

JUSTCHILDREN  
— A Program of the —  
LEGAL AID JUSTICE CENTER

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April 28, 2008

**By First Class and Electronic Mail**

Judith A. Douglas  
Division of Special Education and Student Services  
Virginia Department of Education  
P. O. Box 2120  
Richmond, Virginia 23218

**RE: Comments on Draft Regulations Governing Special Education Programs for Students with Disabilities in Virginia**

Dear Dr. Douglas:

Attached please find the comments of JustChildren, a Program of the Legal Aid Justice Center, on the Draft Regulations Governing Special Education Programs for Students with Disabilities in Virginia. The attorneys and staff of JustChildren do a high volume of work advocating for low-income children with disabilities and their parents. In the course of that work, we see how the current Special Education Regulations in Virginia work well and how they could be improved. We make our comments from that perspective. We appreciate your review of these comments.

Please note that we have structured our comments as follows:

- (1) if we suggest that a draft regulation should be amended, or if it should stay the same, we have included the relevant language from that regulation in a text box;
- (2) if we suggest striking language from the draft regulation, we have marked that text with a ~~strikethrough~~;
- (3) if we believe language in a draft regulation should be amended or added, we have noted that language in *italics*; and,
- (4) if we particularly recommend maintaining language in a current regulation, we have noted that language by underlining it.

Again, we thank you for your time and consideration.

Sincerely,

Emily F. Suski  
Staff Attorney, JustChildren

Encl.

**Draft 8 VA Admin. Code § 20-81-10 Definitions**

*“Caseload” means the total number of students served by whose individualized education plans are managed by special education personnel. Managing a caseload means ensuring evaluations and reevaluations are timely completed, and IEPs, including functional behavioral assessments and behavior intervention plans, are timely written, implemented, and revised.*

**Rationale:** The draft definition of “caseload” is ambiguous in that it could apply to the number of special education students who are served by a special education teacher in a classroom, or it could apply to the number of students whose individualized education plans (“IEPs”) are managed by a special education staff member, among other things. This ambiguity makes the caseload standards in draft VA Admin. Code § 20-81-40, and to whom and in what context they apply, confusing. In practice, special education caseloads only refer to the number of students whose IEPs are managed by a special education staff person. Therefore, the definition should reflect that practice and eliminate the confusion caused by the ambiguity in the draft definition.

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

*“Child Study Committee” means a committee that enables school personnel, and nonschool personnel, as appropriate to meet the needs of individual children who are having difficulty in the educational setting. The committee reviews existing data to make recommendations to meet children’s needs and reviews results of implementation of the recommendations. The child study committee may refer children for evaluation for special education and related services.*

**Rationale:** For the reasons stated herein, we support maintaining the child study process for addressing referrals for special education evaluations. Therefore, we support maintaining the definition of “child study committee.”

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

*“Developmental Delay” means a disability affecting a child ages two by September 30 through eight five...*

**Rationale:** We strongly support maintaining the current age range of 2 to 8 years old for the disability category ‘developmental delay’ because there are a number of disability categories that cannot be accurately determined for children as young as 5 years old or younger. As an acknowledgment of this problem in the context of public benefits, the state does not even allow

children to apply for mental retardation support waivers until after they are 5 years old. Prior to that time, those same children may receive developmental delay waivers.

Another example of the difficulty of determining a precise disability and disability category for a child under 5 years old is Asperger's Syndrome. According to the National Autistic Society, some experts believe that children with Asperger's Syndrome cannot be accurately diagnosed until children have spent "a lot" of time in school because their social delays will not be apparent until then. Thus, if a 5 year old student starts school as or after s/he turns 5, but before professionals have enough information to accurately determine whether a child has Asperger's, the child can and should be eligible for special education services under the category of developmental delay even though the child has turned 5. However, unfortunately under the draft definition of 'developmental delay,' this child would likely go without needed special education services.

Finally, we are very concerned that if the age range for developmental delay is 2-5, then it will lead a school division to simply advocate for terminating needed special education services if it is having trouble specifying the disability category to which a child of 5 or 6 belongs. We are concerned about this problem because we know of school divisions that have started using the 2-5 age range prematurely and are terminating special education services for children under these very circumstances.

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

"Functional Behavioral Assessment" means a process *that includes a child's parent(s)* to determine the underlying cause or functions of a child's behavior that impede the learning of the child with a disability or the learning of the child's pers. ~~A functional behavioral assessment may be a review of existing data.~~

**Rationale:** We do not support the provision allowing a functional behavioral assessment ("FBA") to be a review of existing data. In order to accurately determine the cause of a child's behavior by conducting a quality FBA, an IEP team must do much more than review existing data on a child. In fact, the Center for Effective Collaboration and Practice ("CECP"), which is an organization that is funded by the United States Department of Education Office of Special Education Programs, states that an FBA "relies on a variety of techniques and strategies to identify the purposes of specific behavior and to help IEP teams select interventions to directly address the problem behavior" (emphasis added) (<http://cecp.air.org/fba/>). Relying only on a review of existing data does not comport with these guidelines from CECP and may very well do little to determine the cause of child's behavioral problems.

Additionally, we support including parents in the FBA process because their input is crucial to an accurate understanding of the underlying causes of children's behavioral problems.

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

“Level I services” means the provision of special education *and related services* to children with disabilities for less than 50% of their instructional day...

**Rationale:** We support including both special education and related services in the calculation of how much of a child’s instructional day is spent receiving special education services. First, both special education and related services are part of the total package of special education services a child receives. Second, both special education and related services are counted when determining if a child is receiving “Level II” services and thus they should also be counted when determining if a child is receiving “Level I” services.

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## Draft 8 VA Admin. Code § 20-81-10 Definitions

“Parent” means

1. Persons who meet the definition of “parent”:
  - a. a biological or adoptive parent
  - b. a foster parent:
    - i. ~~if the biological parent(s)’ authority to make educational decisions on the child’s behalf has been extinguished under §§ 16.1-283, 16.1-277.01 or 16.1-277.02 of the Code of Virginia or a comparable law in another state;~~
    - ii. ~~the child is in permanent foster care pursuant to § 63.2-900 et seq. of the Code of Virginia or comparable law in another state; and~~
    - iii. ~~the foster parent has an on-going, long-term parental relationship with the child, is willing to make the educational decisions required of the parent under this chapter, and has no interest that would conflict with the interests of the child.~~
  - c. a guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not a Guardian ad litem, or the State if the child is a ward of the State);’
  - d. an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
  - e. a surrogate parent who has been appointed in accordance with requirements detailed under 8 VAC 20-81-220 of this chapter.
2. If a judicial decree or order identifies a specific person(s) under subdivision 1.a. through 1.e. of this subsection to act as the “parent” of a child or to make educational decisions on behalf of a child, then such person(s) shall be determined to be the “parent” for the purposes of this definition.
3. “Parent” does not include local or state agencies or their agents, including local departments of social services, even if the child is in the custody of such an agency.
4. The biological or adoptive, when attempting to act as the parent under this part and when more than one party is qualified under this section to act as a parent, shall be presumed to be the parent for purposes of this section unless the natural or adoptive parent does not have legal authority to make educational decisions for the child *or a judicial decree or order has identified another specific person under subdivision 1.a. through 1.e to make educational decisions on behalf of the child.*
5. Non-custodial parents whose parental rights have not been are entitled to all parent rights and responsibilities available under this chapter, including access to their child’s records.
6. Custodial step-parents have the right to access the child’s record. Non-custodial step-parents do not have the right to access the child’s record.

**Rationale:** We support incorporating all of the federal definition of ‘parent,’ including the less restrictive circumstances in which a foster parent is a ‘parent,’ in the Virginia regulations. The criteria for when foster parents can be parents in the current Virginia regulations are too limiting. In contrast, the federal definition allows foster parents, who often know the children very well and are therefore best positioned to act on their behalf, to act as parents when the biological or adoptive parents are not acting as parents. At the same time, the new federal definition protects biological and adoptive parents’ rights by ensuring that they will be the parent when they act as parents. Moreover, the draft Virginia regulation regarding when a foster parent can be a parent is confusing. School

staff, foster parents, and social workers from more than one school division have all reported to us that they do not understand when foster parents can act as parents.

In addition we also support adding the italicized language to subsection 4 of this definition so that it clearly comports with subsection 2.

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

“Psychological services” means those services provided by a qualified psychologist or under the direction or supervision of a qualified psychologist, including:

1. Administering psychological, *including clinical psychological*, and educational tests, and other assessment procedures;

.....

**Rationale:** We support clarifying that the provision of psychological services includes administering clinical psychological tests/evaluations to students when needed. We know of some school divisions who refuse to conduct clinical psychological evaluations at all. We find this position curious given that it is difficult, if not impossible, for a school division to determine if a child has certain disabilities, such as emotional disturbance, without conducting a clinical psychological evaluation. Changing the definition in the way proposed here would prevent such issues from occurring.

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**Draft 8 VA Admin. Code § 20-81-10 Definitions**

“Specific Learning Disability” means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including difficulties with handwriting and/or mathematics, that interfere with academic achievement. The disorder must not be the result of visual, hearing, or motor handicaps, of an intellectual disability, or of emotional or behavioral conditions.

**Rationale:** We oppose this definition of dyslexia. According to the Fourth Circuit Court of Appeals, “federal law establishes a minimum ‘baseline’ of educational benefits that states must offer students with disabilities. States are free, however, to set a higher standard for provision of educational services to those students.” (*G v. Fort Bragg Dependent Schools*, 343 F.3d 295, 303 (4<sup>th</sup> Cir. 2003).) States, however, cannot fall below the federal minimum baseline.

The additional definition of dyslexia is illegal in that it violates the federal minimum baseline set forth in the federal definition of specific learning disability because it adds additional criteria for dyslexia that do not exist in the federal special education regulations. The additional definition of dyslexia in the draft Virginia regulations does so by stating that dyslexia is characterized by “difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities” as if all of these problems are always true of all dyslexic children. Because the National Institute of Child Health and Human Development states that these problem only “may” be present or may “often” be present in dyslexic children, as opposed to always being present, and because the federal definition does not so restrict the definition of specific learning disability/dyslexia, the draft Virginia definition of dyslexia could exclude students with dyslexia from special education when the federal definition of “specific learning disability” does not exclude the same children from special education. Therefore, the draft Virginia definition is too restrictive, falls below the federal minimum baseline, and thus should be removed from the final version of the regulations. ([http://www.nichd.nih.gov/health/topics/learning\\_disorders.cfm](http://www.nichd.nih.gov/health/topics/learning_disorders.cfm)).

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**8 VA Admin. Code § 20-81-40 Special Education Staffing Requirements**

A. School Age Programs

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3. Caseload standards.

a....

3. *The number of students with disabilities* ~~No more than 14 children shall be assigned to~~

**Rationale:**

Comment on Subsection A.3: We strongly support changes to caseload standards. We understand that this changes need to be made through the General Assembly. Therefore, we strongly support the caseload standards being changed through the legislative process as soon as possible.

Proposed Change to Subsection A.3.a.3: We believe the classroom requirements in subsection A.3.a.3 should be changed to reflect that students with disabilities require more time and attention from teachers than do most students without disabilities. Therefore, we support using the weights in Appendix A to determine the number of students with disabilities who can be educated in a classroom, as proposed above.

We also believe that the term “similar achievement levels” must be defined in the regulations. Currently, the regulations do not define this term, which creates widely varying practices across school divisions and even within school divisions. The proposed definition above would provide flexibility to school divisions so that they could still assign students who are two grade levels apart in terms of performance levels to the same classroom, but it would also not overburden teachers, which only in turn harms students, by assigning them students with widely varying achievement levels.

Proposed Change to A.3.a (addition of standards/limits for inclusion classes): We strongly support provisions governing the number of students with disabilities who can be in inclusion classes. Currently there are no standards for inclusion classes. Consequently, we have heard about classrooms with 17 to 20 students with varying disabilities and 3 or 5 students without disabilities. Such situations must be avoided as they are untenable for the classroom teacher and the students. Including the suggested limits on inclusion classes would avoid such problems in the future.



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**8 VA Admin. Code § 20-81-50 Child Find**

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~~E. Each school division shall have procedures to process in a timely manner all referral requests for a child suspected of having a disability.~~

~~1. The local school division's procedures shall ensure that the processing of such referrals do not needlessly delay a child suspected of having a disability from being evaluated for special education and related services.~~

~~— 2. If the school division decides not to evaluate, prior written notice, in accordance with 8 VAC 20-81-170 shall be given to the parent(s), including the parent's right to appeal the decision through the due process hearing procedures.~~

**Rationale:** We oppose the elimination of child study committees, and therefore we oppose the provision in the draft regulations allowing school divisions to establish their own procedures for addressing referrals for evaluations. Allowing school divisions to determine their own processes for addressing referrals will result in multiple processes across multiple school divisions. Consequently, parents who move between school divisions, as many parents of limited means often do, will have to determine what process applies in the school division in which they reside. This information can be difficult for low-income parents to access, let alone understand, and thus it will reduce parental participation in the special education process. Moreover, if a child moves between school divisions during the referral process and the new school division uses a different referral process than the previous school division, both school division staff and parents will likely be confused about what process to apply and where the child is in the referral process.

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**8 VA Admin. Code § 20-81-60 Referral for Initial Evaluation**

A. All children, aged two to 21, inclusive, whether enrolled in public school or not, who are suspected of having a disability, shall be referred to the special education administrator or designee, who shall initiate the process of determining eligibility for special education and related services.

1. Referrals may be made by any source, including *a child study committee*, school staff, a parent(s), the Virginia Department of Education, any other state agency, or other individuals.

**Rationale:**

Support for Subsection A.1: We strongly support the provision in the draft regulations allowing for referrals for evaluations to come from any source. This provision ensures all children with suspected disabilities are considered for special education evaluations and helps ensure that school divisions meet their child find responsibilities.

Proposed Change to Subsection A.1: Because we oppose the elimination of child study committees for the reasons stated in our comments on Child Find processes above, we support a change to subsection A.1.that states that referrals for evaluations can come from child study committees.

Proposed Change to Subsection A.2: For the reasons stated in our comments on Child Find processes above, we strongly oppose the removal of the child study committee processes for addressing referrals for special education evaluations.

Support for Subsection A.3: We support the provision in the draft regulations allowing for referrals for evaluations to be made orally or in writing. This provision helps ensure parental referrals, which are often oral referrals, will be addressed.

Proposed Change to Subsection B.1.g: We oppose the timelines for evaluations proposed in the draft regulations. These proposed timelines are longer than the current timelines because they start at a later point—parental consent to the evaluations—than do the current timelines, which start at the time of the referral for an evaluation. If children have disabilities requiring special education services, those needs should be addressed as soon as possible, and extending the timelines for completing evaluations prevents that from happening.

Proposed Change to Subsection B.3.d: We support including the suggested language above regarding when a school division does not need to obtain parental consent before proceeding with an evaluation. The regulations should make it clear that if someone other than the biological or adoptive parent, who are the only persons whose rights can be terminated, qualifies as a ‘parent’ under the definition of ‘parent,’ then the school division needs to obtain consent for evaluations from that person instead of simply moving forward with evaluations without parental consent.

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**8 VA Admin. Code § 20-81-70 Evaluation and Reevaluation**

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D. A written copy of the evaluation report shall be provided at no cost to the parent(s). The report shall be available to the parent(s) no later than two business days before the meeting to determine eligibility.

...

F. Reevaluation

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2. The local educational agency shall not conduct *the same evaluation* ~~a reevaluation~~ more

**Rationale:**

Support for Subsection D: We support the provision in the draft regulation requiring local school divisions to provide parents with copies of evaluations at least 2 days before eligibility meeting. This requirement is crucial to ensuring parents can effectively participate in eligibility discussions and decisions because it enables them to be familiar with the findings of the evaluations that form a large part of the basis for eligibility decisions.

Proposed Change to Subsection F.2: We support clarifying that although a school cannot conduct the same evaluation more than once per year (for example, a school cannot conduct two psychological evaluations within 12 months of each other), it could conduct two different evaluations in the same year (for example, a school could conduct a psychological evaluation 6 months after a speech therapy evaluation). We have worked with school divisions who are implementing the federal regulations regarding this issue, and some of those school divisions believe that no evaluation can be conducted within 12 months of any other evaluation no matter the circumstance. We believe the suggested language above would clarify the requirement and avoid the confusion we have encountered.

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**8 VA Admin. Code § 20-81-80 Eligibility**

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D.

...

5. The documentation of the determination of eligibility shall include a statement of:

...

- c. The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's *academic and functional performance* ~~academic functioning~~.

...

J. The Virginia Department of Education permits each local educational agency to use a process for determining whether a child has a disability based on the child's response to scientific, research-based intervention and permits each local educational agency to use other alternative research-based intervention procedures *provided that any research-based intervention or alternative research-based intervention does not delay or deny appropriate evaluations of a child suspected of having a disability*.

~~K. Eligibility of a child with a specific learning disability.~~

...

~~L. Eligibility as a child with autism.~~

...

~~M. Eligibility as a child with deafness.~~

...

~~N. Eligibility as a child with developmental delay.~~

...

~~O. Eligibility as a child with hearing impairment.~~

...

~~P. Eligibility as a child with mental retardation.~~

...

~~Q. Eligibility as a child with other health impairment.~~

...

~~R. Eligibility as a child with speech or language impairment.~~

**Rationale:**

Proposed Change to Subsection D.5.c: We support amending the language in subsection D.5.c regarding documentation in eligibility determinations about how behavior affects children's educational performance so that it includes all aspects of educational performance—that is, both functional performance and academic achievement. The IDEA requires that disabilities adversely affect educational performance, and the IDEA 2004 regulations repeatedly make it clear that educational performance is more than academic achievement. For example, the IDEA 2004 regulations state that a free appropriate public education (FAPE) must be available to children with disabilities “even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” (34 C.F.R. § 300.101(c)). In other words, children with disabilities must be provided a FAPE even if their academic achievement is not affected by their disability if

other aspects of their educational performance are affected by their disability. As another example, IEPs must include statements about a student's academic and functional performance, and if there are problems in either of these areas, then the IEP must address those problems. (34 C.F.R. § 300.320) In sum, behavioral problems can affect aspects of a child's educational performance other than their academic performance and the eligibility documentation should reflect that.

Proposed Change to Subsection J: We believe that RTI and other research based interventions can be used very effectively to help with the process of evaluating a child and determining eligibility. However, we also believe that RTI can be misused to delay evaluations of a child with a suspected disability. Therefore, we believe the Virginia special education regulations need to be as clear as the federal IDEA 2004 regulations that RTI cannot "delay [an] appropriate evaluation of a child suspected of having a disability." (34 C.F.R. § 300.226(c)). We accordingly support including this language, as proposed above, in subsection D.5.c of 8 VA Admin. Code § 20-81-80.

Proposed Elimination of Subsections K-R: We strongly oppose the inclusion of additional eligibility criteria in the Virginia special education regulations. First, these eligibility criteria are overly complicated and restrictive in that they require a certain number—often a high number—of factors to be met from certain lists or categories. We have looked into eligibility criteria in other states and none are as extensive or restrictive as those in the draft Virginia regulations.

Second, because the eligibility criteria are more specific than the definitions of disabilities, children could be found ineligible for special education under the eligibility criteria who otherwise should be found eligible under the definitions of disabilities in the federal law. This result would be illegal in that it would create situations in which Virginia's regulations fall below the "minimum 'baseline' of educational benefits that states must offer students with disabilities" according to federal law. (*G v. Fort Bragg Dependent Schools*, 343 F.3d 295, 303 (4<sup>th</sup> Cir. 2003).) Children with Asperger's Syndrome who need special education are a prime example of this potential problem. The eligibility criteria for 'autism' specifically states that that disability category includes children with Asperger's Syndrome. However, the criteria then exclude virtually any child with Asperger's Syndrome by requiring communication delays as part of the eligibility criteria for autism. These communication delays exclude children with Asperger's Syndrome because they are not present in children with Asperger's Syndrome. According to the Yale Developmental Disabilities Clinic, children with Asperger's often are precocious in their language development as opposed to delayed.

Third, although we recognize that these criteria may have been added to the draft regulations in an effort to ensure uniformity in eligibility determinations across school divisions, we do not believe simply adding more and complicated criteria to the process of making eligibility determinations will achieve that goal.

Instead of implementing additional eligibility criteria, we suggest using the factors in the eligibility criteria as non-regulatory guidance to schools and parents on how to determine eligibility. We believe such guidance, as long as it makes it clear that some students may be eligible if they meet the definitions of disabilities even if they do not meet the factors in the guidelines, would be helpful to schools and parents. In addition, we support and suggest that the Virginia Department of Education develop check-lists based on the definitions of the disabilities in the federal IDEA 2004 and the Virginia regulations, such as are used by the Louisa County Public Schools (see attached) that are based on the definitions of disabilities in the federal IDEA 2004 regulations, to help schools and parents determine eligibility according to the definitions of disabilities. We believe the use of such check-lists, which could be appended to the regulations in the same way model forms are attached to

the Federal Rules of Civil Procedure and other rules, would help achieve uniformity in eligibility decisions across school divisions.

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**8 VA Admin. Code § 20-81-90 Termination of Special Education and Related Services**

A. A local educational agency shall evaluate a child with a disability in accordance with 8 VAC 20-81-70 before determining that a child is no longer a child with a disability under this chapter *or before completely terminating a child’s related or supplementary services*. Evaluation is not required before the termination of eligibility due to graduation with a standard or advanced studies high school diploma or reaching the age of 22.

**Rationale:** We support a provision requiring evaluations prior to the termination of a child’s related or supplementary services as well as before terminating all of a child’s special education services. We believe that such evaluations are crucial to ensuring that all the members of a child’s IEP team can participate in a decision to terminate a child’s related or supplementary services and thus should be required by the Virginia regulations.

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**8 VA Admin. Code § 20-81-100 Free Appropriate Public Education**

...

G. Transportation

...

- 3. A local educational agency shall ensure that a child with a disability is provided a commute to and from an education program that is comparable in length to the commute provided to children without disabilities, unless the child’s IEP team determines that a longer or shorter commute is necessary to ensure the child receives a free appropriate public education.

**Rationale:** We support this requirement regarding comparable commutes for children with disabilities and children without disabilities because it supports egalitarian treatment of children.

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**8 VA Admin. Code § 20-81-110 Individualized Education Program**

...

**B. Accountability**

...

2. Each local agency shall ensure that an IEP:

...

b. Is developed within 30 calendar days of the date of the initial determination that the child needs special education and related services.

...

d. Is implemented as soon as possible following parental consent to the IEP, not to exceed ~~30~~ 10 calendar days, unless the local educational agency documents the reasons for the delay.

...

7. This chapter does not require that any local educational agency, teacher, or other person to be held accountable if a child does not achieve the growth projected in the annual goals, including benchmarks or objectives *if the child is receiving a free appropriate public education*. However, the Virginia Department of Education and local educational agencies are not prohibited from establishing their own accountability systems regarding teacher, school, or agency performance.

8. Nothing in this section limits a parent' right to ask for revisions of the child's IEP if the parent feels the efforts required by this chapter are not being met.

~~a. If the local educational agency considers the parent's request unreasonable and refuses to meet, the local educational agency shall advise the parent in writing of the reasons for denying the parent's request and provide the parent information on this chapter's dispute resolution options.~~

...

10. ...

~~b. Upon request, a~~ A parent shall be provided with a revised copy of the IEP with the amendments incorporated.

...

**E. Parent participation.**

...

6. Audio and video recording of IEP meetings.

...

b. The local educational agency may have policies that prohibit, limit or otherwise regulate the use of:

1. video recording devices at IEP meetings; or

2. audio or video recording devices at meetings other than meetings that are for the purposes of *determining eligibility for special education services*, developing, reviewing, revising the child's IEP, or reviewing matters related to discipline provisions under 8 VAC 20-81-160.

...



## 8 VA Admin. Code § 20-81-110 Individualized Education Program

...

G. Content of the individualized education program. The IEP for each child with a disability shall include:

1. A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general curriculum or, for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.

...

b. The present levels of performance shall directly relate to other components of the IEP.

...

~~3. For children with disabilities who take alternate assessments aligned to alternate achievement~~

~~standards,~~ a A description of benchmarks or short-term objectives *for each annual goal.*

~~a. The IEP team may determine that benchmarks or short-term objectives are required for other children with disabilities in order for the children to benefit educationally.~~

...

8. A statement of:

a. How the child's progress toward the annual goals will be measured;

b. When periodic progress reports on the progress the child is making toward meeting the goals will be provided; ~~for example, through the use of quarterly or other periodic reports, concurrent with the issuance of report cards.~~ *Progress reports must be provided to parent(s) of children with disabilities at least as often as the parent(s) of children without disabilities.*

...

10. Secondary transition services.

a. Prior to the child entering secondary school but beginning not later than the first IEP to be in effect when the child turns 14, or younger if determined appropriate by the IEP team, and updated annually, the IEP shall include:

1. Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills;

2. The transition services, including courses of study (such as participation in advanced-placement course or career and technical education program), needed to assist the child in reaching those goals; and

3. A statement, if appropriate, of interagency responsibilities or any needed linkages.

### Rationale:

Support for Subsection B.2.b: We support maintaining the current requirement that IEPs be developed within 30 calendar days from an eligibility decision. Once an eligibility committee determines that a student needs special education services, the student's IEP should be developed as soon as possible so that those needed services can begin, and the child can begin to receive a free appropriate public education.

Proposed Change to Subsection B.2.d: A student’s IEP needs to be implemented as soon as possible for the same reason that the IEP needs to be developed as soon as possible. Allowing more than ten days for a school to implement an IEP only delays needed services to children.

Proposed Change to Subsection B.7: We strongly oppose the provision relieving schools of accountability for a student’s lack of progress on IEP goals. We believe this provision is only appropriate if the child is also receiving a FAPE. If a child is not receiving a FAPE, then schools must be held accountable for any related lack of progress towards the IEP goals.

Proposed Change to Subsection B.8: We strongly oppose the draft provision limiting a parent’s right to request and have an IEP meeting for their child(ren). A parent should not be limited in their right to ask for an IEP meeting. Doing so limits parental rights and participation, which is a primary tenet of the IDEA.

Proposed Change to Subsection B.10: We oppose the provision limiting when a parent can obtain copies of amendments to their children’s IEPs to situations in which they request copies of the amendments. A parent should always be given a copy of amendments to their child’s IEP without having to request it, just as they are provided copies of their children’s IEPs automatically and without having to request it. Doing so supports parental participation in their child’s educational progress.

Proposed Change to Subsection E.6.b.2: We support allowing audio or video recording devices at eligibility meetings as well as at IEP meetings and MDRs. Because the record of the eligibility decision is as important as the decisions made at IEP meetings and MDRs, there is no reason to disallow audio or video recordings at eligibility meetings.

Support for Subsection G.1.b: We support the provision requiring that the IEP components directly related to the needs identified in the present levels of academic achievement and functional performance because this requirement ensures that all of the needs of students with disabilities will be met through their IEP, and they will receive a FAPE.

Proposed Change to Subsection G.3: We oppose the removal of the requirement that all students have short-term or benchmark goals to support their annual goals. Short-term and benchmark goals allow both parents and teachers to better track students’ progress toward their annual goals and thereby encourages and improves parental participation in their children’s education.

Proposed Change to Subsection G.8: We strongly oppose the elimination of the requirement that progress reports be provided to parents of students with disabilities at least as often as they are provided to students without disabilities because we support students with disabilities being treated the same as students without disabilities. We see no justification for potentially treating students with disabilities differently than students without disabilities.

Support for Subsection G.10: We support maintaining the requirement that transition services and goals be included in a student’s IEP at age 14 because we believe that students need more, not less, time to transition to post-secondary phases of their academic or professional lives.

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## 8 VA Admin. Code § 20-81-120 Children Who Transfer

A. Children with disabilities who transfer between local educational agencies in Virginia or transfer from a local educational agency outside of Virginia to a local educational agency in Virginia within the same school year are subject to the following provisions.

1. The new local educational agency shall take reasonable steps to obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education and related services to the child, from the previous local educational agency in which the child was enrolled. The previous local educational agency shall take reasonable steps to promptly respond to the request from the new local educational agency.

a. If the previous local educational agency is not forthcoming in providing the records for the child, the new local educational agency should contact the Virginia Department of Education for assistance in resolving the matter.

b. ~~If the new local educational agency is unable to obtain the IEP from the previous local educational agency or from the parent, the new local educational agency is not required to provide special education and related services to the child. The new local educational agency shall place the student in a general educational program and conduct an evaluation if the new local educational agency determines that an evaluation is necessary the new local educational agency shall provide the child with a free appropriate public education and shall consult with the child's parent(s) to determine what services, including services comparable to those in the child's IEP from the previous local educational agency, the child should be receiving in order to ensure the child receives a free appropriate public education and provide those services until the requirements of subsection A.2 can be met.~~

2. The new local educational agency shall provide a free appropriate public education to the child, in consultation with the parent(s), including services comparable to those described in the child's IEP from the previous local educational agency, until the new local educational agency either:

a. adopts the child's IEP from the previous local educational agency; or

b. conducts an evaluation, if determined necessary by the local educational agency *and the parent(s)*, and develops and implements a new IEP that meets the requirements in this chapter.

3. The local educational agency may develop and implement an interim IEP while obtaining and reviewing whatever information is needed to develop a new IEP *provided that the interim IEP provides the child with a free appropriate public education, including services comparable to those described in the child's IEP from the previous local educational agency.*

4. ~~If the parent does not provide written consent to a new IEP or an interim IEP, the local educational agency shall provide FAPE, in consultation with the parent(s), including services comparable to those described in the child's IEP from the previous local educational agency implement the child's IEP from the previous local educational agency.~~

### Rationale:

Support for Subsection A.1.a: We support the provision requiring LEAs to contact the Virginia Department of Education if LEAs cannot obtain a copy of the IEPs of transferring children from previous local educational agencies. The Virginia Department of Education is in an excellent position to mediate and resolve such problems.

Proposed Change to Subsection A.1.b.: We strongly oppose the provision relieving LEAs from the responsibility of providing FAPE to children who transfer if the new LEA cannot obtain the IEP of the child from the previous LEA. This provision violates the federal IDEA and its implementing

regulations, which both require that children with disabilities who have been found to need special education services be provided with special education services—even if they transfer between school divisions. Therefore, in cases where the new LEA cannot obtain the child’s IEP from the previous LEA, we propose requiring LEAs to comply with federal law by providing FAPE after consulting with the child’s parent(s) about what services would be comparable to the services the child received in the previous LEA and then requiring the new LEA to provide those services until the IEP from the previous LEA can be obtained or until evaluations can be completed and a new IEP can be developed.

Proposed Change to Subsection A.2.a: We oppose the provision giving LEAs the option of unilaterally deciding whether to evaluate children with disabilities who have transferred between school divisions before the LEA implements a new IEP for the child. Instead, we believe that the decision should be made by both the LEA and the parent(s). Parental participation in these very types of decisions is a key tenet of the IDEA, and parents have the right to participate in decisions about evaluations at all other times under the IDEA. There is no reason to fail to include parents in decisions about evaluations when children transfer between school divisions.

Proposed Change to Subsection A.3: We only support the provision allowing LEAs to develop interim IEPs for children with disabilities who transfer if the interim IEPs provide children with FAPE and services comparable to those the children received in the previous LEA. The IEP teams in the previous LEAs know the children and their educational needs much better than the teams in new LEAs and therefore there is no justification for providing services that are not comparable to the services that the previous IEP team deemed necessary for the child to receive a FAPE. Anything short of those services arguably will not provide the child with a FAPE.

Proposed Change to Subsection A.4: We strongly oppose any provision that removes the rights of parents to consent to new or interim IEPs. Therefore, if a parent does not consent to a child’s interim IEP, the LEA should be required to implement the child’s IEP from the previous LEA.

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**8 VA Admin. Code § 20-81-160 Discipline Procedures**

C. Long-term removals.

1. A long-term removal is for more than 10 consecutive school days; or
2. The child has received a series of short-term removals that constitute a pattern...

...

3. *In school suspensions are part of a pattern of removals if the child is not afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive services specified in the IEP, and continue to participate with nondisabled children*

**Rationale:**

Proposed Changes to Subsection C: First, we support the inclusion of rules regarding when in school suspensions and bus suspension count towards ten cumulative days of suspensions constituting a pattern of removals. The change would simply formalize the United States Department of Education’s “long term” policy on this matter.

Second, we support a provision requiring that FBAs and BIPs be developed for students with disabilities whenever they are long-term removed. When any child is having such difficulty in school such that the child has been long-term removed, the child can benefit from an FBA and a BIP. Moreover, developing FBAs and BIPs will help the schools better address the child’s problems.

Proposed Changes to Subsection D: First, we strongly support maintaining the standards in the current Virginia special education regulations for making a manifestation determination because the federal IDEA 2004 regulations do not fully ensure that children will not be disciplined for behaviors

that either are rooted in their disabilities or that occur because their disabilities were not being adequately addressed in school.

Second, we support requiring that manifestation determination review teams/IEP teams document the reasons for their answers to each question they must address. It benefits schools and parents to have clarity about this decision making process—especially if disputes about the MDR process arise.

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**8 VA Admin. Code § 20-81-170 Procedural Safeguards**

A. Opportunity to examine records; parent participation

1. Procedural safeguards...

...

b. Parent participation in meetings.

(1). Each local educational agency shall provide notice to ensure that the parent(s) of a child with a disability has the opportunity to participate in meetings described in subdivision 1.a.(2) of this subsection, including notifying the parent(s) of the meeting

**Rationale:**

Proposed Change to Subsection A.1.b(1): We support a requirement that notices of meetings inform parents of the right to reschedule meetings. Many parents we work with do not understand that they can reschedule meetings. Therefore, when they receive notice of a meeting on a date that they cannot attend, they often simply do not attend the meeting. Informing parents that they have another option—namely, rescheduling the meetings—will promote parental participation in their children’s education.

Proposed Change to Subsection E.1.d. and E.2.f: We strongly oppose the erosion in parents’ rights to consent before any change in their children’s IEPs. Virginia has long been a leader in promoting parents’ rights and participation in their children’s education. Reducing parental consent rights in the way proposed in the draft Virginia special education regulations will go against this long history. Moreover, the current parental consent rights promote school-family partnerships, a huge factor in the small number of due process hearings that are filed each year in Virginia. Reducing parental consent rights will damage school-family partnerships and may likely increase the amount of litigation and due process hearings in Virginia. Such a consequence would take teachers away from classrooms and money (to pay for attorneys’ fees) away from school divisions. Such a result is avoidable simply by maintaining current parental consent rights.

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**8 VA Admin. Code 20-81-190 Mediation**

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C. The local educational agency or the Virginia Department of Education may establish procedures to offer parents and schools who choose not to use the mediation process an opportunity to meet, at a time and location convenient to them, with a disinterested party who is under contract with a parent training and information center or community parent resource center in Virginia established under § 1472 or § 1473 of the Act; or an appropriate alternative dispute resolution entity. The purpose of the meeting would be to explain the benefits of and encourage the parent(s) to use the mediation process. *Such a meeting cannot be used to delay or deny a due process hearing.*

...

F. An individual who serves as a mediator:

1. May not be an employee of any local educational agency or the Virginia Department of Education if the Virginia Department of Education is providing direct services to a child who is the subject of the mediation process;
2. Shall not have a personal or professional conflict of interest, including relationships or contracts with schools or parents outside of mediations assigned by the Virginia Department of Education; ~~and~~
3. Is not an employee of the local educational agency or the Virginia Department of Education solely because the person is paid by the agency to serve as a mediator; *and*
4. *Upon agreement between parents and schools, may attend IEP and other school meetings regarding a child after a mediation regarding any aspect of that child's identification or evaluation for special education services, special education services IEP, or placement.*

**Rationale:**

Proposed Change to Subsection C: The proposed addition to subsection C would ensure clarity regarding whether the meeting referenced in that subsection could delay a due process hearing. The language is consistent with language regarding mediations generally.

Proposed Change to Subsection F: The proposed change to subsection F would allow mediators to attend school meetings subsequent to mediation. This change would help facilitate agreement and therefore avoid the need for further mediation or later litigation. It would impose minimal administrative burdens on schools because they would have to inform mediators of the meeting dates and locations. While it would likely impose a cost on LEAs, who pay for mediation, the requirement would benefit the LEAs in the long run by helping to avoid the cost of further mediation or litigation.

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**8 VA Admin. Code § 20-81-200 Complaint Resolution Procedures**

...

B. A complaint may be filed with the Virginia Department of Education by any individual, organization, or an individual from another state and shall:

...

6. Address an action that occurred not more than one year prior to the date the complaint is received, *unless the Virginia Department of Education determines that a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received by the Virginia Department of Education;*

**Rationale:** We support maintaining the exceptions in the current Virginia regulations to the one-year limitations period for bringing complaints. Many parents will be unable to bring a complaint to DOE before the expiration of that period for continuing violations or compensatory services. Maintaining these exceptions will help to protect the rights of those students with disabilities and their parents to bring these complaints, and, more importantly, protects their children when an LEA has violated provisions of the IDEA. Because schools keep records for longer than 3 years, maintaining these exceptions will not prevent schools from being able to adequately respond to complaints.

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**8 VA Admin. Code § 20-81-210 Due Process Hearing**

...

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

**8 VA Admin. Code § 20-81-210 Due Process Hearing**

...

R. Right of Appeal

...

~~3. If the Special Education Hearing Officer's decision is appealed in court, implementation of~~

**Rationale:**

Proposed Change to Subsection B: We oppose the proposed change in the draft regulations placing responsibility for overseeing Special Education Hearing Officers with the Virginia Department of Education. We support maintaining the provision in the current Virginia regulations placing this responsibility with the Virginia Supreme Court. Doing so avoids potential conflicts and/or the appearance of conflicts in the due process hearing system.

Proposed Change to Subsection D.6.a: We strongly oppose the provision permitting LEAs to raise issues at due process hearings that have not been raised in a parent’s due process complaint. This provision is patently unfair. We oppose any provision that affords rights to LEAs at due process hearings that are not also provided to parents.

Proposed Changes to Subsection O: We support a provision requiring that discussions at resolution meetings be confidential. Such a requirement would ensure open and honest discussion during resolution meetings, and it would increase the likelihood that settlement could occur. Without this language, parents and schools alike will be less apt to make statements in furtherance of settlement for fear that those statements will be used at a later hearing or civil proceeding.

We also strongly oppose the provision in Subsection O relieving LEAs of the responsibility of holding resolution sessions if the LEA has filed the due process complaint. Like the provision we oppose in Subsection D.6.a, this provision is also patently unfair. LEAs should not be afforded rights or relieved of obligations unless the same is provided to parents.

Proposed Change to Subsection R.3: We oppose the provision requiring that Special Education Hearing Officer Decisions be held in abeyance if the decision is appealed. Once a hearing officer has made a decision, for example, that a child needs services in order to provide the child with FAPE, there is no justification for denying that child a FAPE during what could potentially be a lengthy appeal process.

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## 8 VA Admin. Code § 20-81-220 Surrogate Parent Procedures

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### B. Appointment of Surrogates

1. Children, aged two to 21, inclusive, who are suspected of having or determined to have disabilities do not require a surrogate if
  - a. The ~~natural~~ *biological or adoptive* parent(s) or guardians are allowing relatives or private individuals to act as a parent;
  - b. *Any person who can serve as 'parent,' as defined by this chapter in 8 VA Admin. Code § 20-80-10, other than a surrogate parent, is either acting as parent, or is available and willing to act as parent for the purposes of this chapter.*

~~The child is in the custody of a local department of social services or a licensed child-placing agency, and termination of parental rights has been granted by a juvenile and domestic relations district court of competent jurisdiction in accordance with § 16.1-283, § 16.1-277.01, or § 16.1-277.02 of the Code of Virginia. The foster parent for that child may serve as the parent of the child for the purposes of any special education proceedings.~~

- ~~e. The child is in the custody of a local department of social services or a licensed child-placing agency, and a permanent foster care placement order has been entered by a juvenile and domestic relations court of competent jurisdiction in accordance with § 63.2-908 of the Code of Virginia. The permanent foster parent named in the order of that child may serve as the parent of the child for the purposes of any special education proceedings.~~

2. The local educational agency shall appoint a surrogate parent for a child, aged two through 21, inclusive, who is suspected of having or determined to have a disability when:
  - ...
  - c. The child is a ward of the state *and the provisions of 8 Va. Admin. Code § 20-81-220(B)(1) do not apply;*
  - ...

4. The local educational agency shall establish procedures *in accordance with this regulation* for determining whether a child needs a surrogate parent.

### Rationale:

Proposed Change to Subsection B.1: We support changing subsection B.1 so it reflects changes in the definition of 'parent' in the federal IDEA 2004 regulations because we also support the definition of 'parent' in the federal IDEA 2004 regulations being substituted for the definition current and draft Virginia special education regulations. The change would save schools administrative time and money otherwise spent training and recruiting surrogates because fewer surrogate parents would be needed if more persons could act as parents under the definition of 'parent' in the federal IDEA 2004 regulations.

Proposed Change to Subsection B.2: We propose the above change to subsection B.2 would clarify that LEAs are not responsible for appointing surrogate parents only in situations when the provisions of subsection B.1 do not apply.

Proposed Change to Subsection B.4: The proposed change to subsection B.4 clarifies that the LEA procedures for appointing surrogates must comply with the provisions of this regulation.

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**8 VA Admin. Code § 20-81-230 Local Educational Agency Administration and Governance**

...

D. Local advisory committee: A local advisory committee for special education, appointed by each local school board, shall advise the school board through the division superintendent.

1. Membership.

- a. A majority of the committee shall be parents of children with disabilities or individuals with disabilities.
- ~~b. The committee shall include representation of gender and ethnic population of the local school division.~~

**Rationale:** We oppose the draft provision requiring that LEA staff be members of the local advisory committees because we believe that this requirement will compromise the independence of the local committees. The independence of the committees is a crucial component of their usefulness to parents and the schools.

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