determine whether
70 significant discrepancies are occurring in the rate of long-term suspensions and expulsions of
71 students with disabilities among districts in the state and as compared to such rates for students
72 without disabilities within the district.

73 On an annual basis, the county board of education shall:

74 (1) Ensure the suspension and expulsion data that it collects and reports to the department
75 are accurate;

76 (2) Use data-based decision-making procedures to review and analyze district-level
77 discipline data to determine if significant discrepancies are occurring between the long-term
78 suspension and expulsion rates for students with and without disabilities; and

79 (3) Develop, implement and revise district improvement plans, and when found to have a

80 significant discrepancy, review and revise policies, procedures and practices as necessary to
81 ensure that they are in compliance with the Individuals with Disabilities Education Improvement
82 Act of 2004 in relation to the development and implementation of individualized education
83 programs, the use of positive behavioral interventions and supports, and procedural safeguards.

84 (f) The department shall make an annual report on the proportion of students identified as
85 needing special education based upon race and ethnicity, including the following information:

86 (1) Number and percentage of students in each particular racial or ethnic group who are
87 identified as eligible for special education and weighted risk ratio indicating the chances of a
88 student within the racial group being so identified;

89 (2) Percentage of students in each racial and ethnic group who are identified under
90 particular categories of disability and weighted risk ratio indicating the chances of a student within
91 the racial group being identified within particular categories; and

92 (3) Percentage of students in each racial and ethnic group who are placed in particular
93 special education settings and weighted risk ratio indicating the chances of a student within the
94 racial group being placed in the setting.

95 In the case of a determination of significant disproportionality, the department shall review
96 the policies, procedures and practices used and require any county board of education identified
97 to reserve the maximum amount allowed under law of federal special education funds to provide
98 comprehensive coordinated early intervening services.

99 On an annual basis, the county board of education shall use data-based decision-making
100 procedures to review and analyze district-level data on race to determine if significant
101 disproportionality exists, and review and, if appropriate, revise the district improvement plan,
102 policies, procedures and practices used in the identification or placement of students to prevent
103 disproportionality based on race.

§18-20A-903. Duty to employ qualified personnel; special requirements for speech-
language pathologists, school psychologists and sign support specialists; use of

paraprofessionals, assistants and aides.

1 (a) The county board of education shall ensure that personnel working with students with
2 disabilities are fully licensed or certificated and highly qualified, whether they contract with or are
3 employed by the county board of education. The county board of education shall take measurable
4 steps to recruit, hire and retain highly qualified personnel who meet department of education
5 certification, licensure or other requirements for position assignments, including those for
6 teachers, related service providers, paraprofessionals and assistants. Nothing in this article shall
7 create a right of action on behalf of a student or class of students for failure to employ highly
8 qualified personnel or shall prevent a parent from filing a state administrative complaint about staff
9 qualifications.

10 The requirements for highly qualified personnel do not apply to any special educator
11 contracted or employed by districts to provide services to privately placed students whether
12 placed by the parents or an individualized education program team.

13 (b) Speech-language pathologists and speech-language pathology assistants shall
14 complete as least twelve of their annual professional development hours in topics relating directly
15 to their discipline, including augmentative and alternative communication, phonology, articulation,
16 receptive or expressive language, swallowing, fluency, voice disorders, cognitive and social
17 aspects of communication, hearing, assessment of students with speech-language disorders and
18 other topics related to the practice of speech-language pathology. The department of education
19 shall provide at least twelve hours of professional development training in these areas and shall
20 provide registration information for these programs to all school districts.

21 The county board of education shall document the participation of speech-language
22 pathologists in professional growth development and shall submit such documentation to the
23 department.

24 (c) School psychologists shall complete as least twelve of their annual professional
25 development hours in topics, areas and domains relating directly to their discipline, including data-

26 based decision making and accountability, consultation and collaboration, interventions and
27 instructional support to develop academic skills, interventions and mental health services to
28 develop social and life skills, school-wide practices to promote learning, preventative and
29 responsible services, family-school-community collaboration services, diversity in development
30 and learning, research and program evaluation, and legal, ethical and professional practice.

31 The department of education shall provide at least twelve hours of professional
32 development training in these areas and shall provide registration information for these programs
33 to all school districts.

34 The county board of education shall document the participation of school psychologists in
35 professional growth development and shall submit such documentation to the department.

36 (d) A county board of education shall pay the cost of certification renewal necessary to
37 satisfy the requirements of the West Virginia Registry of Interpreters for any service person who
38 is:

39 (1) Employed as an educational sign language interpreter I or II and is required to complete
40 any testing, training or continuing education in order to renew or maintain certification at that level;

41 (2) Employed as an educational sign language interpreter I and is required to complete
42 any testing, training or continuing education to advance to an educational sign language
43 interpreter II; or

44 (3) Employed as a sign support specialist and is required to complete any testing, training
45 or continuing education in order to advance to an educational sign language interpreter I or II.

46 (e) If a school district provides a program of professional development for any specialized
47 personnel identified in this section, the program shall be submitted to the department of education
48 for its review and approval.

49 (f) The county board of education may employ paraprofessionals, interveners, assistants,
50 and aides who are appropriately trained and supervised to assist in the provision of special
51 education and related services to students with disabilities if they meet standards established by

52 the department of education.

PART X. PROCEDURAL SAFEGUARDS.

§18-20A-1001. Types of written notice; language requirements.

1 Under the provisions of this article, three different types of written notice may be required
2 to be given to an affected party, either individually or in combination, according to the specific
3 terms of the provision and procedure in question:

4 (1) The procedural safeguards notice;

5 (2) Prior written notice; and

6 (3) Notice of meetings.

7 All notices shall be written in the native language of the parent or adult student or other
8 mode of communication used by the parent or adult student, unless it clearly is not feasible to do
9 so, and shall be written in an easily understandable manner. If the native language or mode of
10 communication of the parent or adult student is not a written language, the county board of
11 education shall take steps to ensure that the notice is translated orally or by other means to the
12 parent or adult student in his or her native language or other mode of communication and the
13 parent or adult student understands the content of the notice. The county board of education
14 shall maintain written evidence that these requirements have been met.

§18-20A-1002. Contents of the procedural safeguards notice; when required.

1 (a) To facilitate their informed participation, parents and adult students are informed of the
2 extensive procedural safeguards through a written notice prepared by the department of
3 education. The notice shall include a full explanation of the following procedural safeguards:

4 (1) Independent educational evaluation;

5 (2) Prior written notice;

6 (3) Parent or adult student consent;

7 (4) Access to educational records;

8 (5) Opportunity to resolve complaints through due process complaints or the state

9 complaint process, including the time period in which to file a complaint, the opportunity for the
10 agency to resolve the complaint and the difference between the due process and state complaint
11 procedures, including the jurisdiction of each procedure, what issues may be raised, filing and
12 decisional timelines, and relevant procedures;

13 (6) The availability of mediation;

14 (7) The student's placement during pendency of decisions in due process hearings;

15 (8) Procedures for students who are subject to placement in an interim alternative
16 educational setting;

17 (9) Requirements for unilateral placements by parents of students in private schools at
18 public expense;

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

21 (11) Civil actions; and

22 (12) Attorneys' fees.

23 (b) The county board of education shall provide the parent or adult student a procedural
24 safeguards notice at least once per school year, that is, one copy between July 1 and June 30.

25 In addition, the county board of education shall also provide the procedural safeguards notice to
26 the parent or adult student in each of the following circumstances:

27 (1) Upon an initial referral or a parent or adult student request for evaluation;

28 (2) Upon the first occurrence of a filing of a due process complaint or state complaint
29 alleging violations of Part B of the Individuals with Disabilities Education Improvement Act of 2004;

30 (3) With notice of a disciplinary removal resulting in a change of placement; and

31 (4) Upon request by the parent or adult student.

32 A parent or adult student may receive the procedural safeguards notice by electronic mail if the
33 county board of education makes that option available.

§18-20A-1003. Prior written notice.

1 (a) "Prior written notice" refers to the act of informing a parent or adult student, in writing
2 within a reasonable amount of time, before the county board of education proposes or refuses to
3 initiate or change the student's identification, the evaluation, educational placement, or provision
4 of a free appropriate public education. This notice shall effect these two purposes:

5 (1) To provide the parent or adult student with enough information so that he or she is able
6 to fully understand the county board of education's proposed actions or refused actions and to
7 make informed decisions, if necessary; and

8 (2) To provide a framework for data-based discussion and problem solving.

9 (b) When required to be given to a parent or adult student, prior written notice shall include
10 the following:

11 (1) A description of the action proposed or refused by the county board of education;

12 (2) An explanation of why the county board of education proposes or refuses to take the
13 action;

14 (3) A description of each evaluation procedure, assessment, record, or report the county
15 board of education used as a basis for the proposed or refused action;

16 (4) A description of other options the individualized education program team considered
17 and the reasons why those options were rejected;

18 (5) A description of other factors relevant to the district's proposal or refusal;

19 (6) A statement that the parent or adult student has protection under the procedural
20 safeguards, and if notice is not an initial referral for evaluation, a description of how to obtain a
21 copy of the procedural safeguards notice; and

22 (7) Sources to contact in obtaining assistance in understanding their procedural
23 safeguards notice.

24 (b) Prior written notice shall be provided to the parent or adult student five days prior to
25 implementing the proposed action or within five days of the refusal. This requirement does not
26 apply to notice of disciplinary removals, which shall be provided on the same day the decision to

27 remove the student is made. If the county board of education and parent agree, prior written notice
28 shall be provided and services may be initiated within a reasonable time, which may be fewer
29 than five days.

§18-20A-1004. Notice of meetings.

1 To ensure that one or both of the parents of the student with an exceptionality are present
2 at each meeting and are afforded the opportunity to participate in meetings, including eligibility
3 committee and individualized education program meetings, the county board of education shall
4 provide written notice of meetings by:

5 (1) Notifying the parents or adult student of the meeting at least eight days prior to the
6 scheduled meeting date, to ensure that they will have the opportunity to attend; and

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

8 The written notice shall include the purpose, time, and location of the meeting, the persons
9 who will be in attendance, and an explanation that, at the discretion of the county board of
10 education or parent or adult student, other individuals who have knowledge or special expertise
11 regarding the student as determined by the county board of education or the parent or adult
12 student inviting the individual, may attend the meeting.

13 When scheduling an initial individualized education program team meeting for a child who
14 was previously served in the WV Birth to Three program, the written notice shall indicate this
15 purpose, and indicate that the county board of education will invite, at the parent's request, the
16 WV Birth to Three service coordinator or other representative to assist with the smooth transition
17 of services.

18 If the purpose of the meeting includes the consideration of post-secondary goals and
19 transition services for the student, at age sixteen, or younger if appropriate, the written notice shall
20 also indicate this purpose, indicate that the county board of education will invite the student and
21 identify any other agency that will be invited to send a representative. Representatives of other
22 agencies may not be invited to attend an individualized education program team meeting without

23 the written consent of the parent or parents.

§18-20A-1005. Parental participation

1 To ensure parental participation in the special education process, the county board of
2 education shall afford the parents of a student with an exceptionality an opportunity to inspect and
3 review all education records with respect to the identification, evaluation and educational
4 placement of the student, and the provision of a free appropriate public education to the student.

5 Parents shall also be afforded an opportunity to participate in meetings with respect to the
6 identification, evaluation and educational placement of the student, and the provision of a free
7 appropriate public education to the student. The county board of education shall take all action
8 is necessary to ensure that the parent understands the proceedings at a meeting including
9 arranging for an interpreter for parents with deafness or whose native language is other than
10 English.

11 The county board of education may conduct the eligibility committee or individualized
12 education program team meeting without a parent or adult student in attendance only when the
13 county board of education has documentation that reasonable measures have been taken to
14 ensure parent or adult student participation. If unable to convince the parent or adult student that
15 he or she should attend, the county board of education shall make a record of its attempts to
16 arrange a mutually agreed upon time and place including, but not limited to, the following
17 documentation:

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

19 (2) Copies of correspondence sent to the parent or adult student and any responses
20 received; and

21 (3) Detailed records of visits made with the parent or adult student and the results of those
22 visits.

23 If neither parent can attend, the county board of education shall use other methods to
24 ensure parent or adult student participation, including individual or conference telephone calls.

25 The county board of education shall obtain written parental consent for the initial provision
26 of special education services and provide the parent a copy of the individualized education
27 program, at no cost to the parent.

§18-20A-1006. Informed consent

1 (a) “Informed consent” is written approval given by a parent or adult student who has been
2 fully informed of and understands all information relevant to the activity for which consent is
3 sought. The request for consent shall describes the activity for which consent is sought and lists
4 the records, if any, that will be released and to whom. All information shall be provided in the
5 native language or mode of communication of the parent or adult student. The parent or adult
6 student shall be informed that the approval is voluntary and may be revoked at any time. Consent
7 is indicated by the parent’s or adult student’s signature. If a parent or adult student revokes
8 consent, the revocation is not retroactive and does not negate an action that has occurred after
9 the consent was given and before the consent was revoked. If consent is revoked after the
10 student has initially been provided special education and related services, the county board of
11 education is not required to amend the student’s educational records to remove any references
12 to the student’s receipt of special education and related services because of the revocation of
13 consent.

14 (b) Informed written consent is required before:

15 (1) Conducting an initial evaluation or reevaluation to determine whether a student is
16 eligible for special education when this involves more than a review of existing information. The
17 county board of education need not obtain parental consent for a reevaluation if the county board
18 of education can demonstrate and document that it made reasonable efforts to obtain consent
19 and the parent has failed to respond;

20 (2) Initially providing special education and related services to a student with a disability.
21 Parent consent for initial evaluation may not be construed as consent for the initial provision of
22 special education and related services;

23 (3) Disclosing personally identifiable information from the student's education records,
24 unless provided as an exception under the Family Educational Rights and Privacy Act and Policy
25 4350 of the West Virginia Board of Education;

26 (4) Accessing public benefits or insurance or private insurance to pay for services listed in
27 the individualized education program;

28 (5) An agency representative likely to pay for or provide transition services attends an
29 individualized education program meeting; and

30 (6) Personally identifiable information is released between officials in the county board of
31 education of residence and the county board of education in which the private school is located.

32 (c) The county board of education is not required to obtain informed consent in the
33 following situations:

34 (1) When a review of existing data is part of an evaluation or a reevaluation;

35 (2) When tests are administered to both general and special education students in a grade
36 or class and consent is not required for all students;

37 (3) When a teacher or related-service provider conducts observations, ongoing classroom
38 evaluation, or criterion-referenced tests, as described in the individualized education program, to
39 determine the student's progress toward goals and benchmarks or objectives on the
40 individualized education program;

41 (4) When disclosing personally identifiable information to persons authorized to have
42 access under the Family Educational Rights and Privacy Act.

43 (c) If the parent refuses consent or the parent fails to respond to a request to provide
44 consent for an initial evaluation, mediation or due process procedures may be used, if appropriate.

45 The county board of education may not use the mediation or due process procedures if consent
46 for the initial evaluation involves a student who has been parentally enrolled in a private school
47 or is being home schooled.

48 If the parent refuses consent for or refuses to respond to a request for consent to initial

49 provision of special education and related services after the county board of education has
50 documented reasonable efforts to obtain consent, the county board of education may not use
51 mediation or due process to obtain placement. In this situation, the county board of education is
52 not considered in violation of the free appropriate public education requirement and is not required
53 to convene an individualized education program team meeting or develop an individualized
54 education program for the child for whom the parent refused consent.

55 The county board of education may not use a parent's refusal to consent to one service
56 or activity to deny the parent or student any other service, benefit or activity, except as required
57 by this part.

58 (d) When a parent or adult student fails to respond to reasonable measures taken by the
59 county board of education to obtain written consent to determine continued eligibility, the county
60 board of education may proceed with the reevaluation. The county board of education shall make
61 a record of its attempts to gain consent by documenting telephone calls made or attempted,
62 correspondence sent, or visits made to the home or place of employment.

63 (e) When consent has been given for an evaluation, an individual assessment, the initial
64 provision of special education and related services, or the disclosure of information, a parent or
65 adult student may only revoke consent prior to the occurrence of the action. Revocation of
66 consent shall be in writing. If at any time subsequent to the initial provision of special education
67 and related services the parent or adult student revokes consent in writing for the continued
68 provision of special education and related services, the county board of education may not
69 continue to provide special education and related services, but shall provide prior written notice
70 before ceasing provision of special education and related services. The county board of
71 education is not considered in violation of the free appropriate public education requirement and
72 shall not be required to convene an individualized education program team meeting or develop
73 an individualized education program for the student for whom consent is revoked. Dispute
74 resolution procedures may not be used to obtain agreement or a ruling that the services may be

75 provided to the student.

§18-20A-1007. Right to independent educational evaluations; request for evaluation; consideration of results.

1 (a) An “independent educational evaluation” means one or more individual assessments,
2 each completed by a qualified examiner who is not employed by the county board of education
3 responsible for the education of the student in question.

4 (1) A parent or adult student has the right to obtain an independent educational evaluation
5 at public expense if he or she disagrees with an evaluation obtained or conducted by the county
6 board of education. Additional independent evaluations may not be provided at public expense.

7 (2) The parent or adult student has the right to an independent educational evaluation at
8 his or her own expense at any time.

9 (3) If the independent educational evaluation meets the criteria outlined in section three
10 hundred four of this article, eligibility committee or the individualized education program team shall
11 consider the evaluation in its decision making process.

12 (4) The parent or adult student is not automatically entitled to have additional assessments
13 beyond those determined necessary for an evaluation. However, if the parent or adult student is
14 interested in additional or different assessments and the county board of education refuses to
15 provide them, he or she may pursue additional assessments through a due process hearing
16 request. In addition, the county board of education may initiate a due process hearing to determine
17 if the evaluation it conducted is appropriate. If the final decision of a hearing officer, or a court of
18 law’s decision on an appeal, is that the evaluation conducted by the county board of education
19 was appropriate, the parent or adult student still has the right to an independent educational
20 evaluation, but at his or her own expense.

21 (5) A hearing officer may order an independent educational evaluation at public expense
22 if he or she determines that the evaluation conducted by the county board of education was not
23 appropriate.

24 (b) Within five days of a parent or adult student's written request for an independent
25 educational evaluation at public expense, the county board of education may ask why he or she
26 disagrees with the evaluation obtained by the county board of education, but the county board of
27 education cannot require an explanation. Within ten school days of the written request for an
28 independent educational evaluation, the county board of education shall give the parent or adult
29 student information about where the evaluation may be obtained and the agency criteria
30 applicable for an independent educational evaluation including the location for the evaluation, the
31 required qualifications of the examiner, and the maximum allowable charges for specified
32 evaluations based on reasonable and prevailing rates typically paid by the county board of
33 education for similar evaluations, to eliminate unreasonably excessive fees, including travel costs
34 for necessary services not available in the community.

35 Except for the criteria listed above, the county board of education may not impose other
36 conditions or timelines if doing so would be inconsistent with the parent or adult student's right to
37 an independent educational evaluation. Upon request, a list of qualified examiners who can
38 conduct an independent educational evaluation shall be provided.

39 A parent or adult student may request an opportunity to demonstrate that unique
40 circumstances justify an independent educational evaluation that does not fall within the county
41 board of education's cost criteria. If an independent educational evaluation that falls outside the
42 county board of education's cost criteria is justified, that independent educational evaluation will
43 be publicly funded.

44 (c) (1) If a parent or adult student requests an independent educational evaluation at public
45 expense, the county board of education shall do one of the following within ten school days of
46 written request:

47 (A) Agree, in writing, to pay for an independent educational evaluation at reasonable and
48 prevailing rates, and provide the county board of education's independent educational evaluation
49 criteria and information about where an independent educational evaluation may be obtained;

50 (B) Offer, subject to the parents' agreement, mediation by the department to try to resolve
51 differences;

52 (C) Request a due process hearing to show that the county board of education's
53 evaluation is appropriate.

54 (2) If a parent or adult student asks the county board of education to pay for an
55 independent educational evaluation that has already been obtained, the county board of
56 education shall resolve the request through one of the following options:

57 (A) Pay for the independent educational evaluation; or

58 (B) Request West Virginia Department of Education mediation when parents agree to
59 mediate; however, an attempt to resolve the request by mediation shall not preclude resolution
60 by any of the other options within this subdivision; or

61 (C) Request a due process hearing within ten school days of the receipt of the evaluation
62 report to show that the evaluation obtained by the parent or adult student did not meet the criteria
63 for a publicly funded independent educational evaluation; or

64 (D) Request a due process hearing within ten school days of billing to demonstrate that
65 the county board of education's evaluation was appropriate. The county board of education does
66 not have to pay for an independent educational evaluation if the hearing officer finds for the county
67 board of education.

68 (d) If a parent or adult student obtains an independent educational evaluation and makes
69 the evaluation available to the county board of education, the results shall be considered by the
70 county board of education, if the independent educational evaluation meets the county board of
71 education's criteria, in any decision made with respect to the provision of free appropriate public
72 education. The results may also be presented as evidence at a hearing regarding the student.

73 The results of an independent educational evaluation shall not be the sole basis for a
74 student's eligibility for disability services. The eligibility committee has the responsibility to use
75 existing evaluation data and other information from a variety of sources, in addition to the

76 independent educational evaluation, to determine whether a student has an exceptionality or
77 continues to have a disability.

§18-20A-1008. Surrogate parents.

1 (a) A “surrogate parent” is an individual assigned by the county board of education to
2 assume the rights and responsibilities of a parent under the Individuals with Disabilities Education
3 Improvement Act of 2004. The surrogate parent may represent a student in all matters relating
4 to the identification, evaluation, and educational placement of the student and the provision of
5 free appropriate public education to the student.

6 (b) Any person who is aware that a student may need a surrogate parent may make a
7 referral for a determination to the county board of education’s special education director or an
8 appropriate county board of education administrator. The county board of education shall appoint
9 a surrogate in any of the following circumstances:

10 (1) A parent cannot be identified;

11 (2) A parent cannot be found after reasonable efforts to locate the parent;

12 (3) The student is a ward of the state;

13 (4) The student is an unaccompanied homeless youth as defined in Section 725 (6) of the
14 McKinney-Vento Homeless Assistance Act.

15 The county board of education shall make reasonable efforts to assign a surrogate within
16 thirty days after it determines that the student needs a surrogate. If a state judge has appointed
17 a surrogate to oversee the care of a student who is a ward of the state, the judge-appointed
18 surrogate may make decisions regarding the student’s education, including special education,
19 provided he or she meets the criteria for a district-appointed surrogate.

20 (c) The county board of education shall make a good faith effort and maintain records of
21 attempts to locate a parent. The county board of education may not appoint a surrogate parent
22 when the natural parent is available but chooses not to participate.

23 (d) A surrogate parent may represent the student in all matters relating to identification,

24 evaluation, placement and the provision of a free appropriate public education. The county board
25 of education shall ensure the person selected and appointed as a surrogate parent:

26 (1) Has knowledge and skills that ensure effective representation of the student;

27 (2) Has no personal or professional interest that conflicts with the interest of the student;

28 (3) Is not an employee of the West Virginia Department of Education, the county board of
29 education, or any other agency that is involved in the education or care of the student.

30 A person who otherwise qualifies to be a surrogate parent shall not be deemed an
31 employee of the county board of education or agency solely because he or she is paid to serve
32 as a surrogate parent.

33 In the case of a student who is an unaccompanied homeless youth, appropriate staff of
34 emergency shelters, transitional shelters, independent living programs and street outreach
35 programs may be appointed as temporary surrogates without regard to the above requirements
36 until a surrogate can be appointed that meets all of the requirements of this section.

§18-20A-1009. Adult students; transfer of special education rights at adulthood.

1 An “adult student” is a student who is at least eighteen years of age to whom special
2 education rights have transferred under the Individuals with Disabilities Education Improvement
3 Act of 2004 and West Virginia Code.

4 No later than the student’s seventeenth birthday, the individualized education program
5 team shall discuss the transfer of special education rights to the student. Special education rights
6 shall transfer from the parent to the adult student when the student turns eighteen years of age
7 unless a court has appointed a legal guardian to represent the educational interests of the student.
8 Beginning no later than the seventeenth birthday, the individualized education program shall
9 include a statement that the student has been informed of the rights that will transfer at age
10 eighteen.

11 When the student’s special education rights transfer at age eighteen, the parent and
12 student shall be notified that rights have transferred. The individualized education program shall

13 contain a statement that the student has been informed of the special education rights that have
14 transferred to him or her.

15 The right to receive written notice is always retained by both the parent and adult student.
16 The parent will continue to receive copies of any notices, including those listed in Section 1 of this
17 chapter. While a parent has the right to receive notices, only the adult student has the right to
18 make decisions regarding his or her educational program.

§18-20A-1010. Confidentiality and Access to Records

1 The county board of education shall collect, use, and maintain information about a student
2 In order to make appropriate decisions concerning special education and the provision of free
3 appropriate public education, the county board of education has a duty to collect, use, and
4 maintain relevant information about a student. The county board of education has the duty to
5 safeguard the information so collected and to ensure that it is only used in conformity with the
6 requirements and protections provided in the Individuals with Disabilities Education Improvement
7 Act of 2004 and Family Educational Rights and Privacy Act. The county board of education shall
8 provide training in these privacy requirements and procedures for all school personnel with
9 responsibilities for educational records.

PART XI. DISPUTE RESOLUTION

§18-20A-1100. Processes for resolution of disputes; role of department.

1 When a county board of education is unable to resolve a disagreement between parents
2 of a student or an adult student and the county board relating to the implementation of state and
3 federal special education laws and regulations regarding the identification, evaluation or
4 educational placement of a student or the provision of a free appropriate public education, the
5 West Virginia Department of Education may seek to resolve the dispute using any of the
6 processes outlined in this part, singly or in combination.

§18-20A-1101. Facilitated individualized education program team meeting.

1 (a) A “Facilitated IEP team meeting” or “Facilitated IEP” is a voluntary early dispute

2 resolution option utilizing an impartial facilitator to guide the individualized education program
3 process and to assist members of the individualized education program team to communicate
4 effectively. An "IEP Facilitator" is a person who provides assistance to the individualized
5 education program team. The IEP Facilitator shall be an impartial third party, not a member of the
6 individualized education program team, and have no stake in decisions made by the team.

7 (b) A county board of education, parent or adult student may request a Facilitated IEP by
8 submitting a written request to the West Virginia Department of Education. The request shall
9 contain an original signature of the person making the request. The Facilitated IEP process
10 requires that both sides to the dispute agree to this process and the department shall not schedule
11 a Facilitated IEP Team Meeting without the consent of both parties. A request for a Facilitated
12 IEP Team Meeting shall be made at least two weeks prior to the intended or proposed meeting
13 date.

14 (c) The Facilitated IEP team meeting process shall conform to the following criteria:

15 1. The Facilitated IEP shall be voluntary and may only proceed with the consent of both
16 parties to the dispute;

17 2. The Facilitated IEP shall not be used to deny or delay a parent or adult student's right
18 to a hearing on the issue or to deny any other rights afforded under Part B of the Act;

19 3. The Facilitated IEP shall be conducted by a qualified and impartial facilitator who is
20 trained in facilitation techniques;

21 4. IEP Facilitators shall assigned from a list of qualified facilitators on a rotational basis
22 and if a facilitator to be assigned according to the rotation schedule is not available during the
23 timeframe for the individualized education program team meeting, the next available facilitator on
24 the rotation schedule shall be assigned;

25 5. The Facilitated IEP process is free to the parties;

26 6. The Facilitated IEP Team meetings shall be scheduled in a timely manner and adhere
27 to all required timelines.

28 (d) The IEP Facilitator shall be qualified and trained in effective facilitation techniques,
 29 verified by the West Virginia Department of Education as having met the requirements for qualified
 30 facilitators, and be enrolled on the list of qualified individuals maintained by the department.

31 (e) The IEP Facilitator may not:

32 Be an employee of the West Virginia Department of Education or an employee of the
 33 county that is involved in the care and education of the student;

34 Have a personal or professional interest that conflicts with the facilitator's objectivity; or

35 Have a student enrolled in the county involved in the Facilitated IEP.

§18-20A-1102. State complaint; procedures for resolution of complaint.

1 (a) A "formal state complaint" is a charge made by a parent, adult student or other
 2 interested party that special education laws or regulations are not being followed by a county
 3 board of education or other public agency.

4 (b) An individual or organization may file a formal state complaint with the West Virginia
 5 Department of Education. The complaint shall be in writing and contain the following information:

6 (1) A statement that a public agency has violated a requirement of federal or state statutes,
 7 federal regulations, or any rule or policy of the West Virginia Department of Education relating to
 8 students with disabilities or exceptionalities, with citations to the statute, regulation, rule or policy
 9 at issue;

10 (2) The facts on which the statement is based;

11 (3) The signature and contact information for the complainant;

12 (4) The relief requested or proposed by the complaining party for resolution of the problem
 13 to the extent known and available to the party at the time the complaint is filed; and

14 (5) If alleging violations against a specific student:

15 (A) The name and address of the residence of the student, and if the student is alleged or
 16 believed to be homeless, the available contact information for the student;

17 (B) The name of the school the student is attending; and

18 (C) A description of the nature of the problem of the student, including facts related to the
19 problem.

20 (c) No complaint shall be accepted if it alleges a violation that occurred more than one
21 year prior to the date that the complaint is received.

22 (d) The party filing the complaint shall forward a copy of the complaint to the county board
23 of education serving the student at the same time the party files the complaint with the West
24 Virginia Department of Education.

25 (e) Upon receipt of a formal state complaint, the West Virginia Department of Education
26 may take any of the following actions, singly or in combination:

27 (1) Carry out an independent on-site investigation if the West Virginia Department of
28 Education determines the investigation to be necessary based upon the nature of the allegations,
29 review of information submitted by the parent or adult student and the county board of education,
30 and consideration of information obtained through telephone interviews;

31 (2) Give the complainant the opportunity to submit additional information, either orally or
32 in writing, about the allegations in the complaint; and

33 (3) Provide the county board of education with the opportunity to respond to the complaint,
34 including at a minimum, a proposal to resolve the complaint; and an opportunity for the county
35 board of education and the parent or adult student to voluntarily engage in mediation and/or early
36 resolution.

37 (4) Review all relevant information and make an independent determination as to whether
38 the public agency is violating state or federal special education laws or regulations.

39 (f) After review of all of the information received and collected in relation to the allegations
40 of the complaint, the West Virginia Department of Education shall, within sixty days of receipt of
41 the complaint, issue a written decision to the county board of education and the complaining party
42 that addresses each allegation in the complaint and contains:

43 (1) Findings of facts and conclusions;

44 (2) The reasons for the department's decision upon each claim or allegation in the
45 complaint; and

46 (3) Procedures for effective implementation of the department's decisions, if needed,
47 including:

48 (A) Technical assistance activities;

49 (B) Negotiations; and

50 (C) Corrective actions, including timelines for completion of corrective activities, to achieve
51 compliance, which timelines will only be extended if requested by the county board of education
52 within five days of the board's receipt of the decision and based upon exceptional circumstances.

53 The department may only exceed or extend the sixty-day time limit for a determination if
54 exceptional circumstances exist with respect to a particular complaint or if the parent and the
55 county board involved agree to extend the time to pursue other measures, such as mediation, to
56 resolve the dispute.

57 (g) If a written state complaint is received that is also the subject of a due process
58 complaint as provided in section one thousand one hundred four of this article, or contains multiple
59 issues of which one or more are part of the due process complaint, the department shall set aside
60 any part of the state complaint that is being addressed in the due process complaint until the
61 conclusion of the hearing. Any issue that is not a part of the due process action shall be resolved
62 following the established state complaint procedures and timelines. For issues that are addressed
63 in the due process hearing, the hearing officer's decision is binding on those issues and the West
64 Virginia Department of Education shall inform the complainant to that effect. Any remaining
65 issues not addressed in the due process hearing decision shall be investigated upon receipt of
66 the hearing decision by the department in accordance with the established state complaint
67 procedures and timelines.

68 If an issue raised in a state complaint filed under this section has previously been decided
69 in a due process hearing involving the same parties, the due process decision is binding on that

70 issue and the department shall inform the complainant that the state complaint process cannot
71 be used to overrule the due process decision.

72 A state complaint alleging a failure of a county board of education to implement a due
73 process hearing decision shall be investigated and resolved by the department utilizing the state
74 complaint procedures described in this section.

75 (h) Any party to a formal state complaint may request early resolution to a complaint
76 investigation by contacting the other party and participating in a local conference if both parties
77 voluntarily agree to utilize the early resolution option. If early resolution is reached on any or all
78 allegations within fifteen days of being notified of the receipt of the state complaint, the county
79 board of education need not submit its written response to the allegations to the West Virginia
80 Department of Education, but the parties shall inform the department of their actions and the
81 relevant portions state complaint shall be considered resolved. Allegations not resolved shall be
82 investigated and determined as provided in this section.

83 (i) The West Virginia Department of Education may promulgate procedural rules, pursuant
84 to the provisions of article three-b, chapter twenty-nine-a of this code to specify procedures for
85 responding to or investigating complaints under this section.

§18-20A-1103. Mediation.

1 (a) The term “mediation” means an informal, non-adversarial, confidential and voluntary
2 process in which an impartial third party, the mediator, provides an opportunity to the parties
3 involved in a dispute to resolve their differences and create a mutually satisfactory solution.
4 Mediation may take place at any time in the dispute resolution process regardless of the filing of
5 a due process complaint or a formal state complaint or both. Information about the mediation
6 option shall be provided by the department when a formal state complaint is filed for the first time,
7 when a due process complaint is received, and upon request of a party who has identified a
8 dispute that may not be resolved informally.

9 (b) A party to a dispute, relating to the implementation of state and federal special

10 education laws and regulations regarding the identification, evaluation or educational placement
11 of a student or the provision of a free appropriate public education, may request mediation by
12 submitting a written request to the county board of education or to the department and the request
13 shall contain an original signature of the requesting party or the party's legal representative. The
14 mediation process may only be utilized if both parties agree to mediation.

15 (c) If the parties resolve the dispute through the mediation process, the parties shall, with
16 the assistance of the mediator, prepare and execute a legally binding agreement that sets forth
17 the terms of the resolution. The agreement shall also contain:

18 (1) A statement that all discussions that occurred during the mediation process will remain
19 confidential and not be used as evidence in any subsequent due process hearing or civil
20 proceedings; and

21 (2) The signatures of both the parent of the student or of the adult student and the
22 representative of the county board of education who has the authority to bind the board.

23 (d) If mediation fails to produce an agreement, or if either party requests termination of the
24 mediation process, the mediator shall issue a statement to the parties and the West Virginia
25 Department of Education that the process has been terminated.

26 (e) The mediation process shall conform to the following criteria:

27 1. The process is voluntary and is agreed to by both parties;

28 2. The mediation process or the option to use the mediation process shall not be used to
29 deny or delay a parent or adult student's right to a hearing on the issue, or to deny any other rights
30 afforded under Part B of the Individuals with Disabilities Education Improvement Act of 2004;

31 3. The mediation shall be conducted by a qualified and impartial mediator who is trained
32 in effective mediation techniques;

33 4. Mediators shall be assigned from the list of qualified mediators on a rotating basis;

34 5. The mediation process shall be free to the parties;

35 6. Parties to the mediation shall be informed of the confidential nature of the discussions

36 that occur during mediation and that these discussions may not be used as evidence in any
37 subsequent due process hearing or civil proceeding arising from that dispute;

38 7. Parties to the mediation may be required to sign a confidentiality agreement prior to
39 commencement of the mediation;

40 8. Mediation sessions shall be scheduled in a timely manner and shall be held in a location
41 that is convenient to the parties in the dispute.

42 (f) All mediators shall be qualified and trained in effective mediation techniques, as well
43 as in the requirements of the Individuals with Disabilities Education Improvement Act of 2004 and
44 Policy 2419 of the West Virginia State Board of Education. No mediator may be an employee of
45 the West Virginia Department of Education or an employee of the county that is involved in the
46 care and education of the student and no mediator may have a personal or professional interest
47 that conflicts with the person's objectivity, including, but not limited to, representing boards of
48 education or parents against boards of education and having a student enrolled in the county
49 schools involved in the dispute. A person who otherwise qualifies as a mediator is not considered
50 an employee of the West Virginia Department of Education or an employee of the county board
51 of education solely because he or she is paid by the West Virginia Department of Education to
52 serve as a mediator.

53 (g) For parents and schools that choose not to use the mediation process, a county board
54 of education may establish procedures to offer parents or adult students an opportunity to meet
55 at a convenient time and location with a disinterested party who is under contract with an
56 appropriate alternative dispute resolution entity, or a parent and training information center, or
57 community parent resource center; and who may explain the benefits of, and encourage the use
58 of the mediation process.

§18-20A-1104. Due process complaints

1 (a) When a parent of a student or an adult student due has reason to believe that a student
2 has been denied rights related to the proposal or refusal to initiate or change the identification,

3 evaluation, educational placement of, or the provision of a free appropriate public education for,
4 a public school student and demands a formal hearing of the dispute, the parent or adult student
5 may file a due process complaint with the West Virginia Department of Education. The due
6 process complaint procedure is not available for students placed in a private school by the parent
7 for issues regarding the provision of services under the student's services plan; however, due
8 process procedures do apply to child find, evaluation and reevaluation issues. However, a parent
9 who has placed their child in a private school where free appropriate public education is an issue,
10 a unilateral placement, may file a due process complaint.

11 (b) A parent, adult student, county board of education or an attorney representing a party
12 may file a due process complaint by contacting the district superintendent or the West Virginia
13 Department of Education. The complaint shall be in writing and shall be mailed or hand delivered
14 to the other party and to the coordinator responsible for due process complaints at the West
15 Virginia Department of Education.

16 (c) No due process complaint may be accepted if it is filed more than two years from the
17 date the complaining party knew or should have known of the disputed decision or alleged action
18 that forms the basis for the complaint. The two-year time limit may be tolled if the parent or adult
19 student was prevented from filing a complaint due to specific misrepresentations by the county
20 board of education that it had resolved the problem forming the basis of the due process complaint
21 or due to the county board of education's withholding of information that the board was required
22 to provide to the parent or the student.

23 (d) In a proceeding upon a due process complaint, the burden of proof will be on the party
24 seeking relief in accordance with the decision in *Shafter v. Weast*, 546 U.S. 49, 126 S. Ct. 528,
25 163L. Ed.2d 387 (2005).

26 (e) A due process complaint shall be made in writing and include the following information:

27 (1) The student's name, address of the residence of the student (or available contact
28 information in the case of a homeless student) and the school the student is attending;

29 (2) A specific description of the problem relating to the proposed or refused initiation or
30 change, including the facts relevant to the determination of the issue;

31 (3) The relief requested by the party or a description of the proposed resolution of the
32 issue; and

33 (4) The signature of the party or a legal representative of the party requesting the due
34 process hearing.

35 (f) The party receiving a due process complaint shall, within ten days of receiving the due
36 process complaint notice, send to the other party a response that specifically addresses the
37 issues raised in the due process complaint notice except that if the party receiving the due process
38 hearing complaint notice is a county board of education that has not sent a prior written notice
39 pursuant to the provisions of part X of this article, to the parent with regard to the subject matter
40 contained in the due process complaint, the county board of education shall within ten days of
41 receiving the due process complaint, send to the parent or adult student a response that includes:

42 (1) An explanation of why the district proposed or refused to take the action raised in the
43 due process complaint;

44 (2) A description of other options the individualized education program team considered
45 and the reasons why those options were rejected;

46 (3) A description of each evaluation procedure, assessment, record, or report that the
47 district used as a basis for the proposed or refused action; and

48 (4) A description of other factors relevant to the district's proposal or refusal.

49 Providing the parent or adult student with PWN does not preclude the district from
50 asserting that the parent or adult student's due process complaint was insufficient, where
51 appropriate.

52 (g) If the party receiving the due process complaint believes that the complaint insufficient
53 and fails to meet the requirements of subsection (e) of this section, the party shall notify the
54 hearing officer and the other party of the insufficiency within fifteen days of receipt of the due

55 process complaint. A county board of education may assert that a complaint is insufficient, even
56 if that board has provided the parent or student with notice of a proposed change as provided in
57 section one thousand three of this article. If the party receiving the due process complaint fails to
58 allege the insufficiency of the complaint within the fifteen day period, the complaint shall be
59 deemed sufficient as to form and contents.

60 Within five days of receiving notice of a claim that the complaint is insufficient, the hearing
61 shall make a determination of sufficiency based solely upon the content of the complaint and the
62 notice of the objecting party. The hearing officer shall notify the parties forthwith of the officer's
63 determination in writing. The parties may not have a hearing on a due process complaint nor
64 participate in an early resolution session if the due process complaint is deemed in sufficient. A
65 party may only amend a due process complaint if the other party consents in writing to the change
66 and is given the opportunity to resolve the due process issues through the resolution process
67 described below or if the hearing officer grants permission to amend the due process complaint
68 no later than five days before the due process hearing begins. If a party files an amended due
69 process complaint, the time periods for a resolution meeting and resolution period shall restart
70 from the filling of the amended complaint.

71 (h) The parties shall have a thirty day period in which to attempt to resolve the issues
72 raised in the due process complaint. Within fifteen days of receiving a due process complaint from
73 the parent as the party and prior to initiating a due process hearing, the county board of education
74 shall convene a meeting with the complaining party to discuss his or her due process complaint
75 and the facts that form the basis for the complaint in order to provide the county board with an
76 opportunity to resolve the dispute. The resolution meeting need not be held if both parties agree
77 in writing to waive the meeting or both parties agree to participate in mediation.

78 If the county board of education fails to hold the resolution meeting within fifteen days of
79 receiving notice of a due process complaint or fails to participate in the resolution meeting, the
80 parent or adult student may seek the intervention of a hearing officer to enforce the due process

81 hearing timelines. Where the district is unable to obtain the participation of the opposing party in
82 the resolution meeting after reasonable efforts have been made and documented, the county
83 board of education may at the end of the thirty day resolution period request that a hearing officer
84 dismiss the complaint.

85 If the county board of education has not resolved the due process complaint to the
86 satisfaction of the opposing party within thirty days of the receipt of the complaint, the due process
87 hearing may proceed.

88 The hearing office may make adjustments to shorten or extend the thirty day resolution
89 period under any of the following circumstances:

90 (1) Both parties agree in writing to waive the resolution meeting;

91 (2) After either the mediation or resolution meeting starts, but before the end of the thirty-
92 day period, the parties agree in writing that no agreement is possible; or

93 (3) If both parties agree in writing to continue the mediation at the end of the thirty-day
94 resolution period, but later, the parent or county board withdraws from the mediation process.

95 At the conclusion of the thirty day resolution period or the day after any of the three
96 foregoing events occurs, a forty-five day period for the due process hearing and decision shall
97 begin.

98 (i) In the implementation of due process complaint system, the West Virginia Department
99 of Education shall:

100 (1) Provide assistance in alternative means for submitting due process complaints in
101 instances where parents are unable to submit written requests;

102 (2) Develop a model form to assist parents and students in filing a due process complaint;

103 (3) Maintain a list of attorneys, including a statement of their qualifications, trained to serve
104 as hearing officers and provide this information to any person regardless of whether the person
105 has filed or received a complaint;

106 (4) Inform the parties of the availability of mediation when a due process complaint is

107 initiated or the parties request the information;

108 (5) Provide information regarding any free or low-cost legal, and other relevant services in
109 the area, to the parent or adult student if the parent or adult student requests the information or
110 when the parent or adult student or district files a due process complaint;

111 (6) Ensure that all required timelines for due process complaint resolution process and
112 due process hearings are met; and

113 (7) Transmit findings and decisions from due process hearings, after deleting any
114 personally identifiable information, to the West Virginia Advisory Council for the Education of
115 Exceptional Children and make those findings and decisions available to the public.

116 (i) In order to qualify as a due process hearing officer, a person shall have the following,
117 minimum qualifications:

118 (1) A law degree;

119 (2) Admission to the West Virginia State Bar;

120 (3) The knowledge of, and the ability to understand the Individuals with Disabilities
121 Education Improvement Act of 2004, federal regulations relating to the Act, West Virginia law
122 regarding the education of exceptional children, including Policy 2419 of the West Virginia State
123 Board of Education, and legal interpretations regarding special education law, regulations and
124 state policy by federal and state courts;

125 (4) The knowledge and ability to conduct hearings in accordance with appropriate,
126 standard legal practice;

127 (5) The knowledge and ability to render and write decisions in accordance with
128 appropriate, standard legal practice; and

129 (6) Specific competency in due process, special education law, effective writing and
130 speaking, decision-making and related areas, as evidenced through application, interview, and
131 competency-based training.

132 Due process hearing officers may not be a person who is an employee of the West Virginia

133 Department of Education or the district that is involved in the education or care of the student; a
134 person with a personal or professional interest that conflicts with the person's objectivity in the
135 hearing; or a lawyer who represents boards of education or parents in actions against boards of
136 education.

137 (k) An otherwise qualified due process hearing officer shall be ineligible to begin hearing
138 officer training or to serve as a hearing officer during the pendency of any action in which he or
139 she represents boards of education or parents in actions against boards of education and for one
140 year following the conclusion of this representation. A due process hearing officer shall not be
141 deemed an employee of the West Virginia Department of Education solely because he or she is
142 paid by the Department to serve as a hearing officer.

143 (l) Upon receipt of a written request for a due process complaint, the West Virginia
144 Department of Education shall select a hearing officer by:

145 (1) Using a rotational selection process from the list of qualified hearing officers;

146 (2) Making an initial determination whether the hearing officer has a personal or
147 professional interest which would conflict with objectivity in the hearing; and

148 (3) Selecting a new hearing officer if conflict is determined or the hearing officer is
149 unavailable to conduct the hearing within timelines.

150 Any party to the complaint may submit a challenge to remove a hearing officer for cause.
151 This challenge shall be submitted in writing to the hearing officer with a copy to be provided to
152 every other party in the proceeding.

153 (m) The party requesting a due process hearing may not raise issues at the due process
154 hearing that were not raised within the due process complaint unless the other party expressly
155 agrees otherwise.

156 (n) Each party to a hearing shall have the right to:

157 (1) Be accompanied and advised by counsel and by individuals with special knowledge or
158 training with respect to students with exceptionalities; however, this provision does not supersede

159 or contravene any state law relating to legal representation by persons who are not attorneys
160 licensed or otherwise authorized to practice law in this state;

161 (2) Present evidence and confront, cross-examine, and compel the attendance of
162 witnesses and compel the production of relevant documents;

163 (3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to
164 that party at least five business days before the hearing;

165 (4) Obtain a transcript or verbatim record of the hearing; and

166 (5) Receive written, or at the option of the parent or adult student, electronic findings of
167 fact and decisions.

168 (o) Parents or adult students involved in hearings shall the right to:

169 (1) Have the student who is the subject of the hearing present;

170 (2) Open the hearing to the public;

171 (3) Have the record of the hearing and the findings of fact and decisions provided at no
172 cost to the parent or adult student;

173 (4) Be provided with interpreters for the deaf or interpreters fluent in the primary language
174 of the home as needed at public expense at all stages of the due process procedures;

175 (5) Have the hearing conducted at a time and place that is reasonably convenient; and

176 (6) File a due process complaint on an issue separate from a due process complaint
177 already filed.

178 (p) During the pendency of any administrative or judicial proceeding regarding a due
179 process complaint except complaints based upon disciplinary matters, the student involved in the
180 complaint shall remain in the educational placement established at the time of the filing of the
181 complaint, unless the parties to the proceeding agree otherwise. If the complaint involves an
182 application for initial admission to public school, the student, with the consent of the parent, shall
183 be placed in the public school until the completion of all the proceedings.

184 If a complaint involves initial services for a child transitioning from services available under

185 Part C of the Individuals with Disabilities Education Improvement Act of 2004 to Part B services
186 and the child is no longer eligible for Part C services because he or she has turned three years of
187 age, the county board of education shall not be required to provide the Part C services that the
188 child had previously been receiving. If the child is found eligible for special education and related
189 services under Part B and the parent consents to the initial provision of services, the county board
190 of education shall provide those services that are not in dispute between the parent and the county
191 board.

192 If the decision of a hearing officer in a due process hearing agrees with the parent or adult
193 student that a change of placement is appropriate, that placement shall be treated as an
194 agreement between the district and the parent or adult student.

195 (q) Within forty-five days after the end of the resolution period specified subsection (h) of
196 this section, the hearing officer shall issue a final decision following an administrative hearing on
197 the allegations of the complaint. At the request of either party the hearing officer may grant specific
198 extensions of time beyond this time limit. Each hearing and every proceeding involving oral
199 arguments shall be conducted at a time and place that is reasonably convenient to the parent or
200 student involved. The hearing officer shall mail a copy of his or her decision to each of the parties.

201 (r) An expedited due process hearing shall be used solely for disciplinary issues and may
202 be requested with the West Virginia Department of Education when the parent or adult student
203 with a disability disagrees with a decision regarding a manifestation determination or with any
204 decision regarding placement for disciplinary reasons, or the county board of education believes
205 that maintaining the current placement of the student is substantially likely to result in injury to the
206 student or others.

207 In an expedited hearing, the due process procedures previously described in this chapter
208 shall be followed, subject to the following exceptions:

209 (1) A resolution session meeting shall occur within seven days of the date of the receipt
210 of the due process complaint by the West Virginia Department of Education unless mutually

211 waived by both parties in writing;

212 (2) The hearing shall, unless the matter has been resolved to the satisfaction of both
213 parties, proceed within fifteen days or receipt of the due process complaint;

214 (3) Deadlines for disclosure of evidence and evaluations and recommendations based on
215 those evaluations shall not be less than five business days prior to the hearing;

216 (4) The hearing shall occur within twenty school days of the date the hearing is requested
217 and shall result in a determination within ten school days after the hearing with no extensions
218 permitted; and

219 (5) The student shall remain in the interim alternative educational setting pending the
220 decision of the hearing officer or until the expiration of forty-five days, whichever comes first,
221 unless the parent or adult student and school personnel agree otherwise.

222 If in making a determination upon a complaint involving an appeal of a disciplinary
223 determination the hearing officer determines that maintaining the current placement of the student
224 is substantially likely to result in injury to the student or others, the hearing officer may return the
225 student to the placement from which the student was removed or order a change in placement of
226 a student with a disability to an appropriate interim alternative educational setting for not more
227 than forty-five days.

228 (s) In holding the hearing upon a due process complaint, the hearing officer shall preside
229 at the hearing, conduct the proceedings in a fair and impartial manner, and take steps to ensure
230 that the hearing will be conducted and completed in an efficient manner. Hearing officers shall
231 have the power to issue subpoenas requiring the attendance of witnesses and the production of
232 books, papers, and physical or other evidence. Any person served with a subpoena pursuant to
233 this section may object and ask the hearing officer in writing to quash or modify the subpoena as
234 illegally or improvidently issued. The hearing officer shall immediately issue a decision on that
235 validity of the subpoena. Any person served with a subpoena pursuant to this section shall have
236 the right to petition the circuit court for the county in which the hearing is to be held for an order

237 to quash any subpoena issued pursuant to this section. The department may, in similar fashion,
238 petition the circuit court for an order of enforcement of a subpoena issued by the hearing officer.
239 Nothing in this section shall prohibit the hearing officer from refusing to issue subpoenas which
240 are requested for purposes of harassment, abuse of process, delay or which are obviously
241 directed to persons who have no direct evidence in the matter to be heard.

242 (t) In matters regarding a procedural violation, the hearing officer may find that a student
243 did not receive a free appropriate public education only if the procedural inadequacies have
244 impeded the student's right to a free appropriate public education, significantly impeded a parent's
245 or an adult student's opportunity to participate in the decision-making process; or caused a
246 deprivation of an educational benefit.

247 A hearing officer may order a district to comply with procedural requirements regardless
248 of whether a district's failure resulted in a denial of a free appropriate public education. A hearing
249 officer's determination of whether the student received a free appropriate public education shall
250 be made on substantive grounds.

251 (u) The decision of the hearing officer upon a due process complaint is final and binding
252 upon the parties unless a party to the hearing petitions a state circuit court for judicial review of
253 the decision pursuant to section four, article five, of chapter twenty-nine-a of this code or appeals
254 the decision through a civil action in a United States district court. Any party aggrieved by the
255 findings and decisions made in the hearing has the right to bring a civil action with respect to the
256 due process hearing complaint in the district court of the United States for the district where the
257 student resides, without regard to the amount in controversy, within 90 days of the issuance of
258 the hearing officer's written decision.

259 (v) Nothing in this part shall restrict or limit the rights, procedures, and remedies available
260 under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation
261 Act of 1973, or other federal laws protecting the rights of students with disabilities.

NOTE: The purpose of this bill is to establish in the West Virginia Code procedures relating to implementation of the federal Individuals with Disabilities Education Improvement Act of 2004 and to update the procedures and interpretations that have been implemented by the State Board of Education.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.