A Report on the Virginia Department of Education

Monitoring, Supervision and Compliance with IDEA

Produced by:

The Virginia Coalition for Students with Disabilities

Introduction

The Office of Special Education Programs (OSEP) last performed its federal monitoring of the Virginia Department of Education (VADOE) in 1995. OSEP's September 29, 1995 report (reference **G-1**) highlighted five main areas of concern:

1. Free appropriate public education (FAPE) in the least restrictive environment (LRE)
2. Extended school year (ESY) services
3. Secondary transition
4. Parental involvement
5. General supervision

This Report on the Virginia Department of Education ("VCSD Report") has been prepared by the Virginia Coalition for Students with Disabilities, a group of parents and advocates greatly concerned that VADOE has failed to take significant steps to improve ***any*** of these areas. Parents and advocates have read the OSEP report of 1995 and believe that OSEP could simply reprint the substantial points made in that report. The included papers and evidence in this report is but a small sample of evidence that the Department is doing little to improve outcomes for students with disabilities.

Over 5 years have passed since OSEP's review with little or no effort for correction undertaken by VADOE. VADOE only recently (summer, 2000) requested focus group sessions with parents, advocates, students, educators and administrators in an effort to determine how the Department and/or its local educational agencies (LEAs) were performing in four of the five areas cited in 1995 (ESY was not included). Token efforts previously undertaken by VADOE in 1996 to seek input largely failed to result in any action by VADOE or the LEAs. Indeed, documentation of any effort is largely or entirely nonexistent.

FAPE in the Least Restrictive Environment, and Extended School Year

This report touches upon both extended school year (ESY) services and placement in the least restrictive environment (LRE). A number of issues are addressed in each area. Typically, the evidence presented in this report establishes that the Department does not scrutinize the information made available by the LEAs, otherwise changes would have been made over the last five years. The report clearly presents significant failures by VADOE to investigate LEAs based on the initial impetus placed on VADOE by OSEP in 1995, and the impetus reiterated by the data presented from LEAs in their general reporting.

Parental Involvement

Parental input is a component that VADOE seeks to improve and is an initiative of Virginia's 5-year improvement plan. Nevertheless, when the Department takes input from parents, it is largely ignored or thoroughly sanitized before distribution. For example, roughly forty parents from across the state recently participated in VADOE-sponsored focus groups in September and October of 2000. The contracted focus group facilitators not only heard shocking stories, but countless deficiencies in the system including categorical placements, children not being served in the LRE, ineffective corrective actions associated with complaints and a lack of meaningful parental input during all facets of the process. The focus group report {"A Report on Focus Group and Phone Interviews Conducted for the Virginia Department of Education's Self-Assessment of Special Education," dated October 30, 2000 (reference **PI-7**)} fails to convey the substantially disapproving input of the parents which was given both verbally and through written documentation at the sessions.

VADOE's attitude also trickles down to the LEAs as well. In a couple examples to be discussed in the body of the report, LEAs "seek" parental involvement but fail to include parents when finalizing the product that is disseminated.

Complaints

The Virginia complaint process should be the foundation upon which these main areas of concern are addressed for our special needs children who need relief from LEAs that are violating IDEA. Unfortunately, the complaint process is held in low esteem by knowledgeable parents and advocates who have used it in an effort to resolve noncompliance with IDEA. VADOE has allowed its "Division of Accountability--Due Process and Complaints" to issue vapid and meaningless actions time and again. This persistent pattern has placed the Division of Accountability into great disrepute with informed parents and advocates. The use of the complaint process is inhibited by the foregoing VADOE reputation for weak enforcement as well as a variety of other reasons. A lack of knowledge of the process and a well grounded fear of retribution by LEAs to parents (which VADOE then overlooks upon receipt of a subsequent complaint) are documented reasons for the relatively small annual number of complaints. VADOE has almost always believed it is sufficient in its written corrective actions to (a) order from the LEA an "assurance statement" that the LEA will comply with federal and state regulations (even when previous "assurance statements" from the same LEA have been found to have been breached in a new complaint), and (b) order another IEP meeting to be held rather than order the relief necessary by its own factual findings.

VADOE has been reluctant to the point of almost never using its authority available since the 1997 IDEA Amendments to require LEAs to remediate the denial of services with a corrective action appropriate to the needs of the child. (34 C.F.R. 300.660).

The National Council on Disability in its executive summary wrote:

> Notwithstanding federal monitoring reports documenting widespread noncompliance, enforcement of the law is the burden of parents who too often must invoke formal complaint procedures and due process hearings, including expensive and time-consuming litigation, to obtain the appropriate services and supports to which their children are entitled under the law. Many parents with limited resources are unable to challenge violations successfully when they occur.

A recurring theme in the NCD report echoes OSEP's documented problems in Virginia in 1995: "Our review revealed problems in the effectiveness of VADOE’s monitoring and complaint management procedures... [and] VADOE, however, provides technical assistance only upon the request of public agencies, and agencies we visited that had not requested that assistance continued to have problems in these areas."

The Virginia Coalition for Students with Disabilities believes that VADOE's Office of Compliance is almost entirely ineffective in:

- failing to act at all;
- failing to act within timelines;
- failing to issue meaningful findings; and finally
- failing to ensure compliance with findings.

Parents in Virginia have neither a fair nor meaningful enforcement mechanism. In a number of the areas listed above, VADOE has generally been quite consistent in its failures. The Department makes information available, simply offers technical assistance to the LEAs (rather than require assistance), and neglects to follow through to ensure that the laws, rules or recommendations are followed. When faced with compelling evidence of noncompliance by LEAs, the Department's response is inevitably to request assurance statements from its LEAs, and offer technical assistance to its LEAs if desired. History has repeatedly shown these approaches to be ineffective.

Procedural Safeguards, the Hearing Officer System, and Due Process

Information is presented relating to due process hearings and, specifically, hearing officers who have little or no knowledge of IDEA. Other issues are raised with respect to the procedural safeguards documents drafted and distributed by VADOE, and subsequently, by the LEAs.

Summary

The following material and the supporting documents show that the Commonwealth of Virginia does not take compliance with IDEA as a mandated duty in exchange for receiving federal funding.

While the enclosures are not from all geographic regions of Virginia, the VCSD believes that the representative materials it is enclosing with this VCSD Report provide a clear showing that Virginia does not target its LEA monitoring of implementation of IDEA with meaningful measures that improve compliance and outcomes for students with disabilities. The parents and advocates who are members of VCSD do not have access to a statewide database of evidence as does VADOE, but the VCSD is confident that the OSEP monitoring staff will be able to access whatever further information is needed for verification.

Free Appropriate Public Education in the Least Restrictive Environment

Placement in the least restrictive environment (LRE) is an individual consideration. The fact that placement in the LRE requires an IEP team determination allows the Department to justify shirking its responsibility to adequately monitor placement of students within its LEAs. Simple data collection provides evidence that there are problems with students' placements in the least restrictive environment.

TABLE LRE – T1 (below) is one such collection of data. It is data that the Department has at its disposal as the data is provided through LEA self-assessment forms developed by VADOE. The numbers should clearly alert the Department that there are major problems with placement in the LRE, or alternatively, flag that the reporting mechanism is severely flawed. Either way, this has been a long-term problem and it has not been appropriately addressed.

A review of the Virginia Beach ("VA BEACH") column in the **Table LRE - T1** below reveals either a reporting problem or a serious placement problem. At face value, the information provided reveals that Virginia Beach does not place disabled students in the LRE. A review of the Buchanan column clearly indicates that very few children with disabilities are being placed in the regular education environment. Overall, the fact that hardly any students are placed in the regular education/inclusion environment "to the maximum extent appropriate," or the disparities between the LEAs, must raise a myriad of questions and at the very least provoke an investigation. For speech-language impaired (SLI) students, how can certain LEAS report 100% of students placed in the regular class (South Hampton and Poquoson) while other LEAs report 0% (Buchanan, Portsmouth and VA Beach)? How can one LEA report 37% of all disabled students placed in the regular class (South Hampton) while other LEAs report 3.8% and 0.0% (Buchanan and VA Beach, respectively)? The data begs for a further investigation, but none will be undertaken by VADOE unless it is coerced.

Table LRE – T1

% of Special Education Students with Placement in Regular Class/Inclusion

$$\left(\frac{\#\text{ of students in regular education} + \text{inclusion placement}}{\#\text{ of students in all placements by disability category}}\right)$$

Disability Category	Buchanan	Portsmouth	South Hampton	Poquoson	Suffolk	Norfolk	VA Beach
EMR	0.0%	14.0%	0.0%	0.0%	4.1%	7.9%	0.0%
TMR	0.0%	2.3%	0.0%	0.0%	0.0%	4.0%	0.0%
SPD	Null set	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
HI	0.0%	9.1%	20.0%	0.0%	0.0%	40.3%	0.0%
SLI	0.0%	0.0%	100.0%	100.0%	8.8%	24.6%	0.0%
VI	0.0%	0.0%	Null set	50.0%	20.0%	70.6%	0.0%
SED	0.0%	4.7%	4.5%	5.3%	24.4%	7.3%	0.0%
OI	0.0%	12.5%	Null set	0.0%	30.0%	46.2%	0.0%
OHI	0.0%	14.1%	40.0%	13.0%	21.5%	48.3%	0.0%
SLD	7.6%	14.6%	17.4%	13.3%	29.6%	38.3%	0.0%
DB	Null set	Null set	Null set	Null set	Null set	Null set	Null set
MD	0.0%	6.6%	0.0%	Null set	0.0%	11.9%	0.0%
DD	6.5%	1.8%	25.0%	3.4%	25.3%	23.9%	0.0%
AUT	Null set	3.7%	0.0%	0.0%	0.0%	6.3%	0.0%
TBI	Null set	12.5%	Null set	Null set	Null set	0.0%	0.0%
Sum	3.8%	9.3%	37.3%	20.3%	20.3%	25.0%	0.0%

Extended School Year (ESY) Services

The provision of extended school year services to eligible students with disabilities in Virginia has been deficient since the courts introduced the notion of an "extended school year" beyond 180 days. OSEP has cited VADOE twice on the issue of extended school year services: in 1989 and in 1995. At best, the Department has offered technical assistance to LEAs. However, offering technical assistance, or even providing it, does not change entrenched patterns of improper practice.

In October of 1989, OSEP conducted an on-site investigation of the Virginia Department of Education and found deficiencies within local school systems and with the Department's activities. The provision of extended school year (ESY) services was included as one of those deficiencies. A full five years after being cited, VADOE issued Superintendent's Memo # 91 (reference **ESY-1**), dated September 23, 1994. The memo was a corrective action plan (CAP) directing school systems to establish policy and procedures for the provision of ESY services to eligible students. The corrective action plan gave direction for establishing local policy and procedures for ESY services. Training was supposed to take place with local special education directors regarding ESY.

In September of 1995, OSEP issued a monitoring report (reference **G-1**) that again found deficiencies with the provision of ESY services to eligible children in Virginia. The corrective action plan required VADOE to issue a memorandum to ALL local school divisions advising them of OSEP's findings. VADOE released Superintendent's Memo # 162 (reference **ESY-2**), dated December 1, 1995, directing local school systems to review their policy and procedures with regard to deficiencies found in the OSEP monitoring report. The provision of ESY services was one of the noted deficiencies (reference **G-1**, page 26) as distinguished below:

> VADOE is **required to ensure** that extended school year services are provided to students with disabilities who require those services as a component of a free appropriate public education. [emphasis added]

Four months later, on March 29, 1996, Superintendent's Memo # 12 (reference **ESY-2**) was issued directing LEAs to essentially ignore the previous CAPs and fill out a "Needs Assessment" document. No documentation of Needs Assessments from any LEAs can be found at VADOE.

While Superintendent's Memos are a form of supervision and might favorably impress outside agencies such as OSEP, the fact is that VADOE does ***not*** monitor for implementation, and by default, does not ensure that the memos are followed. VADOE is negligent in ensuring that eligible children receive ESY or FAPE. VADOE will gladly generate more memos and other information if ordered by OSEP, ***but over ten***

years of paper exchange has not resulted in the necessary provision of extended school year services to the children who require it for their free appropriate public education. Furthermore, the evidence shows that when provided examples of clear non-compliance, VADOE fails to intervene.

One such example of information provided to VADOE covering the provision of ESY services was submitted by Poquoson, Virginia in its 1997 self assessment (reference **ESY-3**). As shown in **TABLE ESY – T1** below, one student in the ***entire*** school system received IEP-based ESY services.

TABLE ESY – T1

Number of Students Receiving ESY Services as Indicated in Their IEPs

(includes the notation: "A Summer Program is offered to all students with IEPs")

Disability/ Age Group	Preschool	Elementary	Middle	Secondary	Alternative or Other
EMR	0	0	0	0	0
TMR	0	0	0	0	0
SPD	0	1	0	0	0
HI	0	0	0	0	0
SLI	0	0	0	0	0
VI	0	0	0	0	0
SED	0	0	0	0	0
OI	0	0	0	0	0
OHI	0	0	0	0	0
SLD	0	0	0	0	0
DB	0	0	0	0	0
MD	0	0	0	0	0
DD	0	0	0	0	0
AUT	0	0	0	0	0
TBI	0	0	0	0	0

Noncompliance in Newport News, VA

Another example of information provided to VADOE concerning the provision of ESY services is submitted to VADOE in the form of annual plans. Advocates found that Newport News, Virginia has not established written policy and procedure governing the provision of ESY services as directed by the Superintendent's Memo of 1994. Furthermore, Newport News has also failed to include any reference to ESY in its special education plan. Advocates in the Newport News area have repeatedly brought these facts to the attention of the Department. The negative impact on students with disabilities as a result of Newport News' noncompliance is shown in **TABLE ESY - T2** below (excerpts from the annual reports that provide the basis for this information are found in **ESY-4**):

TABLE ESY - T2

Number of Newport News preschool children with disabilities provided extended school year (ESY) services as noted on IEPs

Reported in	Age 2	Age 3	Age 4	Age 5	Total
1999 Annual Plan	0	0	0	0	0
1998 Annual Plan	0	0	0	0	0
1997 Annual Plan	0	0	0	0	0
1996 Annual Plan	0	0	0	0	0

Statistics are not, of course, the whole answer, but nothing is as emphatic as zero. What is most distressing is that Newport News provides this data annually to VADOE in its annual plans and VADOE is not concerned (except when OSEP visits).

Advocates contacted Sandra Ruffin of VADOE (reference **ESY-5**) and forwarded the above data over 18 months ago. Nothing has been done. Over a year ago, two advocates met with Ms. Ruffin, H. Douglas Cox, and Anthony Faina of VADOE to discuss the ESY problems. The advocates specifically outlined the problem that no Newport News preschool children receive ESY services. Mr. Cox defended the LEA by stating, "What if none of those children needed ESY"? Newport News now has over 400 preschool students with IEPs. The attitude of and failed corrective action by VADOE is appalling. **TABLE ESY – T1** & **TABLE ESY - T2** above, each showing numbers of students receiving ESY services, provide data that indicates that there are systems of denial in place.

This lack of monitoring is not isolated in the southeastern region of Virginia. It is, in fact, statewide. A FOIA request dated November 10, 2000 (reference **ESY-6**) was submitted to the Department seeking information on the number of students receiving ESY in a number of north-central Virginia counties. In a recent response to this FOIA request dated November 20, 2000 (also included in **ESY-6**), VADOE's Anthony Faina states, "no one is aware of this data being collected by the Virginia Department of Education."

How exactly is VADOE ensuring that ESY services are provided when required? VADOE is not collecting data (reference **ESY-6**). When VADOE does receive voluntary submissions of ESY data (see tables above), there is no inquiry. When VADOE receives letters of concern from advocates, there is no intervention. How is effective monitoring/supervision taking place if LEAs do not have to report ESY statistics to VADOE, and VADOE does not compile any information on the number of students receiving extended school year services?

The Standards for ESY

Extended school year services must be provided where necessary to ensure a free appropriate public education. VADOE, however, apparently does ***not*** take the position that ESY determinations by IEP teams rise to the level of protection afforded by the IDEA. Specifically, VADOE's compliance office has taken the position that a parent is not entitled to prior written notice (see 20 U.S.C. § 1415 (b)) upon an IEP team's denial of ESY services for a child with a disability.

A VADOE Letter of Findings dated October 30, 1998 states that **"[t]he prior written notice provision is a procedural safeguard that does not apply to an IEP committee's decision not to provide ESY services."** (see **ESY-7**, Attachment 10 at page 4, last paragraph). Furthermore, the Findings did not address the parent's contention that an improper standard was used to determine whether ESY services were required.

The guidelines on the provision of, and standards for, ESY have been defined by various court decisions throughout the country. Within the 4th Circuit, two decisions stand above all others: The ***Reusch v. Fountain*** decision in a class action suit and the ***Lawyer v. Chesterfield*** decision (***Reusch v. Fountain***, 872 F.Supp 1421, 97 Ed. Law Rep. 299, 8 A.D.D. 514 (D.C. Md., 1994); ***Lawyer v. Chesterfield***, 19 IDELR 904; 1 ECLPR 297 (E. D. Va, 1993)). Many LEAs still perpetuate myths (i.e., single criteria) about both the standard for determining the need for ESY and the provision of ESY services. These myths find no basis in the court decisions and are used as tools to deny or to limit ESY services.

A small sample of some LEA ESY guidelines is highlighted below. While no one expects that these documents provide interpretations of the law exactly as parents and/or disability advocates would like, one can certainly expect that these policy documents will outline current law and not be used as a harbinger for ESY service denials or limitations.

VADOE's Anthony Faina provided parents with the York County ESY policy document (see **ESY-8**) on November 16, 1999. The document sets forth that regression/recoupment is the sole criteria for determining whether ESY services are warranted.

Fairfax County, Virginia provides an ESY policy document (see **ESY-9**) with the procedural safeguards. The Fairfax document perpetuates the myth that regression / recoupment is the only relevant area to be addressed through goals and objectives. The policy document explicitly misinforms parents that "[o]nly those skills that are likely to be affected by regression are addressed" (see page 3 of 4).

LEAs are also predetermining what ESY should entail. This need for ESY is certainly not done on an individual basis. In one case, an excerpt from Isle of Wight's Self-Assessment dated May 15, 2000 states that its "Exemplary Practice" for ESY is a program that actually limits students to a ½-day summer program (see **ESY-10**).

On November 16, 1999, VADOE's technical assistant, Anthony Faina, provided parents with a Newport News City Public School "policy" that states, "factors which make ESY services difficult are: limitations of options, costs, recruitment of staff, and scheduling around family plans" (see **ESY-11**). While Judith Douglas of VADOE's Office of Due Process and Complaints had said that these statements were illegal in November of 1999 at a parent-training meeting, this document is in VADOE possession and remains uncorrected.

In that same November 1999 communication (reference **ESY-11**) from Anthony Faina, it is noted that ESY is contained in the Newport News City Public Schools (NNCPS) policy manual, and that NNCPS states they have a procedure to implement ESY. However, a NNCPS letter to a parent dated August 21, 2000 states that NNCPS local procedures do ***not*** contain ESY information and that NNCPS is awaiting the release of the VA special education regulations in 2001 before updating (reference **ESY-12**). It is unclear as to exactly what NNCPS or the Department is waiting for. There is nothing regarding ESY provisions, guidelines or standards in the modified Virginia Regulations except for a reference that ESY must be provided where necessary to ensure FAPE.

Turning to other LEAs, a Spotsylvania County communication dated March 20, 1997 from a teacher reiterates throughout that the emphasis for ESY services is to "maintain" skills (reference **ESY-13**). An earlier communication from Spotsylvania County dated June 19, 1996 indicates that ESY is to "prevent regression of specific skills" (also included in **ESY-13**).

The law covering ESY has moved well beyond the "regression (and recoupment)" standard. The main cases within the 4th Circuit (***Reusch v. Fountain*** *supra*, ***Lawyer v. Chesterfield,*** *supra*) dictate that ESY is significantly more than to simply "prevent regression." Only now, since August 20, 2000, has VADOE developed guidelines on the provision of, and standards for, ESY (reference **ESY-14**). However, this must be balanced with VADOE's earlier distributed draft document that provided some typical misinformation related to ESY services (reference **ESY-15**). In the draft document, VADOE indicates that ESY is not to teach new skills. To the contrary, the provision of ESY services should include whatever is necessary to ensure a child's free appropriate public education. Furthermore, the Department's choice of wording, highlighted within **ESY-15**, predisposes those reading the document to arrive at negative ESY determinations.

The current OSEP monitoring will, most likely, result in a third consecutive report (over a span of 10 years) wherein VADOE will be cited for failing to monitor and/or ensure that ESY services are provided where necessary to ensure FAPE. Short of a few memos and a technical assistance document, VADOE has done nothing, even when confronted with compelling evidence of noncompliance. As pointed out earlier in this report,

> VADOE will gladly generate more memos and other information if ordered by OSEP, ***but over ten years of paper exchange has failed to result in the necessary provision of extended school year services to eligible children as part of their free appropriate public education.***

Parents in Virginia request that OSEP order the Department to meaningfully monitor LEAs for compliance. At a minimum, the Department should gather statistics and be forced to investigate LEAs that are providing ESY services to very few children. The ***Reusch v. Fountain*** case is well known for exposing a system of ESY-service denials within Montgomery County, Maryland. The facts of the case show that Montgomery County was providing IEP-based ESY services to about one percent of its IDEA population. The authors of this report speculate that ESY services are provided to less than one half of one percent of Virginia's special needs population.

Parental Involvement

The Virginia Department of Education sought public comment, as required by IDEA, on four VADOE special education documents as part of Virginia's application for IDEA Part B funding. Those documents were:

(1) VADOE Special Education Monitoring Procedures (IDEA).

(2) Model Form for Due Process

(3) Virginia's State Improvement Plan for Special Education (1999-2004, January 2000 edition.

(4) Procedures for Data Collection on Discipline of Students with Disabilities.

The Virginia Department of Education gave one week's notice for public comment on these documents to be received no later than March 23, 2000. The VADOE conducted public hearings on March 22 and 23, 2000, in two locations; Roanoke and Richmond. The Virginia Coalition for Students with Disabilities and various individuals submitted extensive public comment on these four documents (reference **PI-1** and **PI-2**).

VADOE ignored the public comment. A June 12, 2000, letter from Malcolm B. Higgins, Esquire, to H. Douglas Cox, Director, Office of Special Education and Student Services, VADOE (reference **PI-3**), states that Mr. Higgins reviewed all four documents submitted by VADOE to OSEP. Mr. Higgins concluded that, despite the extensive public comment, the VADOE submitted its application package for IDEA Part B funding for the year 2000-2001 without making a single change in any of the four documents.

A letter dated June 16, 2000 from H. Douglas Cox to Malcolm B. Higgins, (reference **PI-4**) fails to explain why the VADOE made no changes after it sought and received public comment. This letter demonstrates the degree to which the Virginia Department of Education is content to follow a process that pretends to seek involvement of parents of children with disabilities, but in fact ignores the input solicited. The solicitation of the public comment of parents and advocates was a ruse in that the VADOE refused to evaluate or use the public comment for timely and constructive improvement in basic documents such as the State Improvement Plan for Special Education (1999-2004).

A more recent VADOE invitation for parental input involved a series of focus-group sessions conducted across the state in preparation of the state's self assessment. VADOE enlisted four parents from across the state to form the groups. An August 18, 2000 letter (reference **PI-5**) from VADOE's H. Douglas Cox is representative of the Department's request to each of the four parents. In the letter, Mr. Cox asked each parent to enlist 10 parents and 10 students for participation in a focus group concerning a current state self-assessment. As Mr. Cox will attest, the idea was to ascertain what

the Department's strengths and weaknesses were in the eyes of some of VADOE's more vocal critics.

The focus sessions took place. By all accounts from parents, the detailed problems overwhelmed any positive comments. Less skeptical parents left the meetings believing the stated goal had been accomplished; that the Department, via its facilitators, would document the extent of parental concerns. The participants in the Virginia region 2 area further submitted written comments and constructive solutions (reference **PI-6**) to the facilitators as part of focus group study.

The Focus Group summary document (reference **PI-7**) was soon released and as some parents suspected beforehand, the document simply did not adequately represent the substance of the problems levied by parents nor did it convey the extent of the problems. Instead, the document's summary impressed a sense of balance between the positive and negative comments. The emotion present, the criticisms, and even the suggested improvements from the parents at the four focus-group sessions, has been eradicated by this sanitized document.

The Department's "attitude" has also trickled down to its LEAs. A letter from a Chairperson of a local SEAC dated September 25, 2000 (reference **PI-8**) documented the failure of the LEA to incorporate parent input as part of its self-assessment process.

A Chairperson from another local SEAC and another parent were selected to be the parent representatives in the LEA self-assessment process for federal program monitoring. They were included on the initial questionnaire development, but were neither invited to nor included in the meeting that developed the final product. To their surprise, the LEA finished the questionnaire and sent it to them in the mail without any explanation.

A letter dated September 12, 2000 (reference **PI-9**) details events taking place during a 1998 VADOE assessment of Virginia Beach Public Schools. In preparation of that assessment, VADOE representatives met with four parents on October 26, 1998. A summary of the October 26th meeting documented numerous issues concerning the provision of special education (included in **PI-9**) in Virginia Beach. The VADOE representatives returned to Virginia Beach for a SEAC meeting that served to receive public input on the state of special education in Virginia Beach (see SEAC notice in **PI-9**). Twenty-six parents spoke at the SEAC meeting and substantiated all the issues listed in the summary document concerning the October 26th visit.

VADOE issued its report on special education in Virginia Beach City Public Schools on February 12, 1999 (included in **PI-9**). The report failed to acknowledge that any public input was taken. Additionally, the VADOE report addressed ***only*** 2 of the over 20 issues presented by parents at the previously held meetings with VADOE. Again, VADOE lends the appearance of involving the public, but the substance of any public input fails to receive consideration.

The VADOE leads and the LEAs follow. From top to bottom, parents are shut out from meaningful involvement. Even when the parents' input is received, somehow the gist of the input, or in some cases the entire input, is lost in any resulting documentation or report. This is not the intent of Congress; it is not the intent of OSEP; and although it may not be the intent of the SEA, there is certainly a system in place to keep parental involvement out of the process.

VADOE's Complaint System

The Complaint Process

The following section of this report provides instances where VADOE's compliance office shows unfair bias, legal incompetence, and in some cases, barriers that actively discourage parents from filing complaints.

The compliance process begins with the filing and processing of complaints. VADOE creates artificial barriers for complaint filers. The procedural safeguards section of this document highlights an instance of refusal by the compliance office to investigate a valid complaint.

A complaint was filed September 11, 1998 (reference **PSD-1**) addressing the procedural safeguards document alleging that the procedural safeguards document does not include §1415(b)(7) in the prior written notice section (i.e., that sources exist for parents to obtain assistance in understanding their rights). After an exchange of letters (included in **PSD-1**), VADOE responded that the procedural safeguards "document does comply in all respects with the IDEA and that, therefore, your letter does not state an allegation against Stafford County public schools that is subject to investigation by this office." This holding was not only clearly erroneous, but was a clear refusal to record a valid complaint.

A separate complaint was filed October 16, 1998 pertaining to incomplete educational records (reference **C-1**). After receiving a telephone call on October 23, 1998 from a VADOE complaints specialist with questions about the missing records, the complainant filed a supplement to the complaint two days later to include copies of documents allegedly missing from the child's records (included in **C-1**). After receiving the missing documents, VADOE responded on November 12, 1998 and noted that "it is our opinion that your complaint is governed by the Family Educational Rights and Privacy Act (FERPA)" (also in **C-1**). The complainant forwarded the complaint to the Family Policy and Regulations Office of the USDOE on November 19, 1998. The complainant also wrote a letter to VADOE dated November 20, 1998 noting that eight

complaints were filed in the previous year related to "Student Records." The parent inquired as to whether his complaint was being handled in a similar fashion as those complaints. VADOE did not respond to this letter. The USDOE responded on May 6th, 1999 and noted that the issue is an IDEA (Part B) issue to be handled by the State. The parent wrote again to VADOE on 24 May 1999 requesting VADOE to "please handle the matter." VADOE finally handled the complaint seven months after the original complaint was filed (all communications are included in **C-1**).

A complaint was filed March 4, 1999 and contained 29 (twenty-nine) issues related to a child's free appropriate public education (see **C-2**). The compliance office, in a letter dated March 15, 1999 (also included in **C-2**) returned the complaint stating "we have determined that there appears a likelihood that ***some*** of your complaint issues may be addressed in a due process hearing." [***emphasis added***] Additionally, VADOE states that "we have stayed your complaint until the completion of the due process hearing" even though it determined that only ***some*** of the issues were similar (or the same). It is well-settled law that only the common issues are held in abeyance and the rest of the complaint is processed. VADOE's response ensured that no supplement would be filed.

Yet another complaint was filed April 25, 1999 specifically stating "I would like for you to consider this letter a complaint filed with the Virginia Department of Education" (reference **C-3**). A VADOE response letter dated May 6, 1999 attempted to "educate" the parent and stated "you may wish to file a complaint with this office" (included in **C-3**). Despite frowning on the original letter submission, VADOE later acknowledged the complaint in a letter dated June 2, 1999, some 38 days after the original complaint was filed (included in **C-3**). An additional letter was subsequently filed by an advocate dated June 8, 1999, who alleged the issue of the April 25th complaint was an ongoing practice by the same LEA (also in **C-3**).

In each instance, VADOE has refused to consider the complaint or created a barrier to filing the complaint. A number of important points must be made.

1. These complaints represent instances found from just the small group of parents working on this report.
2. In some of these instances, only persistence on the part of the complainant resulted in VADOE handling the complaint.
3. There are undoubtedly other instances of VADOE creating a barrier to the filing of a valid complaint.
4. Additional evidence verifying this pattern of VADOE's behavior is in all likelihood not present in VADOE's complaint files. VADOE, when successfully turning aside the complaint, is in fact not recording the communication as a complaint and may not be keeping the communication in its complaint files.

The Burden of Proof in the Complaint Process

The following section of this report contains two complaint findings issued by VADOE and associated correspondence letters. In one finding (reference **C-4**), VADOE states that ***"the burden in the complaint process is on the parents."*** The parent naturally objected in view of the evidence submitted and the lack of any meaningful investigation by the Department. The parent challenged VADOE on the legal meaning and the legal implications of the term "burden" (reference **C-4**), VADOE's response was to simply brush the issue aside.

A class action complaint was filed against one county alleging the failure to place moderately mentally retarded students in the least restrictive environment. The complaint file is full of expert evaluations and affidavits filed by the complainants while the respondents countered with a series of statements and general documentation. However, VADOE's Letter of Findings (reference **C-5**) echoed the sentiment that the complainants failed to meet their burden of proof.

The complaint process in Virginia, as shown above, creates another unnecessary burden or barrier for the parents. If given conflicting information, VADOE will find that the complainant failed to make the child's case rather than conducting an adequate or even an on-site investigation.

Weak or Non-Existent Corrective Actions in Complaint Findings

The impetus behind any filing of a complaint is a parent seeking to right what he/she believes to be a wrong. Parents rightfully believe that there should be corrections and consequences for an LEA found out of compliance with IDEA. In countless instances, VADOE's compliance office has simply requested an assurance statement from the LEA in view of the documented violation. As shown below, this type of enforcement, or lack thereof, has resulted in parents filing similar complaints on the same uncorrected issue. The Department's solution (or "corrective action") is to require yet another assurance statement. One must wonder if school superintendents smirk as they talk about the burden VADOE's Office of "Compliance" places on them to correct these deficiencies.

VADOE has incorporated two new table columns into its latest "Annual Report for Special Education Due Process Hearings and Special Education Complaints" (reference **C-6**). While one might expect that the Department would be reporting the number of times an LEA was found out of compliance with the law, instead the Department reports on the "No. [of Due Process Hearings] Filed by Same Complainant" and "No. [of Special Ed. Complaints] Filed by Same Complainant." The issue for an "Office of

Compliance" should be whether the LEAs are following the law, not whether the same parent or advocate files multiple complaints.

The VADOE Compliance Office recently issued a Letter of Findings dated October 27, 2000 (reference **C-7**). In the Findings, it was determined that Stafford County Public Schools:

1. "did not consistently implement the signing goal or provide the services from the teacher of the hearing impaired as prescribed by [the student's] IEP" and
2. "improperly denied extended school year services to [the student] when it concluded that her regression and lack of progress were attributable to her absences, tardies and early dismissals without regard for their cause."

The corrective action required with respect to these particular violations was:

- No relevant corrective action for the first finding; and
- For the second finding, to provide an assurance statement that Stafford County will hold an ESY IEP meeting prior to the end of the 2000-2001 school year and that the IEP team will follow proper procedures.

The referenced Letter of Findings (at **C-7)** in this matter includes "corrective" actions that provide absolutely no corrective solutions or actions for the child. The parents are now faced with the daunting prospect of taking the school division to due process to receive compensatory education services. The Department clearly should have ordered compensatory education for this child as its Letter of Findings strongly establishes that no ESY services were provided where necessary, and therefore, no FAPE was provided in the school year at issue.

Many additional instances of inadequate corrective actions are detailed in **Table C-T1** below, entitled "VADOE Corrective Actions for a Single District". This Table contains 13 noncompliance findings by VADOE regarding complaints filed by parents over the past year in Newport News (NNCPS). This table was prepared from complaint findings that 2 parents were able to acquire privately. Since VADOE only reports on the number of complaints filed against an LEA and not the number times an LEA was found in noncompliance, **Table C-T1** provides more meaningful reporting as compared to VADOE's published monitoring reports. The Table also shows that many times assurance statements are requested by VADOE for the same violations within the same school system. Other times, the Department requires a self training; which is by the very persons who were reportedly violating IDEA. One can only imagine how effective these self trainings are.

TABLE C-T1 -- VADOE Corrective Actions for Single District

Letters of Findings Between September 30, 1999 and September 15, 2000

Code	District	**VADOE Corrective Action Requested**	VADOE Letter of Findings Summary
300.504 Procedural safeguards notice	NNCPS	Provide VADOE an assurance statement.	Procedural safeguards notice found in non-compliance. Failed to provide a copy of procedural safeguards notice to the parents of a student with a disability upon initial referral for evaluation.
300.504 Procedural safeguards notice	NNCPS	Provide VADOE an assurance statement. Ensure that the appropriate personnel are provided training with particular emphasis on when written notice of parental rights must be given. Provide documentation of training, training date, who attended, and who provided the training.	Federal regulations require that parents receive a written notice of their procedural rights upon notification of an IEP meeting. In the past, the school division has failed to provide this written notice upon notice of IEP meetings. Despite the fact that this violation has been corrected and the school division is now in compliance, we find the school division to be in noncompliance as it concerns this issue.
300.503 (b) Prior notice by the public agency; content of notice	NNCPS	Provide VADOE an assurance statement. Provide parent proper notice as prescribed by law.	Prior written notice found in non-compliance. Notice provided did not address parent's concerns and was not sufficient.
300.503 (b) Prior Notice by the public agency; content of notice	NNCPS	Provide parent proper notice as prescribed by law (attempt at proper noticed still failed after being cited, VADOE said to try again - 5 months after complaint was filed.)	Prior written notice submitted as part of Corrective Action was still found in non-compliance. Notice provided did not provide all components required by law.
300.503 (b) Prior notice by the public agency; content of notice	NNCPS	Provide parent proper notice as prescribed by law.	Prior written notice found in non-compliance. NNCPS did not properly respond to parent request for notice.
300.503 (a) Prior notice by the public agency; content of notice	NNCPS	Provide VADOE an assurance statement.	Prior written notice found in non-compliance. No notice provided to parents upon refusing to initiate the identification of a child with a disability.
300.350 IEP-accountability	NNCPS	Convene IEP meeting. Develop a contingency plan.	Implementation of IEP, found in non-compliance. Supplemental aids and services: Provision of computer

Code	District	**VADOE Corrective Action Requested**	VADOE Letter of Findings Summary
			equipment and services were not provided due to delays.
300.345 (b) Parent participation; Information provided to parents	NNCPS	Provide VADOE an assurance statement. Develop new set of forms in accordance with regulations and review forms with VADOE.	Content of IEP notice, found in non-compliance. Forms used by NNCPS do not provide proper information to parents (does not include who will be in attendance nor include the purpose of meeting).
300.344 (a)(3) IEP team: General	NNCPS	Ensure that the appropriate school personnel are provided training with emphasis on who must be in attendance. Provide VADOE with confirmation of the time, date, location, and provider of the training.	IEP team composition found in non-compliance. No special education teacher present.
300.344 (a)(3) IEP team: General	NNCPS	Provide VADOE an assurance statement. Reconvene IEP meeting.	IEP team composition found in non-compliance. No regular education teacher present.
300.344 (a)(3) IEP team: General	NNCPS	Provide VADOE an assurance statement. Reconvene IEP meeting.	IEP team composition found in non-compliance. No special education teacher present. IEP pre-signed
300.300 Provision of FAPE	NNCPS	(Combined with other issue in same letter) Conduct a training session for all persons participating in child study committees. Training to be conducted in consultation and collaboration with VADOE.	Screening process to ensure FAPE, found in non-compliance. Failed to include referring source [parents] on child study committee. The school division was unable to supply any evidence that the parents were notified of this meeting or that the school division made a good faith effort to secure their presence at this meeting.
300.300 Provision of FAPE	NNCPS	Conduct a training session for all persons participating in child study committees. Training to be conducted in consultation and collaboration with VADOE.	Provision of FAPE found in non-compliance. NNCPS basis of referral to refer a child for evaluation, undermines the legal standard of individualized consideration.

Thirteen findings of non-compliance for one LEA in a single year has not resulted in any ***significant*** corrective action. Not only are the corrective actions ineffective, but the Department does not ensure that the actions are adequately carried out.

As shown in the Table above, NNCPS was cited twice on its child study screening process. Additionally, a hearing officer, in a letter dated January 31, 2000 (reference **C-11**), strongly urged NNCPS to correct the problem of using its "green book" entitled *Criteria for Identification of Learning Disabilities Emotional Disabilities Other Health*

Impairments, due to its overly restrictive criteria for determining eligibility. Excerpts taken from the NNCPS "green book" ten months later revealed the same overly restrictive criteria (i.e., no change from the document viewed by the hearing officer).

Regarding training efforts, NNCPS, on January 7, 2000, provided a statement to VADOE documenting an intent to train its staff prior to March 1 as its corrective action (reference **C-8**). A VADOE "Closure Letter" dated January 10, 2000 (reference **C-9**) fully concluded the matter and closed the corrective action based on the document of intent. NNCPS simply stated school personnel will be trained on the "proper composition of IEP committees."

About one month after the corrective action was to be completed, it became obvious to the parent that training had not been completed as he was asked to come in and sign an IEP addendum to approve summer school. When the parent asked why he was not notified of an IEP meeting, the teacher stated that it was just a quick signature between the parent, principal, and special education teacher (i.e., no regular education teacher, or IEP development). On July 30, 2000, the parent questioned VADOE about the corrective action plan follow-up. NNCPS provided a document (reference **C-10**) to VADOE showing that, except for EMD and DD teachers, the remaining teachers did **NOT** receive the training as stated in the corrective action due to a snow day. The director of special education stated that she believed the remaining teachers were trained because the principals were trained and principals are responsible for training of teachers. However, VADOE reported in reference **C-13** ("Complaints**"** table, pg. 2, 1999-2000) that "NN provided documentation that the training occurred."

The parent subsequently refuted VADOE's corrective action report. In a September 5, 2000 letter to VADOE, the parent noted that NNCPS' January 7th letter of intent to train (see **C-8**) identified that preschool teachers would receive the training. The parent noted that the preschool teachers were not identified in the reference **C-10** document and that there was no documentation on what was presented to NNCPS staff - only agenda items which state "Composition of IEP Committees," or "Composition of IEP team." In a September 12, 2000 letter back to the parent, VADOE's Judith Douglas responded simply: "The Department was satisfied with the school division's corrective action on this complaint."

A July 19, 2000 corrective action for another parent (reference **C-8**) stated that VADOE and NNCPS were to "develop a comprehensive training plan to address these procedural issues [that have impacted the school division, most notably during this past school year] with the school division administrators and teachers." VADOE's Anthony Faina was to be working directly with NNCPS's director of student services Robert Pietrasanta in the development of this plan for the 2000-2001 school year. The plan was reported to be complete. A Letter of Findings dated December 12, 2000 (reference **C-8**) found Mr. Pietrasanta's personal decisions responsible for most areas of non-compliance. Mr. Pietrasanta made the decision to hold an IEP meeting without the parent (**300.345)** (also see 5/20/99 due process hearing excerpt, page 30) and he made the decision to develop and change an IEP without the parent **(8 VAC 20-80-70**

A.1.g.(3)) when the parent did not receive an IEP meeting notice or procedural safeguards notice **(300.503(a))**. Mr. Pietrasanta then asked the parent to sign the pre-signed IEP without providing prior written notice **(300.504)**. The IEP meeting notice that eventually made it to the parent after the IEP meeting was held did not invite the student (transition) and did not include many other necessary components required for IEP team composition (**300.344(a)(1), (a)(2), (a)(3), (a)(6), and 300.344(b)**).

One must seriously question VADOE's role, concern and effort regarding the most fundamental of compliance issues It is manifest that NNCPS appreciates that VADOE will not require any meaningful corrective action or impose any meaningful penalty. How else could one explain why NNCPS would to do this to one of the token two parents on NNCPS' self-assessment committee? VADOE's corrective action, in "light" of all these violations was to 1) hold another IEP meeting by January 15, 2001, and 2) "request":

- The agreement [comprehensive training plan] between NNCPS and VaDOE be amended by January 31, 2001, to indicate the external presenter(s), the audience, and the date(s) of the training on this specific issue". ["This specific issue" cited refers only to prior written notice.] and
- The training date(s) must be completed by the end of this current school year with documentation of the workshop participants' attendance.

The office requested the corrective action by January 10, 2001. Thus repeated deficiencies in the Department's response include:

1. Corrective actions for violations other than prior written notice were ignored.
2. The corrective action for prior written notice only requests that an editorial change be made (i.e. indicate a list of participants and dates), and the action allows 1½ months to respond.
3. VADOE is ensuring compliance by the honor system after this exhaustive track record of repeated noncompliance. The corrective action is to be completed (1/10/2001) before any of NNCPS's actions are to be completed, thus relying again on NNCPS's intent to comply.
4. There is no check on the validity of the material to be presented, only names are required (or should we say "requested"?),
5. Attendance does not matter to VADOE. It has already been established above that there are no real requirements for documenting FULL attendance (partial is "satisfactory").
6. There is no change required to the comprehensive training plan (except names and dates). It is assumed that the principal draftsman of the NNCPS comprehensive training plan is the very person "knowledgeable" enough to be responsible for such a horrendous record of noncompliance.

7. There are no sanctions. Judith Heumann could be the presenter for a Newport News training session and her lecture would still not result in any changed practices. NNCPS is large enough and its management seasoned enough to know the basics about IDEA. The benefits of cutting corners and ignoring the law when convenient far outweighs any paper retribution imposed by VADOE.

The VSCD notes in addition to OSEP's 1995 federal monitoring findings, VADOE's 1995 federal program monitoring also found NNCPS in noncompliance for prior written notice, child study, and not including student's interest in IEP (transition). It should be clear that nothing effective has been done to correct the noted deficiencies from 1995, and ***nothing is being done to prevent violations from continuing indefinitely***. How many more years, at a great many children's expense, will it take before effective corrective action is taken?

The Complaint Decisions and the Basis Therefor

The inequitable VADOE complaint system is full of problems. The problems parents face are founded in meaningless corrective actions, legal incompetence or poor policies and procedures. As parents continue to provide more and more meaningful forms of evidence, the Department continues to increase the burden of proof placed on the parent.

The following represents a small sample of what we believe to be unjust decisions put forth and/or actions taken by the VADOE complaints specialists. Again, only those of which we are aware are included. One must remember that a typical parent that has been railroaded on an important issue will oftentimes concede to the non-compliance of an LEA's policies and procedures. The small sample includes:

- VADOE Letter of Findings dated October 30, 1998 (reference **ESY-7**) set forth that **"[t]he prior written notice provision is a procedural safeguard that does not apply to an IEP committee's decision not to provide ESY services." (p. 4, last paragraph)).**
- Parent complaint dated the day after an IEP meeting (also included in **ESY-7**) cited that improper standards were used in the ESY services denial. VADOE unjustly held the complaint in abeyance as the parent was in due process for another matter (deciding LRE). The abeyance was held despite repeated objections and clarifications by the parent. The OSEP letters cited by VADOE in holding the complaint in abeyance actually addressed the fact that the complaint should ***not*** have been held in abeyance. In the end, some 139 days after the complaint was filed, VADOE still refused to address the "ESY standards" issue raised in the complaint.

- VADOE "Request for Reconsideration" response dated January 10, 2000 (Reference **C-12**) to a parental request for complaint findings reconsideration shows that *ex parte* phone conversations between the VADOE and the LEA were used to determine findings. Not only do *ex parte* oral communications fail to leave a paper trail, but there is also no record for the parent to rebut. The irony here is that VADOE issued its Letter of Findings without mentioning the *ex parte* communications. The parent struggles to determine how VADOE decided the complaint in the fashion it did and only then finds out that the LEA can provide unsubstantiated rebuttal "evidence" over the phone.
- **TABLE C-T1** above, "VADOE Corrective Actions for Single District" highlights Letters of Findings handed down between September 30, 1999 and September 15, 2000. Select VADOE staff met with select NNCPS staff on July 12th to discuss the increased number of complaints filed against NNCPS. An August 9, 2000 report (reference **C-14**) of the meeting between the "select" staff members states one of the key purposes of the meeting was to ascertain why parents were not trying to resolve problems locally. A more appropriate focus should have been how NNCPS will eliminate their continued practice of noncompliance with federal and state regulations. The August 9, 2000 report additionally notes that parents are provided contact information {from both the Parent Resource Center (reference **C-15**) and SEAC} that would help them resolve problems on a local level. The SEAC document (reference **C-16**) actually reveals that the SEAC contact is the NNCPS Director of Special Education. Rest assured that attempts at local resolution have been exhausted. A significant amount of correspondence has been exchanged with the NNCPS administration and public comment has been provided at both SEAC and at local school board meetings. There appears to be little chance at local resolution when continued assurances/assurance statements have been made to VADOE by the LEA and conditions are not improving.

Procedural Safeguards Notices

In 1995, OSEP noted that VADOE had created and disseminated a model explanation of the procedural safeguards that are afforded to parents and/or children (See **G-1** at page 1). In view of IDEA '97, the Department created an addendum that LEAs could attach to the procedural safeguards. The addendum addressed changes detailed in IDEA. The regulations governing implementation of IDEA '97 took effect no later than July 1, 1999 (see Federal Register of March 12, 1999 (Volume 64, Number 48)). The Department's procedural safeguards document and any subsequent modification thereto has been out of compliance with the IDEA since IDEA '97 went into effect.

The following section of this report contains a series of complaints. The complaints were filed against various counties and cities in Virginia (see highlighted portions of the map in **PSD-7**) citing failure of these LEAs to provide parents with legally compliant procedural safeguards documents. To this day, VADOE has failed to provide LEAs with a procedural safeguards document that accurately and fully details the rights afforded to parents and children under IDEA '97.

The first complaint filed on the procedural safeguards document (contained in this report) was submitted on September 11, 1998 and alleged that the "Parental Rights in Special Education" document is incomplete (see **PSD-1**). The complaint alleged that the procedural safeguards document does not include §1415(b)(7) of the prior written notice section (i.e., that sources exist for parents to obtain assistance in understanding their rights). After an exchange of letters (included in **PSD-1**), VADOE responded that the Parental Rights "document does comply in all respects with the IDEA and that, therefore, your letter does not state an allegation against Stafford County public schools that is subject to investigation by this office." This holding was clearly erroneous. Indeed, VADOE's current procedural safeguards document on its website now includes reference that prior written notice must include that sources exist for parents to obtain assistance in understanding their rights.

On September 24, 1999, advocates met with VADOE's H. Douglas Cox, Anthony Faina, and Sandra Ruffin and identified problems with the Newport News procedural safeguards document (which was derived from the VADOE document). Anthony Faina, in a November 16, 1999 letter to one of the advocates, assured the parent that problems "will be addressed in the next revision of the document" (reference the last page of **PSD-2**).

Six months later, one of the advocates finally filed a complaint that, in part, addressed deficiencies in the Newport News procedural safeguards document. A VADOE Letter of Findings dated July 5, 2000 found that the procedural safeguards document being provided by Newport News Public Schools was out of compliance with federal regulations (reference **PSD-2**). VADOE did not require any corrective action nor did VADOE require an assurance statement with respect to this particular violation. In the Findings, VADOE notes that its document revision process has devised a new procedural safeguards document that was issued June 28, 2000 and is currently being disseminated (see **PSD-2** at page 3 of the Findings and footnote 1). It seems as though the Department is in constant revision of this document, but just cannot seem to get the document within compliance and issued in a timely manner.

In October and November of the year 2000, a parent filed a series of complaints on the procedural safeguards document being distributed by LEAs across the state. Eleven complaints have been filed. Six complaints (sample included at **PSD-3**) addressed counties / cities using an outdated procedural safeguards document originally developed by VADOE. One complaint (included at **PSD-4**) addressed the procedural safeguards document of a county that somewhat independently creates its own. Four complaints (sample included at **PSD-5**) have been filed addressing VADOE's latest procedural

safeguards adaptation. This is the document VADOE refers to in its July 5, 2000 Letter of Findings above (see **PSD-2** at page 3 of the Findings and footnote 1).

As of December 27, 2000, the latest procedural safeguards document was available on VADOE's website and was entitled **"Rights and Procedural Safeguards FOR SPECIAL EDUCATION Related to Free Appropriate Public Education."** Subsequent to the filing of the first three complaints addressing the new procedural safeguards document, the complainant reviewed the full document and filed a supplemental complaint. The supplemental complaint (included at **PSD-6**) details noted inconsistencies, errors and deficiencies found through that initial full review.

Even though complaints have been filed in multiple counties as detailed on a county map of Virginia (**PSD-7**), complaint findings have been issued and procedural safeguards documents are provided with the LEAs' submission of annual plans, **VADOE has failed** to ensure that its LEAs are providing parents with an up-to-date and compliant procedural safeguards notice. Indeed, VADOE's response (See **PSD-8**) to these complaints was to offer resolution to the complainant that consisted of the following:

(1) VaDOE's procedural safeguards document will be revised to comport with the federal and state regulations governing special education and disseminated by February 1, 2001;
(2) The revised document will include your review prior to dissemination;
(3) This action resolves the issues raised in the complaints and closes these cases through this concurrent early resolution process.

The complainant responded (**PSD-9**) by noting:

> I do not accept a revision of this document delayed until February 1, 2001. I further do not accept that the document will simply be "disseminated." After all, the supposed-IDEA-97-compliant procedural safeguards document has been "disseminated" since June 28th [2000] and an estimated 50% of LEAs are not using it.

Quite simply, VADOE's resolution does not ensure that LEAs will start using any new procedural safeguards document that VADOE creates. While this represents business as usual for VADOE, it is unacceptable given a history of noncompliance by the LEAs.

Nevertheless, the Department issued 11 Letters of Findings (**PSD-10**), each having precisely the same "corrective" action and each dated December 20, 2000. The "corrective" action was that the Department would revise the document by February 1, 2001 and distribute it to the LEAs. The Department failed to require the LEAs to do anything. Even those LEAs that were providing parents with outdated procedural safeguards documents received no corrective action or instruction.

The parent filed a request for due process concerning VADOE's handling of the 11 procedural safeguards complaints on December 26, 2000 (**PSD-11**). On December 28, 2000, the parent tried to access the procedural safeguards document link at VADOE's web site. The link was removed and is now inactive. As opposed to VADOE's laissez-faire approach to LEA compliance with IDEA, rest assured that the Department shall vigorously defend its inaction with respect to the procedural safeguards document.

DUE PROCESS ISSUES

The decision to take the LEA to due process is a great step. The process, even with attorney representation, is taxing on a family, both financially and emotionally. Without a doubt, the process should ***not*** be an exercise in frustration because of an inexperienced, untrained, or even a disinterested hearing officer. The following are examples of 1) how the due process system is failing to provide the simplest of procedural safeguards to parents as outlined in Virginia's own regulations, 2) how VADOE fails to monitor the status and the issues involved concerning due process cases, and 3) how hearing officers fail to address all of the necessary components for the hearing.

In a first instance, on November 1, 1999, Alfred Bernard was assigned as hearing officer to a due process case requested by Newport News City Public Schools (See **DP-1**). Virginia regulations (§3.4.A.8.a) provide for a 5-day limit to secure a hearing date, time, and location after a hearing officer is assigned. A pre-trial confirmation letter by Mr. Bernard, (**DP-2**) shows the date that the hearing officer was secured: November 12, 1999 - 11 days after assignment to the case. The same letter (**DP-2**) also establishes that the hearing officer would not attempt to issue subpoenas for witnesses on the parent's behalf (private neuro-psychologist required a subpoena to appear). The hearing officer did not know his authority under state regulations, nor did he know how to locate his own authority or the parents' rights within the governing regulations (see VA Regs at §3.4.A.8.g).

A hearing officer who does not understand where to find the governing regulations cannot make proper determinations. The responsible federal and state monitoring agencies should not allow this caliber of hearing officer to decide a FAPE issue for any child. Additionally, a letter (**DP-3**) from the parent dated November 16, 1999 confirms that the hearing had still not been scheduled at a mutually agreeable time and location.

On August 4th, 2000, 277 days after the hearing officer was appointed, the LEA responded to an inquiry from VADOE (reference **DP-4**). VADOE had requested an implementation plan for the above due process case. VADOE's level of monitoring fell far short of adequate monitoring of compliance with state and federal regulations. On

August 5th, 2000 the hearing officer issued a letter (**DP-5**) stating that he closed the case on November 25th, 1999, BEFORE mediation had taken place (January 5, 2000), and BEFORE the date set by the hearing officer of December 1, 1999.

A number of hearing officers in Virginia show an alarming lack of attention to detail in addition to a general lack of knowledge of IDEA or state regulations. In one local hearing addressing extended school year services, the parents argued significant procedural violations (see excerpt of Parents' Brief at **DP-6**). The reference to the failure of the LEA to provide prior written notice is a continuation of the injustice referenced in the complaint and extended school year sections above (reference **ESY-7**). The parents presented a myriad of procedural issues that were not rebutted by LEA testimony, exhibits or legal argument.

The local-level hearing officer decision (**DP-7**) included one sentence, "I find no procedural violations." Apparently the local hearing officer also believes that **"[t]he prior written notice provision is a procedural safeguard that does not apply to an IEP committee's decision not to provide ESY services"** (reference **ESY-7**).

The parents appealed and in the state-level hearing again presented arguments concerning significant procedural violations (reference excerpt of parents' appeal brief at **DP-8**). While the state hearing officer noted a number of errors made by the local hearing officer in his decision (reference **DP-9**), he had no comment on any issues of procedure.

The parents had now traversed the state complaint process and the local- and state-level due process hearings. Each step of the way, the parents have argued significant procedural violations including that prior written notice is required for a denial of extended school year services. At no time has VADOE or a hearing officer appointed on VADOE's behalf acknowledged that prior written notice is necessary.

Before addressing another due process matter, reference is made to the 1995 OSEP report (reference **G-1**). OSEP noted in a table on page 3 that VADOE had no method to monitor the implementation of the following situation:

> **§300.503(d): Independent educational evaluation**
>
> If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation is at public expense.

A complaint was filed by a parent August 21, 2000 against the Virginia Department of Education for being required to pay costs above a $1000 cap placed on an IEE as part of a local-level hearing agreement (reference **DP-10**). The complaints office at the Department did not respond to this complaint by either staying, or deciding, the complaint.

A hearing review officer dismissed the matter (reference **DP-12**) since the local hearing officer had "*incorporated the parties' agreement into an order dated March 16, 2000.*

This Order was not objected to by the parents until August 21, 2000 when they filed their complaint with the Department of Education." The "complaint" referenced by the state hearing officer here is the parents' request for appeal.

It is no surprise that the review hearing officer was **wrong**. The parents objected to the "agreement" made in the local hearing long before the state appeal request. A long-standing practice of hearing officers in Virginia is to bury issues that might bring to light their lack of training or ignorance of IDEA. This matter is no different. A review of the facts reveals:

- The parents were given a "take it or leave it" offer of $1,000 toward an IEE.
- The parents had no input into determining the amount that would be paid for the IEE, but did indicate that they believed that the LEA should be responsible for whatever the normal cost was.
- The parents vehemently objected to the local hearing officer's IEE Order of March 16, 2000 (not included) with their local hearing brief filed May 5, 2000 (reference **DP-13**).
- The local hearing officer's decision (reference **DP-14**) failed to address the parents' argument that they were entitled to full reimbursement for the IEE.

The local hearing officer directed his efforts to deciding issues outside the purview of the case. The local hearing officer's desire to bury the IEE issue is perfectly understandable since he took part in a blatant violation of the parents' educational rights.

Nevertheless, the state hearing officer's determination (Order at **DP-12**) was clearly wrong. Notwithstanding the torturous proceedings in this matter that the parents endured, the parents are entitled to a decision on their complaint. The Department has yet to respond to the complaint issue as to whether IDEA was violated and the parents should pay an amount of money over an arbitrary cap in order to obtain an independent educational evaluation of their daughter.

ACTIVELY MONITORING DUE PROCESS CASES FOR COMPLIANCE AND POTENTIAL SYSTEMIC VIOLATIONS

VADOE is not utilizing information provided through numerous sources to determine compliance with established standards. Monitoring for VADOE has become a technical assistance activity. VADOE should be monitoring compliance with IDEA, federal regulations implementing IDEA, state special education regulations, and other standards that are in place in Virginia. The following are excerpts from hearing transcripts that could have been used by VADOE to monitor for compliance and possibly intervene in potential systemic procedural violations.

- ***Excerpt from Transcript of Due Process Hearing Regarding Eligibility Meeting (5/20/99) at Newport News Public Schools***

  (Questioning done by educational advocate representing the child. Answers provided by Special Education Coordinator from Newport News Public Schools)

  Question: I understand, and I know you did other things in between. Can I bring you to yesterday's eligibility meeting?

  Answer: Uh-huh

  Question: Which again the hearing officer – and I want you to understand this, and I think it's important – strongly urged that we go back to eligibility again. At that meeting, I wasn't there; am I correct?

  Answer: Uh-huh

  Question: (The Mother) was not there (at the eligibility meeting); am I correct in that?

  Answer: Right.

  Question: Who was present (at this eligibility meeting in question)? In that I wasn't there, I don't know. Who was present at the meeting?

  Answer: On the 20th?

  Hearing Officer: The reference is to the 20th?

  Question: Yes, yesterday.

  Answer: API, Ms. Wallace, myself (Special Education Coordinator, Newport News Public Schools), Ms. Kimmel, . Carroll, Ms. Huilick, Mr. Smith, who is the guidance counselor, Ms. Flowers, and Bob Pietrasanta.

  Question: And who?

  Answer: Bob Pietrasanta.(Director of Compliance, Newport News Public Schools)

  Question: Okay. Did you find it unusual that the parent wasn't there yesterday?

  Answer: Somewhat.

  Question: Have you ever done that before, had an eligibility meeting without a parent present?

  Answer: Yes

  Question: How often does that (conducting an eligibility meeting without the parent present) happen?

Answer: **Fifty percent** of the time. [emphasis added]

Question: Is that correct?

Answer: Nodding affirmatively

Advocate: I don't have any other questions. Thank you.

Contact PADDA (People with Attentional and Developmental Disabilities Association) for the due process hearing transcripts or for testimony on audio cassette.

The following is from a separate case and separate hearing officer concerning the same LEA:

- *Howard E. Copeland, Hearing Officer June 11, 1999* - "Although the staff of Newport News Public schools knew that Stefan needed immediate early intervention services, they balked. Through every step of the special education process, from eligibility to development of the child's first IEP, they missed deadlines. When Newport News held meetings to develop an IEP for Stefan, they made no attempt to involve his parents or other experts who could tell them what the child needed. They placed Stefan in an inappropriate placement, then altered the IEP. The mishandling of this case is inexcusable and tragic...These actions and delays were costly to Stefan and his parents. Stefan was damaged by the acts and omissions of Newport News Public Schools staff...." Also see Complaints section page 21.

In one due process hearing, a preschool student was placed in a public self-contained placement. The placement desired by the parents was a public (same LEA) reverse-mainstream class placement. The local level due process decision dated August 14, 1998 (**LRE-1** at pp 8-9) detailed that 34 CFR 300.552 provides an exception to the requirement to educate preschoolers in the LRE. In a situation where both parties agreed that two preschool placements were appropriate, hearing officer determined that placement in the more restrictive environment was acceptable in view of this "exception." The hearing officer's logic was inapposite to that stated in OSEP letters and memos addressing the topic (see e.g., *OSEP Policy Memorandum 89-23*, OSEP, August 1, 1989, 1 ECLPR 105; *Letter to Zimenoff*, OSEP, June 6, 1995, 23 IDELR 440; *Letter to Neveldine*, OSEP, April 17, 1996, 24 IDELR 442; *Letter to Wessels*, OSEP, April 17, 1996, 24 IDELR 1043.

The parents subsequently filed a complaint on September 27, 1998 (**LRE-2**) and made sure that VADOE understood the issues that the hearing officer decided. The parents also requested the Department to "send a message" by siding with the parents to get the decision overturned. VADOE naturally turned its head (included in **LRE-2**).

The parents' brief (**LRE-3**) in the state appeal made reference to the various OSEP letters and memos. The only case law cited on the issue, directly on point, supported the parents' position. Nevertheless, in a decision devoid of a discussion on LRE for preschool students, the state hearing officer affirmed the local hearing officer on December 17, 1998 (**LRE-4**).

Conclusion

The preceding report and the associated documentary evidence cannot be considered an exhaustive compilation. It is certainly very far from it. The evidence is substantially associated with the actions of a small number of parents and advocates who understand that VADOE is ultimately responsible for implementation of IDEA by its LEAs and other agencies responsible for the provision of FAPE in Virginia.

What we hope to offer from this report is the determination that Virginia is still noncompliant in previously targeted areas, and is additionally noncompliant in areas not previously identified by OSEP. We believe that the evidence presented in this report is significant and should not be overlooked. Please use this evidence, and the analysis thereof, to provide guidance for the OSEP monitors to substantiate our claims of noncompliance issues. Additionally, we hope that any corrective actions as a result of the upcoming monitoring of Virginia will afford effective and sustained change that ensures both FAPE and compliance with IDEA for special children in Virginia.

The Virginia Coalition for Students with Disabilities

January 17, 2001