

2018 EDITION

Education Law and Advocacy

JustChildren, a Program of the Legal Aid Justice Center



Continuing Legal Education
by the Virginia Law Foundation



Education Law and Advocacy

Copyright © 2018 Legal Aid Justice Center. All Rights Reserved.

This electronic book is licensed for use on a single personal computer only. It must be treated in the same way as the print edition. It may not be copied, made accessible on a computer network, or otherwise shared by electronic or optical means. No derivative works may be made, but the purchaser may electronically copy short passages to include in memoranda, briefs, and similar documents.

This publication is presented with the understanding that the authors, the reviewers, and the publisher do not render any legal, accounting, or other professional service. It is intended for use by attorneys licensed to practice law in Virginia. Because of the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, an attorney using this material must always research original sources of authority and update information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of this material. The views expressed herein do not necessarily represent those of the Virginia Law Foundation.

Citations to statutes, rules, and regulations are to the versions in effect at the time the material was written, unless otherwise noted. An effort has been made to ensure the material is current as of August 2018.

Click the left mouse button twice on the link below to view tips on using Virginia CLE Electronic Books (requires Adobe® Reader version 6 or later). 

EDUCATION LAW AND ADVOCACY

Eighth Edition

Produced by JustChildren, a Program of the Legal Aid Justice Center
Charlottesville, Virginia

In Cooperation with Virginia Continuing Legal Education

 LEGAL AID
JUSTICE CENTER

 VirginiaCLE[®]
Publications

TABLE OF CONTENTS

<i>About the Authors</i>	iii
<i>Preface</i>	v
CHAPTER 1: INTRODUCTION TO EDUCATION LAW AND GENERAL PRACTICE TIPS	
1.1 SOURCES OF LAW	1
1.101 Statutes and Regulations	1
1.102 Case Law	2
1.2 OBTAINING EDUCATION RECORDS	4
1.201 Importance of School Records	4
1.202 Privacy and Releases of Information	5
1.3 WHO IS THE CLIENT? RETAINERS/LEGAL REPRESENTATION AGREEMENTS	6
1.4 ETHICAL CONSIDERATIONS: REPRESENTED AND UNREPRESENTED PERSONS AND ORGANIZATIONS	8
APPENDIX 1-1: SAMPLE FORM AUTHORIZATION FOR RELEASE OF INFORMATION	9
APPENDIX 1-2: SAMPLE REQUEST FOR EDUCATION RECORDS	11
APPENDIX 1-3: LEGAL ETHICS OPINION NO. 1537	13
CHAPTER 2: STUDENT AND PARENTAL RIGHTS UNDER THE STANDARDS OF LEARNING (SOL) AND THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA)	
2.1 INTRODUCTION	17
2.101 In General	17
2.102 Accreditation	18
2.2 THE STANDARDS OF LEARNING (SOL)	19
2.201 SOL Tests	20
2.202 SOL Tests and Students with Disabilities	21
2.203 SOL Tests and Graduation	22

TABLE OF CONTENTS

CHAPTER 3: ENROLLMENT IN AND ACCESS TO SCHOOL

3.1	INTRODUCTION	27
3.2	GENERAL ENROLLMENT PRINCIPLES.....	27
3.3	DOCUMENTS AND CERTIFICATIONS REQUIRED FOR ENROLLMENT	29
3.4	ENROLLMENT FOR SPECIAL POPULATIONS.....	30
3.401	Students Living with Non-Parent Relatives	30
3.402	Homeless Students (McKinney-Vento Rights)	31
3.403	Youth in Foster Care.....	33
3.404	Suspended, Expelled, or Court-Involved Students.....	37
3.405	Incarcerated Youth	39
3.406	Immigrant Students.....	40
	APPENDIX 3-1: BEST INTEREST DETERMINATION FOR FOSTER CARE SCHOOL PLACEMENT FORM (VDOE AND VDSS).....	43
	APPENDIX 3-2: IMMEDIATE ENROLLMENT OF CHILD IN FOSTER CARE FORM (VDOE AND VDSS).....	47
	APPENDIX 3-3: BEST INTEREST DETERMINATION FOR HOMELESS STUDENTS AND SCHOOL PLACEMENT FORM (PROJECT HOPE).....	49
	APPENDIX 3-4: HOMELESS STUDENT KNOW YOUR RIGHTS FLYER	53
	APPENDIX 3-5: SAMPLE ENROLLMENT COVER SHEET	55
	APPENDIX 3-6: SAMPLE SWORN PARENTAL STATEMENT	57
	APPENDIX 3-7: SAMPLE POWER OF ATTORNEY.....	59
	APPENDIX 3-8: DREAM BIG: EDUCATION FOR IMMIGRANT STUDENTS AND CHILDREN OF IMMIGRANTS.....	61

TABLE OF CONTENTS

CHAPTER 4: SCHOOL ATTENDANCE AND TRUANCY

4.1	INTRODUCTION.....	69
4.2	COMPULSORY ATTENDANCE REQUIREMENTS	70
	4.201 In General	70
	4.202 Home Schooling	71
4.3	TRUANCY AND THE “CHILD IN NEED OF SUPERVISION” (CHINSUP) PETITIONS	72
	4.301 School-Based Prevention and Intervention.....	72
	4.302 Diversion (Proceeding Informally).....	75
	4.303 Adjudication.....	77
	4.304 Disposition	78
	4.305 Violation of Court Order to Go to School (Pre- or Post-Disposition).....	80
	4.306 Dispositional Alternatives	82

CHAPTER 5: SCHOOL DISCIPLINE AND STUDENT RIGHTS

5.1	INTRODUCTION.....	83
5.2	SUSPENSION AND EXPULSION GENERALLY.....	84
	5.201 Sources of Law	87
	5.202 Definitions and Disciplinary Authority	88
5.3	ZERO TOLERANCE.....	94
	5.301 In General.....	94
	5.302 In Virginia.....	96
5.4	ALTERNATIVE SCHOOLS AND PROGRAMS.....	99
	5.401 Program v. School.....	99
	5.402 Placement.....	99
	5.403 Students with Disabilities.....	100
5.5	PROCEDURAL DUE PROCESS.....	101
	5.501 Fourteenth Amendment.....	101
	5.502 Statutory Procedures.....	104
	5.503 School Board Policies.....	107
	5.504 Contents of Written Notice	107
	5.505 Timelines for Notice, Hearings, and Appeals	108
	5.506 Hearing Officers and Decision Makers	108

TABLE OF CONTENTS

5.6	ADVOCACY STRATEGIES	109
	5.601 Goals of the Representation	109
	5.602 Requesting Discipline Records	110
	5.603 Preparing for the Hearings.....	110
5.7	APPEALS	116
5.8	CRIMINALIZATION OF SCHOOL MISCONDUCT	116
	5.801 School-Court Communications	116
	5.802 Investigation by School and Law Enforcement Officials	119
5.9	OTHER ISSUES IN STUDENT DISCIPLINE	123
	5.901 Punishment of Off-Campus Conduct	123
	5.902 Allegations of Gang Activity and the First Amendment.....	124
	5.903 Corporal Punishment Prohibited; Reasonable Force Permitted	125
	5.904 Restraint and Seclusion	125
	5.905 Bullying	127
	5.906 Threat Assessments	129
	APPENDIX 5-1: SAMPLE REQUEST FOR A SUPERINTENDENT’S HEARING.....	131
	APPENDIX 5-2: SAMPLE REQUEST FOR A SCHOOL BOARD HEARING	133
	APPENDIX 5-3: DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING	135
	APPENDIX 5-4: FIFTEEN PRINCIPLES OF RESTRAINT AND SECLUSION.....	145
	CHAPTER 6: SPECIAL EDUCATION	
6.1	HISTORY AND OVERVIEW OF SPECIAL EDUCATION LAW	147
	6.101 History of Special Education Law	147
	6.102 Overview of Special Education: Law, Eligibility and Timelines.....	149
6.2	WHO QUALIFIES FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER IDEA?	152
6.3	FREE APPROPRIATE PUBLIC EDUCATION (FAPE)	154

TABLE OF CONTENTS

6.4	PARENTAL RIGHTS AND THE DEFINITION OF “PARENT”	157
6.5	FROM CHILD FIND TO ELIGIBILITY	160
6.501	Child Find	160
6.502	Early Intervening Services and Response to Intervention	160
6.503	Referral for Initial Evaluation (Child Study Process)	161
6.504	Evaluations and Reevaluations	161
6.505	Independent Educational Evaluations (IEE)	163
6.506	Eligibility Determinations	163
6.6	THE IEP TEAM	166
6.601	Parental Consent for Services	166
6.602	IEP Development and IEP Team	167
6.7	CONTENT OF THE IEP	168
6.701	Present Levels of Performance	168
6.702	Annual Goals	168
6.703	Related Services	168
6.704	Transition Services	169
6.8	PLACEMENT	170
6.801	Placements and Locations of Services Generally	170
6.802	Least Restrictive Environment	171
6.9	DISPUTES	172
6.901	In General	172
6.902	Informal Resolution	173
6.903	Complaint to the Virginia Department of Education (VDOE)	173
6.904	Mediation	175
6.905	Due Process Hearings	176
6.906	Available Remedies	181
6.907	Due Process Litigation Tips	184
	APPENDIX 6-1: SAMPLE DUE PROCESS HEARING REQUEST	187
	APPENDIX 6-2: PARENTAL REQUEST FOR RESEARCH-BASED INTERVENTIONS AND SPECIAL EDUCATION EVALUATION	207

TABLE OF CONTENTS

CHAPTER 7: SCHOOL DISCIPLINE AND STUDENTS WITH DISABILITIES

7.1 OVERVIEW OF THE PROCESS..... 209

7.2 DISCIPLINARY CHANGES IN PLACEMENT..... 211

7.3 MANIFESTATION DETERMINATION REVIEW..... 211

7.4 WEAPONS, DRUGS, AND SERIOUS BODILY INJURIES..... 213

7.5 SERVICES DURING REMOVAL..... 213

7.6 DISCIPLINING STUDENTS NOT YET FOUND ELIGIBLE FOR SPECIAL EDUCATION..... 214

7.7 DISPUTE RESOLUTION/CHALLENGING THE MDR DECISION..... 216

APPENDIX 7-1: BEST PRACTICES GUIDE FOR MANIFESTATION DETERMINATION REVIEW HEARINGS..... 219

CHAPTER 8: IMMIGRATION, ENGLISH AS A SECOND LANGUAGE, AND LANGUAGE ACCESS—EQUAL ACCESS FOR IMMIGRANT CHILDREN AND STUDENTS WITH LIMITED ENGLISH PROFICIENCY

8.1 *PLYLER V. DOE* AND THE “RIGHT” TO EDUCATION..... 225

8.2 ENROLLMENT ISSUES FOR IMMIGRANT STUDENTS..... 226

8.3 LEGAL FOUNDATIONS OF TITLE VI AND THE EQUAL EDUCATION OPPORTUNITY ACT..... 227

8.301 Title VI of the Civil Rights Act of 1964..... 227

8.302 The Equal Education Opportunity Act (EEOA)..... 230

8.4 ENGLISH AS A SECOND LANGUAGE (ESL) AND BILINGUAL EDUCATION IN VIRGINIA..... 231

8.401 In General..... 231

8.402 Segregation by National Origin..... 231

8.403 Identification and Eligibility..... 232

8.404 Instructional Qualifications..... 234

TABLE OF CONTENTS

8.405	Termination of ESL Services	234
8.406	Special Opportunity Programs	235
8.5	STUDENTS WITH LIMITED ENGLISH PROFICIENCY AND THE SOL.....	235
8.6	SPECIAL EDUCATION AND STUDENTS WITH LIMITED ENGLISH PROFICIENCY	237
8.7	ENFORCEMENT OF RIGHTS AND REMEDIES	238
8.701	Informal Dispute Resolution.....	238
8.702	Title VI	238
8.703	EEOA	238
8.8	DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA).....	238
CHAPTER 9: SECTION 504 AND ADA BASICS		
9.1	OVERVIEW.....	243
9.2	SECTION 504 OF THE REHABILITATION ACT.....	244
9.3	TITLE II OF THE AMERICANS WITH DISABILITIES ACT.....	246
CHAPTER 10: TAKING AN EDUCATION CASE TO COURT		
10.1	FEDERAL COURT	249
10.2	CIRCUIT COURT REVIEW	250
10.3	PRELIMINARY INJUNCTION	252
10.4	JUVENILE COURT: PETITIONS OR MOTIONS TO ORDER EDUCATIONAL SERVICES	254
APPENDIX 10-1: SAMPLE PETITION TO REVIEW SCHOOL BOARD DECISION		
		257
APPENDIX 10-2: SAMPLE MEMORANDUM OF LAW SUPPORTING MOTION TO ORDER EDUCATIONAL SERVICES.....		
		269

TABLE OF CONTENTS

CHAPTER 11: EDUCATION OF INCARCERATED YOUTH

11.1	TERMINOLOGY: “DETENTION” V. “COMMITMENT”	289
11.101	Commitment.....	289
11.102	Detention	290
11.103	The Court Services Unit (“Probation” or “Community Supervision”).....	291
11.104	DJJ Length of Stay Guidelines	291
11.2	EDUCATIONAL RIGHTS DURING CONFINEMENT	293
11.201	Children with Disabilities	295
11.202	Educational Records	296
11.203	Sixty-Day Review	297
11.3	EDUCATIONAL RIGHTS UPON RELEASE: REENROLLMENT REGULATIONS	297
11.301	Eligibility	298
11.302	Entering DJJ or Detention Home Custody.....	298
11.303	Planning for Reenrollment Upon Release from Custody	299
	APPENDIX 11-1: SAMPLE DEPARTMENT OF JUVENILE JUSTICE RECORDS REQUEST.....	303

CHAPTER 3

ENROLLMENT IN AND ACCESS TO SCHOOL

3.1 INTRODUCTION

Court-involved, migrant, and other vulnerable youth often experience multiple school placements or have difficulty enrolling in school. For that reason, specific provisions in the Virginia Code protect and promote school stability for students in foster care; homeless youth receive similar protections under the McKinney-Vento Homeless Assistance Act. There are also protections for juveniles who are leaving the custody of the Department of Juvenile Justice to ensure that they are reenrolled in school as quickly and with as little disruption to their educational services as possible.

3.2 GENERAL ENROLLMENT PRINCIPLES

All children in the Commonwealth of Virginia between the ages of 5 and 18 must be enrolled in school.¹ To comply with the mandatory attendance requirements of the Virginia Code, children can be enrolled in either public or private school or can be home-schooled.²

Although students are only required to be enrolled in and attend school until they are eighteen years old, schools have an obligation under the Virginia Constitution to provide an education to students until they are twenty years old. Section 1 of Article 8 of the Virginia Constitution requires that “a system of free public elementary and secondary schools [be provided] for all children of school age.” Children of “school age” are defined by statute as students who turn five years old by September 30th of the school year and who have not reached age twenty by August 1st of the school year.³ For example, a nineteen year old who has not yet completed high school and who wants to continue attending school may do so, so long as the person turns twenty after August 1st of the school year.

The public schools must be free to all children who “reside” within a school division.⁴ Residency must be “bona fide,” meaning that it may not be

¹ VA. CODE ANN. § 22.1-254(A).

² *Id.*

³ VA. CODE ANN. § 22.1-1.

⁴ VA. CODE ANN. § 22.1-3(A).

solely for school purposes.⁵ Section 22.1-3(A) of the Virginia Code sets forth a list of children who must be deemed to reside in a school division. Children reside in a school division if:

1. their biological or adoptive parents reside in the school division;
2. their parents are in the military and are deployed outside the United States, and their legal guardians, who have been so designated by a Special Power of Attorney pursuant to 10 U.S.C. § 1044b, reside in the school division;
3. their parents are deceased and they are living with someone who is acting *in loco parentis* and lives in the school division;
4. their parents are unable to care for them, and they live with a person in the school division who is a court-appointed guardian, has legal custody, or is acting *in loco parentis* pursuant to the placement of the children for adoption by a person or entity authorized to do so under Section 63.2-1200 of the Virginia Code;
5. the student is an emancipated minor and living in the school division not solely for the purposes of attending school there; or
6. they are homeless youths as defined by the McKinney-Vento Act and Section 22.1-3 of the Virginia Code.⁶

However, this list of students is not exhaustive. It merely constitutes a set of students who must be deemed bona fide residents of a school division.⁷ Any student who can provide evidence of a non-school related reason for living in the school division is a bona fide resident of a school division.

⁵ 1987-88 Va. Op. Atty. Gen. 374 (Va.A.G.).

⁶ VA. CODE ANN. § 22.1-3(A).

⁷ 1987-88 Va. Op. Atty. Gen. 374 (1987).

3.3 DOCUMENTS AND CERTIFICATIONS REQUIRED FOR ENROLLMENT

The Virginia Code requires that certain paperwork be presented to schools before children can be enrolled. First, a certified copy of a child's birth certificate must be presented to the school.⁸ If a certified copy of the birth certificate cannot be obtained, then an affidavit must be presented that sets forth the child's age and explains the reason that a certified copy of the child's birth certificate cannot be obtained.⁹ Schools are required to notify local law enforcement when a student is enrolled without furnishing a copy of his or her birth certificate. The notification must include copies of the proof of age submitted by the parent and the affidavit explaining why the birth certificate could not be produced.¹⁰

Except in circumstances described later regarding homeless students and students in foster care, the school may also require proof of the child's residence, a medical report stating that the child has had a full physical examination within the twelve months prior to the time when he or she will enter school,¹¹ and documentation indicating that the child has received the required immunizations.¹² In 2015, Virginia eliminated the requirement that students present a federal social security number within ninety days of enrollment, and implemented a new requirement for all school districts to assign unique student identification numbers to all students.¹³

Prior to admission, parents must also certify under oath whether the student has been: (1) expelled from school attendance at another school (public or private) for an offense in violation of school board policies relating to weapons, alcohol or drugs, or for willful infliction of injury to another person; or (2) found guilty of or adjudicated delinquent for any offense listed in Virginia Code § 16.1-260(G). Enrollment issues for suspended, expelled, and court-involved youth are reviewed later in this chapter.

⁸ VA. CODE ANN. § 22.1-3.1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ VA. CODE ANN. § 22.1-270.

¹² VA. CODE ANN. § 22.1-271.2.

¹³ VA. CODE ANN. § 22.1-287.02.

3.4 ENROLLMENT FOR SPECIAL POPULATIONS

3.401 Students Living with Non-Parent Relatives. It is not uncommon for students to live with non-parent relatives or other non-parent adults. Often grandparents, aunts, older siblings, and cousins care for children without any court-ordered guardianship or other formal legal relationship with the children. Enrollment in these cases can be confusing for students, caretakers, and school staff.

Like all students, students living with non-parent relatives or other non-relative adults have a right to be enrolled in school in the school division in which they are bona fide residents as long as they are not living with the non-parent relative or adult solely for the purpose of attending school in the school division.¹⁴ According to Opinions of the Virginia Attorney General, bona fide residency can be established by a number of means, and a guardianship order is only one means of establishing residency.¹⁵ Therefore, a school cannot require a guardianship order to enroll a child in school if bona fide residency can be established in other ways.¹⁶

In 2013, Virginia enacted new legislation allowing children receiving kinship care to enroll in the school division where their kinship care provider resides. Kinship care is defined as “full-time care, nurturing, and protection of children by relatives.”¹⁷ This legislation allows local school divisions to require one legal parent and the kinship provider to sign affidavits detailing the arrangement as well as a power of attorney authorizing the kinship providers to make educational decisions. In addition to this documentation, a school division may require confirmation from the local department of social services. These provisions are codified in Virginia Code § 22.1-3, which outlines who is entitled to free public schooling.

There is, however, a specific statute that governs the enrollment of children who reside in a school division in Virginia but whose parents reside out of state. When an adult residing in Virginia is caring for a school-age child whose parents live outside of Virginia, and that child has resided with the adult for 60 days or more, the adult must enroll the child in a Virginia school.¹⁸ Adults caring for children who have parents outside of Virginia must

¹⁴ VA. CODE ANN. §§ 22.1-3(A)(2)-(4).

¹⁵ 1987-88 Va. Op. Atty. Gen. 374 (1987).

¹⁶ *Id.*

¹⁷ VA. CODE ANN. § 63.2-100.

¹⁸ VA. CODE ANN. § 22-1-255.

either pay tuition charges for the child's school attendance or must find some way of having others pay tuition for the child's school attendance.¹⁹

NOTE: JustChildren has worked with some school districts that have allowed children living with relatives and other caretakers to be enrolled in school if the caretaker provides a power of attorney signed by the parent and a sworn statement from the resident caretaker that the child is living in the jurisdiction not solely for school purposes. If a school district does not accept a power of attorney and a sworn statement, the child may still be entitled to tuition-free schooling. Please contact JustChildren for technical assistance. For samples of an enrollment cover sheet, a power of attorney and a sworn statement, see the attachments for this chapter. For Spanish translations of these samples, please contact JustChildren.

3.402 Homeless Students (McKinney-Vento Rights). The McKinney-Vento Homeless Assistance Act, originally passed in 1987 and most recently re-authorized in December 2015 by the Every Student Succeeds Act (ESSA), protects the educational rights of homeless youth. In general, its protections prevent homeless students from having to transfer schools simply because of their status as homeless. Homeless youth are defined as those “who lack a fixed, regular, and adequate nighttime residence.”²⁰ The definition includes a series of categories of housing instability that cover most if not all forms of homelessness.²¹ With the passage of ESSA in 2015, two key changes were made to the definition.²² Preschool aged children are now specifically included among other homeless children and youth²³ while children who are awaiting foster care were removed from the definition of homeless youth.²⁴ The definition now includes:

- children who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason;

¹⁹ *Id.*

²⁰ 42 U.S.C. § 11434a(2).

²¹ *Id.*

²² For more information on the amendments to McKinney-Vento, please see U.S. Dep't of Educ., *Education for Homeless Children and Youths Program Non-Regulatory Guidance (Title VII-B of the McKinney-Vento Homeless Assistance Act, as amended by the Every Student Succeeds Act)* (July 27, 2016), available at <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf> (last visited July 30, 2018).

²³ 42 U.S.C. § 11432(d)(2).

²⁴ See Section in this chapter entitled “Youth in Foster Care,” below.

- children who are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations;
- children who are living in emergency or transitional shelters; or are abandoned in hospitals;
- children who have a primary nighttime residence that is a public or private place not designated for or ordinarily used as a regular sleeping accommodation for human beings, as defined by 42 U.S.C. § 11302(a)(2)(C);
- children who are living in cars, parks, public places, abandoned buildings, substandard housing, bus or train stations, or similar settings; and,
- migratory children as defined by 20 U.S.C. § 6399 who also meet one of the preceding types of homelessness.²⁵

Pursuant to McKinney-Vento, Virginia must ensure that homeless youth are able to enroll in, attend, and succeed in school. Homeless youth are entitled to the same access to education including extracurricular activities, summer school, career and technical education, advanced placement, and other educational programming as any other eligible child.²⁶ States must designate an Office of the Coordinator for Education of Homeless Children and Youths within their respective State Educational Agency (SEA), to coordinate the state's educational efforts for homeless children.²⁷ They must also develop professional development programs and training for liaisons within each Local Educational Agency (LEA).²⁸ The LEA liaisons have an obligation to ensure that homeless youth in their area are identified, enrolled in, and transported to school.²⁹ They must also engage parents or guardians of homeless children and make them aware of educational opportunities and related medical and housing services that they and their children can utilize.³⁰

²⁵ 42 U.S.C. § 11434a(2)(B).

²⁶ 42 U.S.C. § 11431(1).

²⁷ *Id.* at § 11432(d)(3).

²⁸ *Id.* at § 11432(d)(5).

²⁹ *Id.* at § 11432(g)(6)(A).

³⁰ *Id.*