

**Virginia’s Proposed 2008 Regulation
8 VAC 20-81-210
Due Process Hearing
Appointment of Hearing Officers**

Since inception of Virginia’s special education regulations, Hearing Officers assigned to adjudicate Due Process Hearings have been appointed and managed by the Supreme Court of Virginia. The proposed regulations from the Virginia Department of Education remove the Supreme Court and vest sole authority with the Virginia Department of Education. **The current regulation should not be changed. The Supreme Court of Virginia should continue to maintain the list and appointment of Hearing Officers for “impartial due process hearings.”**

Current Regulation 8 VAC 20-80-76, beginning at Subsection C states:

C. Procedure for requesting a due process hearing.

1. A request for a hearing shall be made in writing to the local educational agency, with a copy to the Virginia Department of Education . . .

...

4. The local educational agency shall appoint the hearing officer within five business days of the request for a hearing. **The local educational agency contacts the Supreme Court of Virginia to secure the name of a hearing officer**, contacts the hearing officer to confirm availability, and upon acceptance, appoints the hearing officer in writing, with a copy to the Virginia Department of Education. In the case of an expedited hearing, the local educational agency must appoint the hearing officer within three business days of the request for a hearing.

D. Assignment of hearing officer.

1. **A hearing officer is appointed to a case from a list maintained by the Supreme Court of Virginia.**

2. Upon a request by the local educational agency, the Supreme Court identifies a hearing officer from its list and provides the name to the local educational agency. If the first person selected is unavailable or disqualified, the local educational agency shall immediately request another name to ensure that a timely appointment is made.

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VDOE’s Proposed regulation 8 VAC 20-81-210, beginning at Subsection A states:

A. The Virginia Department of Education administers a special education due process hearing system to resolve disputes between parents and local educational agencies regarding the:

...

B. In administering the special education due process hearing system, the Virginia Department of Education establishes procedures for:

1. **Recruitment, selection, and appointment** of Special Education Hearing Officers.

...

4. Reviewing and analyzing the decisions of Special Education Hearing Officers, and the **requirement for Special Education Hearing Officers to reissue decisions**, relative to correct use of citations, readability, and other errors such as incorrect names or **conflicting data**, but not errors of law which are reserved for appellate review.

...

D. Procedure for requesting a due process hearing.

1. A request for a hearing shall be made in writing to the local educational agency and the Virginia Department of Education.

a. If the local educational agency initiates the due process hearing, the local educational agency shall advise the parent(s) and the Virginia Department of Education in writing of this action.

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F. Assignment of the Special Education Hearing Officer.

1. Within five business days of receipt of the request for a nonexpedited hearing and three business days of receipt of the request for an expedited hearing:

a. The local educational agency shall contact the Virginia Department of Education for the appointment of the Special Education Hearing Officer.

b. The Virginia Department of Education contacts the Special Education Hearing Officer to confirm availability, and upon acceptance, notifies the local educational agency of the appointment.

c. The local educational agency notifies the Special Education Hearing Officer in writing, with a copy to the parent(s) and the Virginia Department of Education of the appointment.

Proposed change from Peter W. D. Wright

I propose that proposed 8 VAC 20-81-210 be changed as follows:

A. ~~The Virginia Department of Education, Supreme Court of Virginia shall continue to administer the~~ *administers a special education due process hearing system to resolve disputes between parents and local educational agencies regarding the:*

...

~~B. In administering the special education due process hearing system, the Virginia Department of Education establishes procedures for:~~

B. If requested by the Supreme Court of Virginia, and in conformance with the provisions of the Code of Virginia, §§ 2.2-4020 and 2.2-4024 of the Administrative Process Act, the Virginia Department of Education may assist the Supreme Court with the establishment of procedures for:

1. Recruitment, selection, and appointment of Special Education Hearing Officers.

...

~~4. Reviewing and analyzing the decisions of Special Education Hearing Officers, and the requirement for Special Education Hearing Officers to reissue decisions, relative to correct use of citations, readability, and other errors such as incorrect names or conflicting data, but not errors of law which are reserved for appellate review. This subsection to be deleted in its entirety.~~

...

D. Procedure for requesting a due process hearing.

1. A request for a hearing shall be made in writing to the ~~local educational agency and the~~ Virginia Department of Education. *A copy of that request shall be contemporaneously delivered by the requesting party to the other party.*

~~a. If the local educational agency initiates the due process hearing, the local educational agency shall advise the parent(s) and the Virginia Department of Education in writing of this action. (This subsection deleted in light of additional last sentence to preceding subsection 1.~~

...

F. Assignment of the Special Education Hearing Officer.

1. Within ~~one~~ *five* business days of receipt of the request for a ~~non-expedited~~ hearing: ~~and three business days of receipt of the request for an expedited hearing:~~

a. ~~The local educational agency shall contact~~ Virginia Department of Education *shall contact the Supreme Court of Virginia* for the appointment of the Special Education Hearing Officer.

b. ~~The Virginia Department of Education contacts~~ *Supreme Court of Virginia shall contact* the Special Education Hearing Officer to confirm availability, and upon acceptance, ~~notifies the local educational agency of the appointment~~ *shall, in writing, within three business days of receipt of the request for a hearing, jointly notify the parents, the local educational agency, all attorneys of record, and the Virginia Department of Education* of the appointment.

e. ~~The local educational agency notifies the Special Education Hearing Officer in writing, with a copy to the parent(s) and the Virginia Department of Education of the appointment.~~ (This subsection to be deleted in light of preceding subsection b.)

For consistency, proposed regulation 8 VAC 20-81-20 regarding the “Functions of the Virginia Department of Education” will need to be changed as follows at Subsection 11(a). Proposed regulation with my suggested change in *italics*:

The Virginia Department of Education (state educational agency) shall perform the following functions:

...

11. Review and evaluate compliance of local educational agencies with state and federal laws and regulations pertaining to the education of children with disabilities and require corrective actions where needed.

a. Deleted in its entirety.

Discussion about proposed changes

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The Department proposes to take control of the appointment of hearing officers who conduct impartial hearings and to acquire the right to review, edit, and correct issues of “conflicting data,” i.e., the conflicts in testimony and exhibits that are common to litigation.

The Department has had a long standing policy that, since Virginia is a Commonwealth and because School Boards have the sole authority to operate local school districts, the Department does not have any enforcement power over local school districts.

As a result of that policy, on two occasions I initiated impartial due process hearings against the Virginia Board of Education and Virginia Department of Education. In *White v. the Virginia Board of Education, Kirk Schroeder, Jo Lynne DeMary, Judith Douglas, and H. Douglas Cox*, the State Department asserted that the Department could not force a local school district to comply with an Order from a Hearing Officer and require that tuition for a private special education school be paid on behalf of a child with a disability.

In *White*, Virginia asserted that the Commonwealth was immune from suit, that a federal special education regulation was invalid, and that the local school board has sole authority over the school district.

After Virginia asserted that a federal special education regulation was invalid, the U. S. Department of Education, in March 27, 2000 correspondence from Heumann to DeMary, threatened to refer the Virginia Board of Education to the U. S. Department of Justice.

In the subsequent *White* litigation, Due Process Hearing Officer Raymond Davis, appointed in the normal course by the Virginia Supreme Court, ordered reimbursement to the parents, such reimbursement to be paid by Virginia, and not the local school district.

After Virginia refused to pay the attorney's fees, in violation of 20 USC 1415, this counsel filed a "Complaint and Petition for Attorney's Fees" in the U. S. District Court against the Board, Schroeder, DeMary, Douglas, and Cox. In those proceedings, the Department maintained that, despite losing at due process, they were not required to pay attorneys fees and were immune from suit. U. S. Magistrate Judge Dennis Dohnal, in a six page decision tracking the history of the case, dismissed those arguments and awarded attorneys fees and prejudgment interest against the state.

Change the facts and turn the clock back. Assume that Virginia controlled the appointment and selection of Hearing Officers and controlled and edited Opinions issued by the Hearing Officers.

What would have happened in *White* with Virginia as the sole defendant? Answer - a legal nightmare that would have brought Virginia's entire due process system into disarray as litigation continued up through several levels.

Our state and federal constitutions have created a balance of power between the judiciary, legislature, and government. Virginia Department of Education's proposed management of the due process system is at high risk for being ruled unconstitutional.

The editing of decisions by the Hearing Officers will raise additional questions of due process violations. Hearing Officers and Virginia Department of Education employees are likely to be required to testify about the editing and revisions of due process decisions.

The present system with hearing officers appointed by the Virginia Supreme Court has worked effectively for more than two decades.

Now, the fox, guarding the chicken coop, wants to change the system that is not broken. Is this in the best interest of the children of Virginia?

Not only does this create the "appearance of an impropriety" but it is a conflict of interest that will lower the public's respect and esteem for the Virginia Board of Education and Virginia Department of Education.

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Note: The pleadings, orders, letters to and from the U.S. Department of Education are located on the <http://www.wrightslaw.com/> website in several different locations. Enter the word *white* into the google search engine and the files, briefs, and more will be available for download.